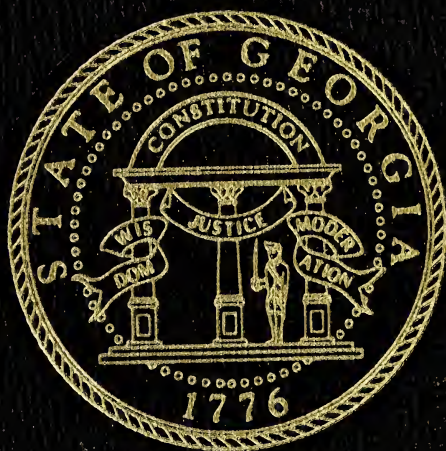


**OFFICIAL CODE
OF
GEORGIA

ANNOTATED**



VOLUME 20

Title 24. Evidence

2010 Edition



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OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

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The Code Revision Commission
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and

The Editorial Staff of LexisNexis®



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Volume 20 **2010 Edition**

Title 24. Evidence

Including Acts of the 2010 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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Charlottesville, Virginia

2010

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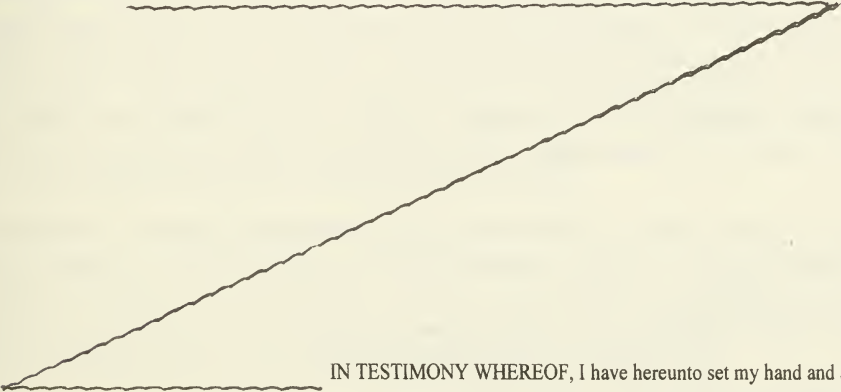
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OFFICE OF SECRETARY OF STATE

I, Brian P. Kemp, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia: all as same appear of file and record in this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 9th day of July, in the year of our Lord Two Thousand and Ten and of the Independence of the United States of America the Two Hundred and Thirty-Fifth.

B. P. Kemp

Brian P. Kemp, Secretary of State

Preface

This volume cumulates and replaces the 1995 edition of Volume 20 of the Official Code of Georgia Annotated, as supplemented by the 2009 Cumulative Supplement. The 1995 Volume 20 and its 2009 Supplement may be recycled or, if so desired, retained for historical purposes. This volume contains all laws specifically codified in Title 24 by the General Assembly through the 2010 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 30, 2010. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2008, 2009, and 2010 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2008 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

Table of Titles

- Title 1. General Provisions.
- 2. Agriculture.
 - 3. Alcoholic Beverages.
 - 4. Animals.
 - 5. Appeal and Error.
 - 6. Aviation.
 - 7. Banking and Finance.
 - 8. Buildings and Housing.
 - 9. Civil Practice.
 - 10. Commerce and Trade.
 - 11. Commercial Code.
 - 12. Conservation and Natural Resources.
 - 13. Contracts.
 - 14. Corporations, Partnerships, and Associations.
 - 15. Courts.
 - 16. Crimes and Offenses.
 - 17. Criminal Procedure.
 - 18. Debtor and Creditor.
 - 19. Domestic Relations.
 - 20. Education.
 - 21. Elections.
 - 22. Eminent Domain.
 - 23. Equity.
 - 24. Evidence.
 - 25. Fire Protection and Safety.
 - 26. Food, Drugs, and Cosmetics.
 - 27. Game and Fish.
 - 28. General Assembly.
 - 29. Guardian and Ward.

TABLE OF TITLES

30. Handicapped Persons.
31. Health.
32. Highways, Bridges, and Ferries.
33. Insurance.
34. Labor and Industrial Relations.
35. Law Enforcement Officers and Agencies.
36. Local Government.
37. Mental Health.
38. Military, Emergency Management, and Veterans Affairs.
39. Minors.
40. Motor Vehicles and Traffic.
41. Nuisances.
42. Penal Institutions.
43. Professions and Businesses.
44. Property.
45. Public Officers and Employees.
46. Public Utilities and Public Transportation.
47. Retirement and Pensions.
48. Revenue and Taxation.
49. Social Services.
50. State Government.
51. Torts.
52. Waters of the State, Ports, and Watercraft.
53. Wills, Trusts, and Administration of Estates.

In Addition, This Publication Includes

Constitution of the United States

Constitution of the State of Georgia

Tables of Comparative Sections

Table of Acts

Index to Local and Special Laws

TABLE OF TITLES

Index to General Laws of Local Application

Short Title Index

General Index

Table of Contents

VOLUME 20

TITLE 24

EVIDENCE

CHAPTER	PAGE
1. General Provisions, 24-1-1 through 24-1-5	3
2. Relevancy, 24-2-1 through 24-2-4	24
3. Hearsay, 24-3-1 through 24-3-53	116
4. Proof Generally, 24-4-1 through 24-4-65	371
5. Best Evidence Rule, 24-5-1 through 24-5-33	556
6. Parol Evidence Rule, 24-6-1 through 24-6-10	589
7. Authentication of Writings, 24-7-1 through 24-7-27	625
8. Establishment of Lost Records, 24-8-1 through 24-8-30	663
9. Witnesses Generally, 24-9-1 through 24-9-108	677
10. Securing Attendance of Witnesses and Production and Preservation of Evidence, 24-10-1 through 24-10-154	1000
Appendix. American Experience Mortality Table; The Commissioners 1958 Standard Ordinary Mortality Table; Annuity Mortality Table for 1949, Ultimate	1059
Index to Title 24	1065

TITLE 24

EVIDENCE

- Chap. 1. General Provisions, 24-1-1 through 24-1-5.
2. Relevancy, 24-2-1 through 24-2-4.
3. Hearsay, 24-3-1 through 24-3-53.
4. Proof Generally, 24-4-1 through 24-4-65.
5. Best Evidence Rule, 24-5-1 through 24-5-33.
6. Parol Evidence Rule, 24-6-1 through 24-6-10.
7. Authentication of Writings, 24-7-1 through 24-7-27.
8. Establishment of Lost Records, 24-8-1 through 24-8-30.
9. Witnesses Generally, 24-9-1 through 24-9-108.
10. Securing Attendance of Witnesses and Production and Preservation of Evidence, 24-10-1 through 24-10-154.

Appendix

Appendix. American Experience Mortality Table; The Commissioners 1958 Standard Ordinary Mortality Table; Annuity Mortality Table for 1949, Ultimate.

Cross references. — Discovery proceedings, § 15-11-75 et seq. Criminal penalties for tampering with evidence, influencing witnesses, etc., § 16-10-90 et seq.

Law reviews. — For article, "Self-serving Declarations in Georgia," see 12 Ga. B.J. 388 (1950). For article reviewing the applications of criminal trial evidence law in 1976 to 1977, see 29 Mercer L. Rev. 55 (1977). For article discussing developments in the law of evidence in Georgia in 1976 to 1977, see 29 Mercer L. Rev. 145 (1977). For article surveying cases dealing with law of evidence from June 1977 through May 1978, see 30 Mercer L. Rev. 91 (1978). For article surveying Georgia cases in the area of tort law from June 1, 1977, through May 1978, see 30 Mercer L. Rev. 215 (1978). For annual survey on evidence, see 36 Mercer L. Rev. 209 (1984). For annual survey of evidence law, see 39 Mercer L. Rev. 213 (1987). For annual survey on law of evidence, see 42 Mercer L.

Rev. 223 (1990). For annual eleventh circuit survey of the law of evidence, see 42 Mercer L. Rev. 1451 (1991). For annual survey on law of evidence, see 43 Mercer L. Rev. 257 (1991). For annual eleventh circuit survey of the law of evidence, see 43 Mercer L. Rev. 1173 (1992). For annual survey on law of evidence, see 44 Mercer L. Rev. 213 (1992). For annual survey article on law of evidence, see 45 Mercer L. Rev. 229 (1993). For annual survey article on evidence issues, see 46 Mercer L. Rev. 233 (1994). For survey of 1995 Eleventh Circuit cases on evidence, see 47 Mercer L. Rev. 837 (1996). For annual survey article on law of evidence, see 4 Mercer L. Rev. 149 (1997). For survey of 1999 Eleventh Circuit cases on evidence, see 51 Mercer L. Rev. 1165 (2000). For annual survey article on evidence law, see 52 Mercer L. Rev. 263 (2000).

For note discussing the admissibility of polygraph test results upon stipulation of the

parties in light of *State v. Chambers*, 240 Ga. 76, 239 S.E.2d 324 (1977), see 30 Mercer L. Rev. 357 (1978).

JUDICIAL DECISIONS

Intent of evidence rules. — Restrictive rules of evidence are intended to prevent verdicts from being based on surmise, and

not to exclude facts which, with others, tend to establish the charge. *Allen v. State*, 71 Ga. App. 517, 31 S.E.2d 107 (1944).

RESEARCH REFERENCES

Am. Jur. Trials. — Locating Public Records, 1 Am. Jur. Trials 409.

Preparing and Using Maps, 2 Am. Jur. Trials 669.

Preparing and Using Photographs in Civil Cases, 3 Am. Jur. Trials 1.

Preparing and Using Photographs in Criminal Cases, 3 Am. Jur. Trials 335.

Preparing and Using Models, 3 Am. Jur. Trials 377.

Preparing and Using Experimental Evidence, 3 Am. Jur. Trials 427.

Preparing and Using Diagrams, 3 Am. Jur. Trials 507.

Introducing and Marking Exhibits, 5 Am. Jur. Trials 553.

Using Blackboards and Related Visual Aids, 5 Am. Jur. Trials 577.

Producing "Day-in-the-Life" Videotape in Personal Injury Lawsuit, 39 Am. Jur. Trials 261.

Presentation and Proof of Damages in Personal Injury Litigation, 39 Am. Jur. Trials 395.

Using "Day-in-the-Life" Documentary in a Personal Injury Lawsuit, 40 Am. Jur. Trials 249.

Forensic Document Examination in Med-

ical Malpractice Cases, 44 Am. Jur. Trials 317.

The Use of Biomechanical Experts in Product Liability Litigation, 46 Am. Jur. Trials 631.

Audio Recordings: Evidence, Experts and Technology, 48 Am. Jur. Trials 1.

Voicegram Identification Evidence, 54 Am. Jur. Trials 1.

Transcript of "The Trial of the Century: America vs. Lee Harvey Oswald," 56 Am. Jur. Trials 1.

Handling Fire Claims Out of Court, 57 Am. Jur. Trials 155.

Video Technology, 58 Am. Jur. Trials 481.

The Business Appraiser as an Expert Witness, 59 Am. Jur. Trials 155.

The Relevancy Rules, 64 Am. Jur. Trials 534.

Paralegals as Exhibit Specialists, 72 Am. Jur. Trials 309.

Litigating Toxic Mold Cases, 92 Am. Jur. Trials 113.

Telecommunication and Other Litigation: Call Detail Records and Fraud, 97 Am. Jur. Trials 1.

Defending the Worker's Compensation Claim in the Trucking Industry, 99 Am. Jur. Trials 1.

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.	
24-1-1.	Definitions.	24-1-4.	Judicial notice.
24-1-2.	Object of rules of evidence.	24-1-5.	Procedure to be followed upon
24-1-3.	Applicability of rules of evi-		arrest of hearing impaired per-
	dence.		son.

RESEARCH REFERENCES

ALR. — Use, in attorney or physician tained by wrongful police action, 20 ALR4th disciplinary proceeding, of evidence ob- 546.

24-1-1. Definitions.

As used in this title, the term:

- (1) “Competent evidence” means evidence which is admissible.
- (2) “Cumulative evidence” means evidence which is additional to other evidence already obtained.
- (3) “Direct evidence” means evidence which immediately points to the question at issue.
- (4) “Indirect evidence” or “circumstantial evidence” means evidence which only tends to establish the issue by proof of various facts, sustaining by their consistency the hypothesis claimed.
- (5) “Preponderance of evidence” means that superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.
- (6) “Presumptive evidence” means evidence which consists of inferences drawn by human experience from the connection of cause and effect and from observations of human conduct.
- (7) “Sufficient evidence” means evidence which is satisfactory for the purpose. (Orig. Code 1863, § 3671; Code 1868, § 3695; Code 1873, § 3748; Code 1882, § 3748; Civil Code 1895, §§ 5143, 5145; Penal Code 1895, § 983; Civil Code 1910, §§ 5729, 5731; Penal Code 1910, § 1009; Code 1933, §§ 38-102, 38-106.)

Law reviews. — For article surveying recent legislative and judicial developments in Georgia’s evidence laws, see 31 Mercer L. Rev. 107 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COMPETENT EVIDENCE

CUMULATIVE EVIDENCE

DIRECT EVIDENCE

INDIRECT OR CIRCUMSTANTIAL EVIDENCE

1. INDIRECT EVIDENCE

2. CIRCUMSTANTIAL EVIDENCE

PREPONDERANCE OF EVIDENCE

PRESUMPTIVE EVIDENCE

SUFFICIENT EVIDENCE

General Consideration

Evidence is defined as the means by which any fact is put in issue, established, or disproved. *Hotchkiss v. Newton*, 10 Ga. 560 (1851).

Prima facie evidence is such evidence as in judgment of law is sufficient, and if not rebutted remains sufficient. *Georgia R.R. & Banking Co. v. Smith*, 83 Ga. 626, 10 S.E. 235 (1889).

When types of evidence must be defined in charge. — In the absence of any request that the judge do so, the judge did not err in failing to read to the jury the part of the statute defining direct, circumstantial, and presumptive evidence. *Starnes v. State*, 45 Ga. App. 238, 164 S.E. 89 (1932).

When there was both direct and circumstantial evidence in a rape case, it was proper for the court to define to the jury each class of evidence and to explain the difference between the evidence. *Shivers v. State*, 181 Ga. 557, 183 S.E. 489 (1935).

Substantial compliance. — When the charge given was substantially the statutory definition, there was no error in failing to give the precise language. *Davis v. Wright*, 194 Ga. 1, 21 S.E.2d 88 (1942); *Strickland v. Padgett*, 197 Ga. 589, 30 S.E.2d 167 (1944).

When the statute is charged substantially in the language of the Code, this is sufficient, providing no greater burden is put upon the movant than that provided by law. *Andrews Taxi & U-Drive It Co. v. McEver*, 101 Ga. App. 383, 114 S.E.2d 145 (1960).

Use of the word "testimony" instead of "evidence" in charge does not unduly restrict the jury to a consideration of the oral evidence only and exclude from the consideration of the jury a diagram and several

photographs of the scene of the occurrence since the judge later gave an instruction on the use of this evidence. *Southern Ry. v. Wilcox*, 59 Ga. App. 785, 2 S.E.2d 225 (1939).

Primary evidence. — When the existence of a fact is the question at issue and not the contents of a writing, then oral and written evidence of the fact may both be primary evidence. *Wells v. State*, 151 Ga. App. 416, 260 S.E.2d 374 (1979), overruled on other grounds, *Copeland v. State*, 160 Ga. App. 786, 287 S.E.2d 120 (1982).

Cited in *Graves v. State*, 63 Ga. 740 (1879); *Jenkins v. Jenkins*, 83 Ga. 283, 9 S.E. 541, 20 Am. St. R. 316 (1889); *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S.E. 18 (1890); *Quiggle v. Vining*, 125 Ga. 98, 54 S.E. 74 (1906); *Hill v. Chattanooga Ry. & Light Co.*, 21 Ga. App. 104, 93 S.E. 1027 (1917); *Roberts v. Allen*, 31 Ga. App. 660, 122 S.E. 86 (1924); *Bonita Theater v. Bridges*, 31 Ga. App. 798, 122 S.E. 255 (1924); *Lowry v. Lowry*, 170 Ga. 349, 153 S.E. 11 (1930); *Caison v. State*, 171 Ga. 1, 154 S.E. 337 (1930); *Moss v. State*, 43 Ga. App. 109, 158 S.E. 461 (1931); *Gladden v. Mobley*, 173 Ga. 48, 159 S.E. 569 (1931); *Boyd v. Boyd*, 173 Ga. 139, 159 S.E. 674 (1931); *Southern Ry. v. Slaton*, 50 Ga. App. 570, 178 S.E. 392 (1934); *Graham v. State*, 183 Ga. 881, 189 S.E. 910 (1937); *Harris v. State*, 184 Ga. 382, 191 S.E. 439 (1937); *Nalley Land & Inv. Co. v. Merchants & Planters Bank*, 187 Ga. 142, 199 S.E. 815 (1938); *Richter Bros. v. Atlantic Co.*, 59 Ga. App. 137, 200 S.E. 462 (1938); *Scott v. Wimberly*, 188 Ga. 148, 3 S.E.2d 71 (1939); *Justice v. Davis*, 62 Ga. App. 872, 10 S.E.2d 267 (1940); *Renfroe v. Hamilton*, 193 Ga. 194, 17 S.E.2d 709 (1941); *American Nat'l Ins. Co. v. Nelson*, 69 Ga. App. 537, 26 S.E.2d

203 (1943); *Continental Cas. Co. v. Bennett*, 69 Ga. App. 683, 26 S.E.2d 682 (1943); *Pulliam v. State*, 196 Ga. 782, 28 S.E.2d 139 (1943); *Fountain v. Davis*, 71 Ga. App. 1, 29 S.E.2d 798 (1944); *Morris v. State*, 72 Ga. App. 466, 34 S.E.2d 46 (1945); *Green v. State*, 74 Ga. App. 390, 39 S.E.2d 765 (1946); *Edge v. Dorsey*, 78 Ga. App. 70, 50 S.E.2d 227 (1948); *Atlas Auto Fin. Co. v. Atkins*, 79 Ga. App. 91, 53 S.E.2d 171 (1949); *Heughan v. State*, 82 Ga. App. 640, 61 S.E.2d 685 (1950); *Adler v. Adler*, 207 Ga. 394, 61 S.E.2d 824 (1950); *Flatauer v. Goodman*, 84 Ga. App. 811, 67 S.E.2d 794 (1951); *Smith v. State*, 85 Ga. App. 459, 69 S.E.2d 281 (1952); *Nissen v. Goodyear Tire & Rubber Co.*, 90 Ga. App. 175, 82 S.E.2d 253 (1954); *Henderson v. State*, 210 Ga. 680, 82 S.E.2d 638 (1954); *Bobo v. State*, 100 Ga. App. 643, 112 S.E.2d 205 (1959); *Wilson v. State*, 215 Ga. 672, 113 S.E.2d 95 (1960); *English v. Shivers*, 220 Ga. 737, 141 S.E.2d 443 (1965); *Fireman's Fund Am. Ins. Co. v. Hester*, 115 Ga. App. 39, 153 S.E.2d 622 (1967); *Williams v. Williams*, 223 Ga. 374, 155 S.E.2d 383 (1967); *McGill v. State*, 123 Ga. App. 20, 179 S.E.2d 297 (1970); *Johnson v. State*, 126 Ga. App. 93, 189 S.E.2d 900 (1972); *Brown Transp. Corp. v. Jenkins*, 129 Ga. App. 475, 199 S.E.2d 910 (1973); *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1973); *Lemon v. State*, 235 Ga. 74, 218 S.E.2d 818 (1975); *Tifton Corp. v. Decatur Fed. Sav. & Loan Ass'n*, 136 Ga. App. 710, 222 S.E.2d 115 (1975); *AMOCO v. Floyd*, 136 Ga. App. 804, 222 S.E.2d 208 (1975); *Brown v. State*, 137 Ga. App. 331, 223 S.E.2d 753 (1976); *Daniels v. State*, 137 Ga. App. 371, 224 S.E.2d 60 (1976); *Hogan v. City-County Hosp.*, 138 Ga. App. 906, 227 S.E.2d 796 (1976); *Delvers v. State*, 139 Ga. App. 119, 227 S.E.2d 844 (1976); *Keating v. Department of Natural Resources*, 140 Ga. App. 796, 232 S.E.2d 84 (1976); *Williams v. State*, 238 Ga. 244, 232 S.E.2d 238 (1977); *Metts v. State*, 144 Ga. App. 593, 241 S.E.2d 476 (1978); *Guye v. Home Indem. Co.*, 241 Ga. 213, 244 S.E.2d 864 (1978); *American Serv. Co. v. Green*, 146 Ga. App. 552, 246 S.E.2d 735 (1978); *Crawley v. Marta*, 147 Ga. App. 293, 248 S.E.2d 555 (1978); *Atlanta Recycled Fiber Co. v. Tri-Cities Steel Co.*, 152 Ga. App. 259, 262 S.E.2d 554 (1979); *Haygood v. State*, 154 Ga. App. 633, 269 S.E.2d 480 (1980); *Danforth v. Danforth*, 156 Ga. App. 236, 274 S.E.2d 628 (1980); *Baker v. State*,

161 Ga. App. 670, 288 S.E.2d 280 (1982); *Gross v. State*, 161 Ga. App. 489, 288 S.E.2d 733 (1982); *Thompson v. State*, 163 Ga. App. 35, 292 S.E.2d 470 (1982); *Pennsylvania Life Ins. Co. v. Tanner*, 163 Ga. App. 330, 293 S.E.2d 520 (1982); *Highfield v. State*, 163 Ga. App. 599, 295 S.E.2d 350 (1982); *Smith v. State*, 164 Ga. App. 624, 298 S.E.2d 587 (1982); *Gilbert v. Powell*, 165 Ga. App. 504, 301 S.E.2d 683 (1983); *Miller v. State*, 165 Ga. App. 638, 302 S.E.2d 394 (1983); *Zippy Mart, Inc. v. Fender*, 170 Ga. App. 617, 317 S.E.2d 575 (1984); *Barton v. State*, 253 Ga. 478, 322 S.E.2d 54 (1984); *Wright v. State*, 255 Ga. 109, 335 S.E.2d 857 (1985); *Bing v. State*, 178 Ga. App. 288, 342 S.E.2d 762 (1986); *Mayne v. State*, 258 Ga. 36, 365 S.E.2d 270 (1988); *Cook v. State*, 185 Ga. App. 585, 364 S.E.2d 912 (1988); *Queen v. State*, 189 Ga. App. 161, 375 S.E.2d 287 (1988); *Alonso v. State*, 190 Ga. App. 26, 378 S.E.2d 354 (1989); *Elliott v. State*, 193 Ga. App. 49, 387 S.E.2d 18 (1989); *Parsons v. Chatham County Bd. of Comm's*, 204 Ga. App. 130, 418 S.E.2d 459 (1992); *Morrow v. State*, 226 Ga. App. 833, 487 S.E.2d 669 (1997); *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 233 Ga. App. 706, 505 S.E.2d 232 (1998); *Grimsley v. State*, 233 Ga. App. 781, 505 S.E.2d 522 (1998); *Murray v. State*, 269 Ga. 871, 505 S.E.2d 746 (1998); *Crozier v. State*, 233 Ga. App. 831, 506 S.E.2d 139 (1998); *Evans v. State*, 233 Ga. App. 879, 506 S.E.2d 169 (1998); *Lucas v. State*, 234 Ga. App. 534, 507 S.E.2d 253 (1998); *Bedford v. Awod*, 248 Ga. App. 28, 545 S.E.2d 162 (2001); *Enviro Pro, Inc. v. Emanuel County*, 265 Ga. App. 309, 593 S.E.2d 673 (2004); *Thompson v. State*, 283 Ga. 581, 662 S.E.2d 124 (2008).

Competent Evidence

Evidence of doubtful competency or relevancy should be admitted and the weight of the evidence left to the jury. *Crass v. State*, 150 Ga. App. 374, 257 S.E.2d 909 (1979).

Cumulative Evidence

For a definition of cumulative evidence, see *Dale v. State*, 88 Ga. 552, 15 S.E. 287 (1892).

Evidence of same kind to same point. — Cumulative evidence is commonly defined as additional evidence of the same kind to

Cumulative Evidence (Cont'd)

the same point. *Perry v. Hammock*, 75 Ga. App. 171, 42 S.E.2d 651 (1947).

True test as to whether evidence is cumulative depends not only on whether the evidence tends to establish the same fact, but it may depend on whether the new evidence is of the same or different grade. *Johnson v. State*, 196 Ga. 806, 27 S.E.2d 749 (1943); *Perry v. Hammock*, 75 Ga. App. 171, 42 S.E.2d 651 (1947).

What constitutes noncumulative evidence. — Newly discovered evidence which either relates to a particular material issue concerning which no witness has previously testified, or which is of a higher and different grade from that previously had on the same material point, will ordinarily be taken outside the definition of cumulative evidence. *Johnson v. State*, 196 Ga. 806, 27 S.E.2d 749 (1943).

Evidence is not merely cumulative, though it may have some bearing upon the main issue in controversy, if it relates to new, distinct, and material facts about which no witness testified at the trial. *Perry v. Hammock*, 75 Ga. App. 171, 42 S.E.2d 651 (1947).

Redundant testimony. — In a condemnation proceeding, testimony that was redundant of actual ordinances, zoning regulations, and of a land use plan already testified to by another was properly excluded. *Hall County v. Merritt*, 233 Ga. App. 526, 504 S.E.2d 754 (1998).

Evidence of admitted prior conviction. — Evidence of a defendant's prior conviction for conspiracy to distribute cocaine is admissible as cumulative evidence in a subsequent prosecution for trafficking in cocaine when the defendant admits at the time of defendant's arrest defendant's previous conviction. *Anthony v. State*, 184 Ga. App. 876, 363 S.E.2d 171 (1987).

Failure to turn over evidence upheld when cumulative. — Failure of trial court to order original tape recordings of conversations in which defendant took part to be turned over to defendant's expert for analysis was upheld because the tapes were but one part of the state's evidence and thus were merely cumulative evidence. *Carpenter v. State*, 252 Ga. 79, 310 S.E.2d 912 (1984).

Direct Evidence

For a definition of direct evidence, see *Moughon v. State*, 57 Ga. 102 (1876); *Graves v. State*, 63 Ga. 740 (1879); *Stubbs v. State*, 265 Ga. 883, 463 S.E.2d 686 (1995).

Instructions to jury. — Court did not err in charging the jury that "direct evidence is that which immediately points to the question at issue," although the case depended entirely upon circumstantial evidence since the charge given is part of the statute and was given in connection with the definition of circumstantial evidence. *Faulkner v. State*, 43 Ga. App. 763, 160 S.E. 117 (1931).

Identification. — Testimony of six witnesses who were present at the scene of the robbery and who positively identified defendant as the perpetrator of the crime was direct, being a distinct "perception of the senses" and not a "mere inference or conclusion of the mind." *Salisbury v. State*, 223 Ga. 414, 156 S.E.2d 48 (1967).

Testimony of the victim as to the fact of the armed robbery and kidnapping and the identification of the defendant as one of the two persons who committed such crimes was direct evidence. *Ward v. State*, 233 Ga. 251, 210 S.E.2d 772 (1974).

Evidence based on a witness's prior knowledge with regard to identification of defendant and based on the perception of the witness's senses falls within the broad scope of direct evidence. *Cowans v. State*, 145 Ga. App. 693, 244 S.E.2d 624 (1978).

Causation. — Trial court erred in granting summary judgment for the Georgia Department of Transportation (DOT) in a wrongful death action as there was a question of fact as to causation because, although the parents' evidence that there was a gouge in the shoulder the day after the collision was not direct evidence to contradict the DOT's evidence that there was not a gouge on the day of the collision, the parents' experts agreed that the severe drop-off the driver encountered when the driver left the east-side roadway caused the driver to lose control of the car. *Karwacki v. Ga. DOT*, 276 Ga. App. 628, 624 S.E.2d 171 (2005).

Witness's state of mind. — Supreme Court recognizes the rule that direct and positive testimony, as distinguished from testimony circumstantial, opinionative, or actually negative in character, which is given by an unimpeached witness as to the existence of a

fact apparently within one's own knowledge, which is not in itself incredible, impossible, or inherently improbable, and which is not contradicted directly or by proof of facts or circumstances that could be taken as incompatible with such testimony, cannot be arbitrarily rejected by a jury or other trier of facts upon the mere surmise that it perhaps might not be in accord with the truth. Although the issue as to contractual capacity is to be determined by the condition of the grantor's mind at the time the deed was executed, the Supreme Court also fully recognizes the rule that, in determining such an issue, it is permissible to receive and consider evidence as to the state of the grantor's mind for a reasonable period both before and after the transaction under investigation; nor should it be said that witnesses might not testify to such a previous state of mind as would authorize a finding against contractual capacity at the time the deed was executed, despite evidence of witnesses who were present at the time and testified that the grantor did have such capacity. The two rules as stated are entirely consistent, and neither of them should be overlooked; the former referring to the ultimate fact, the latter to facts that are evidentiary only. *Thomas v. Lockwood*, 198 Ga. 437, 31 S.E.2d 791 (1944); *Pantone v. Pantone*, 206 Ga. 305, 57 S.E.2d 77 (1950).

An admission of participation in a shooting which resulted in the death of another person is to be taken as direct evidence. *Bowen v. State*, 181 Ga. 427, 182 S.E. 510 (1935).

Evidence was sufficient to support defendant's conviction for malice murder since multiple witnesses testified about defendant's admissions of defendant's participation in the fatal shooting of the victim, which was direct evidence under O.C.G.A. § 24-1-1(3), and the credibility of the witnesses was a jury matter. *Wilson v. State*, 277 Ga. 114, 587 S.E.2d 9 (2003).

Testimony describing admissions of guilt following a crime is direct evidence of guilt. *Brown v. State*, 251 Ga. 598, 308 S.E.2d 182 (1983).

Direct evidence was sufficient. — Because the eyewitness testimony showed that the defendant pushed, pulled, and then carried the victim out of a restaurant as the victim yelled for a coworker to call the police, and

which was direct, not circumstantial, evidence that the victim did not go with the defendant willingly, sufficient evidence supported the defendant's kidnapping conviction. *Holden v. State*, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, 2008 Ga. LEXIS 153 (Ga. 2008).

Indirect or Circumstantial Evidence

1. Indirect Evidence

For definitions of indirect evidence, see *Moughon v. State*, 57 Ga. 102 (1876); *Graves v. State*, 63 Ga. 740 (1879).

2. Circumstantial Evidence

For definitions of circumstantial evidence, see *Warren v. State*, 153 Ga. 354, 112 S.E. 283 (1922); *Greer v. State*, 159 Ga. 85, 125 S.E. 52 (1924); *Stubbs v. State*, 265 Ga. 883, 463 S.E.2d 686 (1995).

Yields to contrary direct evidence. — When a party relies solely on circumstantial evidence to establish the party's cause, such circumstantial evidence must yield as a matter of law to direct, positive, and unimpeached testimony to the contrary. *Whitley Constr. Co. v. O'Dell*, 94 Ga. App. 426, 94 S.E.2d 784 (1956).

Testimony held both as direct and circumstantial evidence on related issues. — Dental technician's testimony that a partial dental impression was encased in an alginate material, as opposed to another type of material, when the technician received the impression from a dental office was direct evidence of the fact that alginate was placed on a patient's partial; however, it was circumstantial evidence of the type of impression material that the patient swallowed in the dental office when the patient was alone with a dental technician. *Ricketts v. Advanced Dental Care, LLC*, 285 Ga. App. 480, 646 S.E.2d 705 (2007).

Before circumstantial evidence can have any probative value to rebut or contradict direct and positive testimony of an unimpeached witness of the alleged facts in question, such evidence must point at least more strongly to a conclusion opposite to the direct testimony; it is not sufficient that such circumstantial evidence points equally one way or the other. *Griffin v. Blackshear Bank*, 66 Ga. App. 821, 19 S.E.2d 325 (1942);

Indirect or Circumstantial**Evidence (Cont'd)****2. Circumstantial Evidence (Cont'd)**

McCarty v. National Life & Accident Ins. Co., 107 Ga. App. 178, 129 S.E.2d 408 (1962).

Must support conclusion and render other conclusions less probable. — In a civil action when the party upon whom the burden of an issue rests seeks to carry it, not by direct proof, but by inferences, the party has not, in this reasonable sense, submitted any evidence for a jury's decision, until the circumstances the party places in proof tend in some proximate degree to establish the conclusion the party claims; and for this, the facts shown must not only reasonably support that conclusion, but also render less probable all inconsistent conclusions. Bentley v. Southern Ry., 52 Ga. App. 188, 182 S.E. 815 (1935); Multivision N.W., Inc. v. Jerrold Elecs. Corp., 356 F. Supp. 207 (N.D. Ga. 1972).

In a civil action based upon circumstantial evidence it is required that the circumstances relied upon not only be consistent with the conclusion sought to be established, but also inconsistent with every other reasonable hypothesis. In civil cases this consistency with the one and inconsistency with the other is required to be established only by a mere preponderance. Multivision N.W., Inc. v. Jerrold Elecs. Corp., 356 F. Supp. 207 (N.D. Ga. 1972).

Directed verdict properly denied. — In a medical malpractice action, the issue of reliance by a patient on a hospital to provide needed services and personnel was subject to proof by circumstantial evidence; thus, denial of a directed verdict in favor of the hospital was not error. Doctors Hosp. v. Bonner, 195 Ga. App. 152, 392 S.E.2d 897 (1990).

Circumstantial evidence which may be inconsistent with direct, positive testimony is sufficient to get the case to jury. Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776, 257 S.E.2d 186, aff'd, 151 Ga. App. 835, 262 S.E.2d 643 (1979).

Circumstantial evidence conflicting with direct evidence. — Fact cannot be established by circumstantial evidence which is perfectly consistent with direct, uncontradicted, reasonable, and unimpeached testimony that a fact does not

exist. Slaton v. Atlanta Gas Light Co., 62 Ga. App. 42, 7 S.E.2d 769 (1940); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

Inconclusive inferences. — In cases of circumstantial evidence, a mere inconclusive inference is not to be regarded as any evidence so as to require the submission of its sufficiency to the jury. Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776, 257 S.E.2d 186, aff'd, 151 Ga. App. 835, 262 S.E.2d 643 (1979).

Use in showing state of mind. — State of mind of either a perpetrator or a victim, including whether a victim has been placed under reasonable apprehension of injury or fear from an event, when in issue may be proved by indirect or circumstantial evidence. Williams v. State, 208 Ga. App. 12, 430 S.E.2d 157 (1993).

Use in proving intent. — Intent with which an act is committed is not often capable of direct proof; it has always been held to be a question for the jury to be drawn from the circumstances of the transaction under investigation. Davis v. State, 53 Ga. App. 325, 185 S.E. 400 (1936).

Use in showing lack of due diligence. — Lack of due diligence is susceptible to proof by circumstantial evidence. Young v. Kitchens, 228 Ga. App. 870, 492 S.E.2d 898 (1997).

Presence of cocaine metabolites in body fluid is direct evidence only of the fact that cocaine was introduced into the body producing the fluid, and is not direct evidence that the person possessed the cocaine. Rather, the presence of cocaine metabolites in body fluid is only circumstantial or indirect evidence of possession. Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990), cert. denied, 500 U.S. 935, 111 S. Ct. 2059, 114 L. Ed. 2d 464 (1991).

Driver need not be seen driving to support DUI conviction. — It is not necessary for a conviction of driving under the influence, much less for probable cause, that the driver actually be seen behind the wheel driving the car while under the influence. Such facts may be shown by circumstantial evidence. Hall v. State, 200 Ga. App. 585, 409 S.E.2d 221, cert. denied, 200 Ga. App. 896, 409 S.E.2d 221 (1991).

"On call" status as circumstantial evidence in collision case. — Mere fact that an

employee is “on call” does not automatically give rise to employer liability in a vehicular collision case. Rather, an employee’s “on call” status gives rise to a question of fact as to whether the employee was acting within the scope of employment at the time of the accident. Therefore, “on call” status, at best, is circumstantial evidence that an employee was acting in the scope of the employee’s employment. In a suit based on a vehicular collision involving an “on call” employee, summary judgment was proper under the burden shifting framework of *Allen Kane’s Major Dodge*, 243 Ga. 776 (1979) because the plaintiff did not provide any direct evidence, as defined in O.C.G.A. § 24-1-1(3), showing that the employee had been called into work and was acting pursuant to the employee’s employment duties at the time of the accident. *Hicks v. Heard*, 692 S.E.2d 360, 2010 Ga. LEXIS 284 (2010).

Probative value. — Expert testimony that salmonella could develop in the home due to improper handling and storage by the consumer, rather than improper cooking or storage by the consumer, could have been the cause of the salmonella, was admissible. The testimony was clearly probative, tending to establish by circumstantial evidence that defendants (rather than the consumer) were responsible for the salmonella in the turkey. *Carsten v. Wilkes Supermarket of Gwinnett County, Inc.*, 181 Ga. App. 834, 353 S.E.2d 922 (1987).

Basis for new trial. — When new evidence, though the evidence be of the same or even inferior grade, tends not merely to strengthen the correctness of the contention of the particular material issue previously sought to be established, but such new proved fact or circumstance, if believed, would in and of itself establish or disprove the controlling point in controversy, or would establish or disprove it by supplying a link or gap missing in the previous testimony, it will afford a basis for the new trial. *Johnson v. State*, 196 Ga. 806, 27 S.E.2d 749 (1943).

When circumstantial evidence must be included in instructions. — It was no error to fail to define circumstantial evidence when the evidence was not wholly circumstantial. *Strickland v. State*, 167 Ga. 452, 145 S.E. 879 (1928). See also *Phillips v. State*, 39 Ga. App. 812, 148 S.E. 631 (1929).

It is only when a case is wholly dependent on the law of circumstantial evidence that the trial judge is required to give in charge to the jury the law of circumstantial evidence. *Wiggins v. State*, 74 Ga. App. 231, 39 S.E.2d 450 (1946).

When circumstantial evidence alone is not relied upon, it is not error to fail to charge, without request, the principles of circumstantial evidence. *King v. State*, 86 Ga. App. 786, 72 S.E.2d 502 (1952); *Jones v. State*, 88 Ga. App. 330, 76 S.E.2d 810 (1953).

When charge required. — In a prosecution for driving under the influence of alcohol, defendant was entitled to defendant’s requested instruction on circumstantial evidence based on a reasonable hypothesis from defendant’s use of Benadryl that defendant was not guilty of the crime charged. *Cato v. State*, 212 Ga. App. 417, 441 S.E.2d 900 (1994).

Instructions against speculation. — When the facts necessary to make out the plaintiff’s case are dependent on circumstantial evidence, it is not error to charge the jury that the jury is not permitted to speculate or guess as to the cause of the injury. *Bentley v. Southern Ry.*, 52 Ga. App. 188, 182 S.E. 815 (1935).

Instructions held sufficient. — When the court in the charge of the jury defined direct and circumstantial evidence in the terms of the statute, and then charged when circumstantial evidence was sufficient to convict when a conviction is sought on circumstantial evidence, an omission to recharge the law of circumstantial evidence in immediate connection with the law of reasonable doubt did not amount to an expression of opinion that direct evidence had been introduced, and did not exclude from the consideration of the jury the law that requires the evidence to be sufficient to exclude every reasonable hypothesis save that of the guilt of the accused before a conviction would be authorized in a case depending upon circumstantial evidence only. *Lucas v. State*, 48 Ga. App. 42, 171 S.E. 850 (1933).

Court having correctly defined circumstantial evidence and instructed the jury on the degree of proof necessary to sustain a conviction on circumstantial evidence, it was not error to omit further instructions elaborating upon circumstantial evidence or attempting an explanation of its meaning.

Indirect or Circumstantial Evidence (Cont'd)

2. Circumstantial Evidence (Cont'd)

Flynn v. State, 77 Ga. App. 791, 50 S.E.2d 91 (1948).

Charge to the jury that, "insofar as the state relies in this case for a conviction on circumstantial evidence alone, the proven facts must not only be consistent with the hypothesis of guilt, but must be inconsistent with the theory of innocence," is substantially correct, and sufficient to withstand a motion for a new trial, although it would be the better practice to charge the law with reference to circumstantial evidence in the terms of the statute. *Bagley v. State*, 212 Ga. 206, 91 S.E.2d 506 (1956).

Preponderance of Evidence

How preponderance determined. — Preponderance is to be determined from all evidence regardless of by which party the evidence is introduced. *Anderson v. Savannah Press Publishing Co.*, 100 Ga. 454, 28 S.E. 216 (1897).

Standard in civil cases. — Establishment of facts in civil cases to a moral and reasonable certainty is not required, but their establishment by a preponderance of the evidence is sufficient. *Masonic Relief Ass'n v. Hicks*, 47 Ga. App. 499, 171 S.E. 215 (1933).

Standard in criminal cases. — Relevant question in a criminal prosecution is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

Preponderance required on each issue. — It is correct in a jury instruction to define what is meant by preponderance of evidence in the language of the statute and to add, "and where there is more than one issue in the case, this rule or definition of preponderance of the evidence relates to each and all of the issues of fact to be determined by you," since, regardless of when the burden of proof lies, it is correct to instruct the jury that the jury shall find according to the preponderance of evidence upon any issue submitted. *Patillo v. Thompson*, 106 Ga. App. 808, 128 S.E.2d 656 (1962).

"Preponderance" when defendant offers no evidence. — When the defendant offers no evidence at all, an instruction that a preponderance of evidence is evidence "stronger than the evidence of the defendant" almost guarantees that any evidence offered by the plaintiff, as against zero evidence, must be considered a preponderance. Such charge is error. *Superior Paving, Inc. v. Citadel Cement Corp.*, 145 Ga. App. 6, 243 S.E.2d 287 (1978).

"Preponderance" does not mean "strong predominance." — Charge that a preponderance of the evidence could be determined by asking "which way does it strongly predominate," was erroneous as the degree of proof required by such instructions was greater than that provided by the statute. *Garrison Motor Co. v. Parrish*, 52 Ga. App. 766, 184 S.E. 766 (1936).

"Preponderance" does not mean "stronger evidence." — Trial court erred in characterizing preponderant evidence as "stronger." *Danforth v. Danforth*, 156 Ga. App. 236, 274 S.E.2d 628 (1980).

Preponderance of circumstantial evidence. — If circumstantial evidence tends to reasonably establish plaintiff's theory of the case, and preponderates to that theory rather than to any other reasonable hypothesis, it is error to enter a nonsuit. *Callaway v. Hall*, 58 Ga. App. 819, 199 S.E. 899 (1938); *Getzinger v. Lariscy*, 77 Ga. App. 768, 49 S.E.2d 907 (1948).

Conflicting circumstantial evidence. — When circumstantial evidence as seen by the court is "equal," or when it is "in conflict," the court cannot decide where the preponderance lies or exclude hypotheses that seem to it to be the less reasonable; and it is error to direct a verdict. *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962).

Reasonable and impartial mind. — In instruction to jury by judge, the use of the words "your minds," omitting any references to "a reasonable and impartial mind," did not lead the jury to believe that they might determine the preponderance of the evidence solely on the basis of what the jury might think of the evidence and not on what "a reasonable and impartial mind" might think of it. This charge affords no ground for a new trial in the absence of a proper, timely written request for a more specific

instruction on the subject. *Southern Ry. v. Wilcox*, 59 Ga. App. 785, 2 S.E.2d 225 (1939).

Deposition testimony and affidavit of an expert were sufficient to state that a doctor's professional negligence was the cause of a patient's injury and death within a "reasonable medical probability or reasonable medical certainty," although the expert only gave the patient a 50-50 chance of leaving the hospital in good condition. The doctor's motion for summary judgment was properly denied. *Naik v. Booker*, No. A09A2269, 2010 Ga. App. LEXIS 349 (Mar. 30, 2010).

Charge sufficiently defined preponderance. *Scott v. Brown*, 127 Ga. 88, 56 S.E. 130 (1906); *Studstill v. Bergsteiner*, 25 Ga. App. 405, 103 S.E. 691 (1920).

Instructions on equally balanced evidence. — Instruction that "where, in the opinion of the jury, the evidence is equally balanced on each side, where the jury believes the witnesses of each side equally credible, where the jury believes the evidence is as strong on one side as it is on the other, then a preponderance of the testimony would not be carried, and in such case, it is the duty of the jury to return a verdict in favor of the plaintiff in this case," was not tantamount, under the facts, to the direction of a verdict for the plaintiff, and constituted insufficient grounds for a new trial. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936).

No need to include § 24-4-1 in charge. — In the absence of a written request to do so, it was not error for the court, after charging former Code 1933, §§ 38-102 and 38-106 (see O.C.G.A. § 24-1-1), to fail to give in charge former Code 1933, § 38-107 (see O.C.G.A. § 24-4-4), which stated how the preponderance of the evidence may be determined, and what facts the jury may consider in deciding where the preponderance of the evidence lies. *Rome Ry. & Light Co. v. King*, 33 Ga. App. 383, 126 S.E. 294 (1925); *Clark v. State*, 167 Ga. 341, 145 S.E. 647 (1928); *Sims v. Sims*, 167 Ga. 537, 146 S.E. 170 (1928).

Presumptive Evidence

Free determination by jury of fact questions. — Jury should be left free to determine under proper instructions as to the law, all questions and presumptions of fact.

Templeton v. Kennesaw Life & Accident Ins. Co., 216 Ga. 770, 119 S.E.2d 549 (1961).

Jury as the trier of facts could have drawn inferences from human experience in connection with cause and effect and applied jury's own opinion from the fact evidence submitted. *Garner v. Driver*, 155 Ga. App. 322, 270 S.E.2d 863 (1980).

Presumptive evidence is for jury determination for a jury is required to consider that evidence presumptive in the light of their experience in the affairs of life. *Mattison v. Travelers Indem. Co.*, 157 Ga. App. 372, 277 S.E.2d 746 (1981).

Jury is entitled to consider as proven certain matters, even without any testimony being introduced. *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972).

Permissive inference almost identical to presumption of fact. — No reversible error occurred when a trial court charged the jury in language of permissive inference rather than presumption of fact. A thin line exists at best between a permissible inference of fact and a rebuttable presumption of fact. *Pouncey v. Adams*, 206 Ga. App. 126, 424 S.E.2d 376 (1992).

Jurors are entitled to use jurors own common sense as intelligent human beings on many questions. *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972).

Nature of property. — Jury may consider the nature of the property involved in an insurance claim and any other facts and circumstances within their knowledge in arriving at a verdict providing there is evidence of sufficient facts from which the jury may draw from the jury's own experience in reaching a conclusion. *Sentry Ins. v. Henderson*, 138 Ga. App. 495, 226 S.E.2d 759 (1976).

Value of property. — Value of merchandise is generally matter of opinion, but the jury may consider such opinion testimony, make reasonable deductions, and exercise their own knowledge and ideas. *Jones v. State*, 139 Ga. App. 366, 228 S.E.2d 387 (1976).

Value is peculiarly for determination of the jury, but there must be evidence upon which the jury may legitimately exercise the jury's own knowledge and ideas. *Citizens & S. Nat'l Bank v. Williams*, 147 Ga. App. 205, 249 S.E.2d 289 (1978).

Question of value is peculiarly for the

Presumptive Evidence (Cont'd)

determination of the factfinder when there is any data in the evidence from which the factfinder may legitimately exercise the factfinder's own knowledge and ideas. Such is presumptive evidence, which consists of inferences drawn by human experience from the connection of cause and effect and observations of human conduct. *Adamson Co. v. Owens-Illinois Dev. Corp.*, 168 Ga. App. 654, 309 S.E.2d 913 (1983).

Use of term "threaten." — In suit by a wife against her husband for divorce for alleged cruel treatment, including physical violence, the testimony of the wife that "he would threaten and choke me," was not, in view of other testimony given by her in the same connection, subject to objection upon the ground that the word "threaten" was a conclusion of the witness. *West v. West*, 199 Ga. 378, 34 S.E.2d 545 (1945).

Party cannot file suit knowingly relying on forged signature. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991) (on motion for rehearing).

Sufficient Evidence

What constitutes sufficient evidence. — Sufficient evidence is such as is satisfactory

to the purpose — satisfaction in its legal sense — such as satisfies the law as to the existence of a given fact. *Mallery v. Young*, 94 Ga. 804, 22 S.E. 142 (1894).

If the evidence adduced is not more than a "scintilla," if it is dependent entirely on guess or speculation, the evidence is insufficient to support a verdict, and it is not error so to charge. *Bentley v. Southern Ry.*, 52 Ga. App. 188, 182 S.E. 815 (1935).

Despite the defendant's contention on appeal that the state's evidence was insufficient, specifically, regarding the presence of a gun, given that the state presented sufficient evidence to support the jury's finding of a reasonable apprehension on the part of the victim that an offensive weapon was being used in an armed robbery when coupled with the direct evidence of the defendant's admission to possessing a gun at the time of the robbery, the defendant's armed robbery conviction was upheld; thus, the defendant was not entitled to a directed verdict of acquittal. *Fluellen v. State*, 284 Ga. App. 584, 644 S.E.2d 486 (2007).

Comparative weight of circumstantial and direct evidence on any given issue is a question for the jury. *Rowe v. State*, 68 Ga. App. 161, 22 S.E.2d 210 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 4, 173.

Am. Jur. Proof of Facts. — Proof of Identification of Bite Marks, 75 POF3d 317.

C.J.S. — 31A C.J.S., Evidence, § 259. 32A C.J.S., Evidence, §§ 1273, 1275, 1290.

ALR. — Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting, 9 ALR 984.

Evidence contrary to scientific principles or laws of nature, 21 ALR 141.

Character and sufficiency of evidence to show that letter was mailed, 25 ALR 9; 86 ALR 541.

Confession as circumstantial evidence, 40 ALR 571.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 ALR 1139; 86 ALR 179; 162 ALR 495.

Presumption and burden of proof as to

loss from failure of pledge to sell or collect choses in action pledged, 53 ALR 1075.

Requirement of "positive" proof of death of insured as excluding circumstantial evidence, 60 ALR 592.

Sufficiency of evidence to show defendant's knowledge of bank's insolvency in prosecution for receiving deposits knowing bank insolvent, 87 ALR 504.

Instruction on circumstantial evidence in criminal case, 89 ALR 1379.

Instructions defining term "preponderance or weight of evidence," 93 ALR 155.

Degree or quantum of evidence required to establish oral rescission or modification of written contract, 94 ALR 1278.

Evidence which indirectly or incidentally suggests poverty or wealth of party not in itself proper matter of proof, 122 ALR 1408.

Reasonable doubt rule as applicable to evidence in civil case of facts amounting to felony or misdemeanor, 124 ALR 1378.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 ALR 1199.

May presumption rest upon admission by opponent's pleading without proof of constituent fact, 153 ALR 1106.

Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287.

Sufficiency of evidence, in absence of survivors or of eyewitnesses competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 ALR2d 580.

Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 ALR2d 218.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Homicide: presumption of deliberation or premeditation from the fact of killing, 86 ALR2d 656.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 ALR2d 852.

Right to elicit expert testimony from adverse party called as witness, 88 ALR2d 1186.

Sufficiency of proof that musculoskeletal condition resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 290.

Sufficiency of proof that digestive condition resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 360.

Sufficiency of proof that cancer resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 384.

Sufficiency of proof that cardiovascular or respiratory condition resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 401.

Sufficiency of proof that hernia resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 434.

Sufficiency of proof that condition of skin

or sensory organ resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 446.

Sufficiency of proof that urogenital condition resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 464.

Sufficiency of proof that mental or neurological condition complained of resulted from accident or incident in suit rather than from preexisting condition, 2 ALR3d 487.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 ALR3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 ALR3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 ALR3d 170.

Admissibility, in criminal case, of statistical or mathematical evidence offered for purpose of showing probabilities, 36 ALR3d 1194.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 ALR3d 1084.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Admissibility of evidence tending to identify accused by his own bite marks, 77 ALR3d 1122.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial — state cases, 36 ALR4th 1046.

Cautionary instructions to jury as to reliability of, or factors to be considered in evaluating, voice identification testimony, 17 ALR5th 851.

Sufficiency of evidence to prove future medical expenses as result of injury to back, neck, or spine, 26 ALR5th 401.

24-1-2. Object of rules of evidence.

The object of all legal investigation is the discovery of truth. The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence. (Orig. Code 1863, § 3670; Code 1868, § 3694; Code 1873, § 3747; Code 1882, § 3747; Civil Code 1895, § 5142; Penal Code 1895, § 982; Civil Code 1910, § 5728; Penal Code 1910, § 1008; Code 1933, § 38-101.)

Law reviews. — For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957). For article, “An Analysis

of Georgia’s Proposed Rules of Evidence,” see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

O.C.G.A. § 24-1-2 capsulizes the *raison d’être* for the rules which govern trials. It is not limited by its terms to civil trials. *Holcomb v. State*, 198 Ga. App. 547, 402 S.E.2d 520, cert. denied, 198 Ga. App. 898, 402 S.E.2d 520 (1991).

Balancing of competing rights. — Trial court must weigh in balance the right of the state as society’s representative to obtain the truth in the purest and simplest form against the right of a defendant to a trial as free as possible from improper influences. *Montgomery v. State*, 156 Ga. App. 448, 275 S.E.2d 72 (1980).

Basic axiom of justice set forth in this statute obtains in all cases except where “it would be more unjust and productive of more evil to hear the truth than to forbear the investigation.” *Hollins v. State*, 133 Ga. App. 183, 210 S.E.2d 354 (1974).

Courts allowed broad discretion. — Pursuant to the liberal rule granting the trial courts very broad discretion in permitting parties to offer additional evidence at any stage of the trial, and because leniency in this area was very unlikely to constitute an abuse of the court’s discretion, the defendant failed to show that the trial court abused the court’s discretion in permitting the state to reopen the evidence after the state had presented the state’s case-in-chief and rested. *Taylor v. State*, 282 Ga. 502, 651 S.E.2d 715 (2007).

Public trial tends to ensure the truth by forcing those who testify to relate their memories without embellishment for fear that there may be those in attendance who could call the testimony into question if not truth-

ful. As one party to the trial, the state is entitled to require common witnesses, both those charged and observers of the charged acts, to present their version of the occurrences in the presence of each other, thereby minimizing witness bias or the possibility of each defendant singly shifting blame to other absent defendants without opportunity of searching inquiry into the truth. *Montgomery v. State*, 156 Ga. App. 448, 275 S.E.2d 72 (1980).

Narrow construction of the attorney-client privilege, inasmuch as the exercise of the privilege results in the exclusion of evidence, comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is “the object of all legal investigation.” *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (2000).

Impeachment evidence. — Trial court’s refusal to permit the introduction of a complaint in another proceeding to impeach a party was at odds with the principle in O.C.G.A. § 24-1-2 that the object of all legal investigation is the discovery of the truth, since it authorized the exclusion of relevant impeaching evidence and allowed the credibility of a crucial witness to go unchallenged; clearly, the subordination of the discovery of the truth to a mere procedural device was erroneous. *Ballard v. Meyers*, 275 Ga. 819, 572 S.E.2d 572 (2002).

Reopening case to admit impeachment evidence. — A trial court did not abuse its discretion in reopening the evidence in a defendant’s marijuana possession trial to allow the prosecutor to present impeach-

ment witnesses who disproved a defense witness's claim that the witness did not know the defendant by showing that the witness was the defendant's girlfriend and the mother of the defendant's child. *Sirmans v. State*, 301 Ga. App. 756, 688 S.E.2d 669 (2009).

Admission of doubtful evidence. — State policy is to admit evidence, even if the admissibility of the evidence is doubtful, because it is more dangerous to suppress the truth than to allow a loophole for falsehood. *Gibbons v. Maryland Cas. Co.*, 114 Ga. App. 788, 152 S.E.2d 815 (1966).

When the admissibility of evidence is in doubt, the Georgia rule favors admission and submission to the jury with any needed instructions. *Georgia Farm Bureau Mut. Ins. Co. v. Latimore*, 151 Ga. App. 786, 261 S.E.2d 735 (1979).

Summary judgment determines only whether material fact exists. — On summary judgment, a trial court determines only whether a material issue of fact exists, and such determination does not include “the discovery of the truth of such fact” or permit frustration of a plaintiff’s constitutional right to a trial by jury “by inferring with the existence of other facts” from predicate evidence. *Bruno’s Food Stores, Inc. v. Taylor*, 228 Ga. App. 439, 491 S.E.2d 881 (1997).

Reception of perjured evidence is never justice, no matter how salutary the end in view. *Hollins v. State*, 133 Ga. App. 183, 210 S.E.2d 354 (1974).

Experiments made in and out of court sometimes make a practical demonstration of the question in issue, and are often the best evidence in elucidating the truth; there should be substantial and reasonable similarity in the facts proved in the case and the facts upon which the experiment is based, but the facts need not be exactly or in every particular similar; if the experiments are sufficiently similar to accomplish the purpose of assisting the jury to intelligently consider the issue of fact presented in regard to the special point in controversy, the evidence is admissible. *Miller v. State*, 53 Ga. App. 275, 185 S.E. 372 (1936).

On cross-examination opposing party is entitled to a thorough and sifting examination of the witness and, when the defendant’s alibi witnesses were under cross-examination, the trial court correctly

refused to grant a mistrial with reference to an effort to impeach the witnesses as to whether or not the testimony was fabricated before trial, since the object of all legal investigation is the discovery of truth. *Mitchell v. State*, 157 Ga. App. 683, 278 S.E.2d 192 (1981).

Refusal to allow a witness to testify is a matter within the discretion of the trial court. *Georgia Bldg. Servs., Inc. v. Perry*, 193 Ga. App. 288, 387 S.E.2d 898 (1989).

Failure of the trial court to allow a witness to testify in a slip and fall premises liability suit constituted an abuse of discretion requiring reversal and a new trial since the exercise of discretion was based upon a misapprehension of the facts of the case, namely, the trial court’s belief that the witnesses’ existence had not been revealed to the opposing party. *Georgia Bldg. Servs., Inc. v. Perry*, 193 Ga. App. 288, 387 S.E.2d 898 (1989).

Blood test admitted in rebuttal. — Ruling of the trial court to allow blood test to be admitted in rebuttal was entirely consistent with the statutorily recognized object of the rules of evidence. *Gregg v. State*, 216 Ga. App. 135, 453 S.E.2d 499 (1995).

Compliance with a subpoena implicit in a confidential settlement agreement. — Provision that a party to a confidential settlement agreement may nevertheless testify or otherwise comply with a subpoena, court order, or applicable law is an implicit term in such a confidential settlement agreement. *Barger v. Garden Way, Inc.*, 231 Ga. App. 723, 499 S.E.2d 737 (1998).

Trial court erred in concluding that a confidential settlement agreement, even if incorporated as another court’s final order, can operate to preclude discovery by Georgia litigants of the parties to that confidential settlement agreement. *Barger v. Garden Way, Inc.*, 231 Ga. App. 723, 499 S.E.2d 737 (1998).

Cited in *Newton Mfg. Co. v. White*, 63 Ga. 697 (1879); *Jefferson v. Markert & Co.*, 112 Ga. 498, 37 S.E. 758 (1900); *Groves v. State*, 162 Ga. 161, 132 S.E. 769 (1926); *King Hdwe. Co. v. Ennis*, 39 Ga. App. 355, 147 S.E. 119 (1929); *Sims v. State*, 177 Ga. 266, 170 S.E. 58 (1933); *Goodwin v. State*, 49 Ga. App. 223, 174 S.E. 742 (1934); *Fletcher v. Gillespie*, 201 Ga. 377, 40 S.E.2d 45 (1946); *Womack v. Central Ga. Gas Co.*, 85 Ga. App.

799, 70 S.E.2d 398 (1952); *Smith v. Morning News, Inc.*, 99 Ga. App. 547, 109 S.E.2d 639 (1959); *Ferguson v. Georgia*, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961); *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965); *Jaynes v. Blake*, 119 Ga. App. 748, 168 S.E.2d 832 (1969); *Central of Ga. R.R. v. Sellers*, 129 Ga. App. 811, 201 S.E.2d 485 (1973); *Seaboard Coast Line R.R. v. Smith*, 131 Ga. App. 288, 205 S.E.2d 888 (1974); *Johnson v. Jackson*, 140 Ga. App. 252, 230 S.E.2d 756 (1976); *Cox v. K-Mart Enters. of Ga., Inc.*, 143 Ga. App. 30, 237 S.E.2d 432 (1977); *Allanson v. State*, 144 Ga. App. 450, 241 S.E.2d 314 (1978); *Kickasola v. Jim Wallace Oil Co.*, 144 Ga. App. 758, 242 S.E.2d 483 (1978); *Farley v. State*, 145 Ga. App. 98, 243 S.E.2d 322 (1978); *Simpkins v. State*, 149 Ga. App. 763, 256 S.E.2d 63 (1979); *Gibbons v. State*, 248

Ga. 858, 286 S.E.2d 717 (1982); *Hilburn v. State*, 166 Ga. App. 357, 304 S.E.2d 480 (1983); *Dawson v. Mason*, 167 Ga. App. 129, 305 S.E.2d 820 (1983); *Sisson v. State*, 181 Ga. App. 784, 353 S.E.2d 836 (1987); *Newell v. Brown*, 187 Ga. App. 9, 369 S.E.2d 499 (1988); *O'Quinn v. Southeast Radio Corp.*, 190 Ga. App. 608, 380 S.E.2d 487 (1989), overruled on other grounds, *Okekepe v. Commerce Funding Corp.*, 218 Ga. App. 705, 463 S.E.2d 23 (1995); *Butts v. State*, 193 Ga. App. 824, 389 S.E.2d 395 (1989); *Rabern v. State*, 221 Ga. App. 874, 473 S.E.2d 547 (1996); *West v. State*, 228 Ga. App. 713, 492 S.E.2d 576 (1997); *Marshall v. State*, 230 Ga. App. 116, 495 S.E.2d 585 (1998); *Lucas v. State*, 234 Ga. App. 534, 507 S.E.2d 253 (1998); *Cornelius v. Macon-Bibb County Hosp. Auth.*, 243 Ga. App. 480, 533 S.E.2d 420 (2000).

RESEARCH REFERENCES

ALR. — Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 ALR2d 218.

Admissibility of evidence of family circumstances of parties in personal injury actions, 37 ALR3d 1082.

24-1-3. Applicability of rules of evidence.

The rules of evidence shall be the same in all courts and in all trials unless otherwise expressly provided by statute. (Orig. Code 1863, § 3673; Code 1868, § 3697; Code 1873, § 3750; Code 1882, § 3750; Civil Code 1895, § 5147; Civil Code 1910, § 5733; Code 1933, § 38-108.)

JUDICIAL DECISIONS

Cited in *Jenkins v. Jenkins*, 83 Ga. 283, 9 S.E. 541, 20 Am. St. R. 316 (1889); *Moyers v. State*, 58 Ga. App. 237, 198 S.E. 283 (1938); *Bagwell v. Henson*, 124 Ga. App. 92, 183

S.E.2d 485 (1971); *Glisson v. State*, 165 Ga. App. 342, 301 S.E.2d 62 (1983); *DeLong v. Welch*, 272 Ga. 730, 533 S.E.2d 724 (2000).

RESEARCH REFERENCES

ALR. — Applicability of rules of evidence in juvenile delinquency proceeding, 43 ALR2d 1128.

Applicability of rules of evidence to juvenile transfer, waiver, or certification hearings, 37 ALR5th 703.

24-1-4. Judicial notice.

The existence and territorial extent of states, their forms of government, symbols of nationality, the laws of nations, all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority, the laws of the United States and of the several states thereof as published by authority, general customs of merchants, the admiralty and maritime courts of the world and their seals, the political constitution and history of our own government as well as the local divisions of our own state, the seals of the several departments of the government of the United States and of the several states of the Union, and all similar matters of public knowledge shall be judicially recognized without the introduction of proof. (Laws 1819, Cobb's 1851 Digest, p. 272; Code 1863, §§ 3674, 3738, 3747; Code 1868, §§ 3698, 3762, 3771; Code 1873, §§ 3751, 3815, 3824; Code 1882, §§ 3751, 3815, 3824; Civil Code 1895, §§ 5148, 5210, 5231; Civil Code 1910, §§ 5734, 5797, 5818; Code 1933, § 38-112.)

Cross references. — Taking of judicial notice of agency rules, § 50-13-8.

Law reviews. — For annual survey article on evidence law, see 52 Mercer L. Rev. 263 (2000).

For comment on *Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949), see 12 Ga. B.J. 476 (1950).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JUDICIAL NOTICE PROPER

JUDICIAL NOTICE IMPROPER

General Consideration

Notice of intention to take judicial notice.

— If a trial court intends to take judicial notice of any fact, the court must first announce the court's intention to do so on the record and afford the parties an opportunity to be heard regarding whether judicial notice should be taken. *Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing *Graves v. State*, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

Presumption that law in force. — When it appears in the manner indicated by statute that a particular law has been of force in another state, until the contrary is shown it is presumed that such law is still of force. *Seaboard Air-Line Ry. v. Phillips*, 117 Ga. 98, 43 S.E. 494 (1903).

Attention of court called to change in law.

— While the common law is presumed to be of force in most of the American states, if either party claims that the statute or common law obtaining in such state is different from the law laid down in the Code, the party must, by pleading, evidence, or a request to charge, call the attention of the court to such difference. *Wells v. Gress*, 118 Ga. 566, 45 S.E. 418 (1903).

Three methods of proof of foreign laws have been recognized. One is by proof of witnesses, testifying as to their familiarity with the law in reference to a certain subject. A second method is by certified copy of the statute in question. Finally, the third method of proof is clearly authorized by this statute; which is judicial recognition. *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S.E. 93 (1907). See also *Simms v. Southern Express Co.*, 38 Ga. 129 (1868) (see O.C.G.A. § 24-1-4).

General Consideration (Cont'd)

Notice of foreign law from nature of litigation. — No issue of foreign law pertaining to sufficiency of long arm process service will arise during the course of litigation, unless the defendant timely raises such issue as prescribed by law. Thus, defendant will always have actual knowledge when an issue of foreign law, pertaining to the adequacy of service of long arm process, will be litigated and will therefore have a reasonable opportunity to prepare for such litigation. *Askari v. Dolat*, 240 Ga. App. 633, 524 S.E.2d 310 (1999).

Responsibility on party wishing to raise foreign law issue. — Notice of intent is required to raise an issue of foreign law, to establish such law by compliance with statutory means (O.C.G.A. §§ 9-11-43(c), 24-1-4, and 24-7-24), or cause a duty to be imposed on a court to judicially recognize any relevant, existing foreign law. *Samay v. Som*, 213 Ga. App. 812, 446 S.E.2d 230 (1994); *P.G.L. & C.C. Employees Credit Union v. Kimball*, 221 Ga. App. 108, 470 S.E.2d 501 (1996); *Askari v. Dolat*, 240 Ga. App. 633, 524 S.E.2d 310 (1999).

Laws published by authority. — Judicial cognizance of the laws of another state will be taken only when presented in some form that shows the law was “published by authority.” *Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949), later appeal, 207 Ga. 308, 61 S.E.2d 282 (1950).

Under O.C.G.A. § 24-1-4, a trial court has a duty to take judicial notice of foreign law if “published by authority,” without introduction of any proof of that law. *Meeker v. Eufaula Bank & Trust*, 208 Ga. App. 702, 431 S.E.2d 475 (1993).

Proof of authority. — Volume of state laws, purporting on the title page to have been printed by order of the Governor, sufficiently shows publication by authority for purpose of judicial recognition of foreign state laws without proof. *Hamilton v. Metropolitan Life Ins. Co.*, 71 Ga. App. 584, 32 S.E.2d 540 (1944).

Law must be pleaded. — Statute does not dispense with the necessity of pleading a foreign law. On the contrary, this provision merely means that when the public laws of a foreign state are published by that state’s authority, the authenticity of its publications

need not be shown by the introduction of proof of their genuineness, but will be judicially recognized by the courts without proof, and given the same effect as though its public laws were proved by the introduction in evidence of a duly certified copy thereof, properly authenticated under the great seal of that state. *Savannah, Fla. & W. Ry. v. Evans*, 121 Ga. 391, 49 S.E. 308 (1904). But see *Lane v. Harris*, 16 Ga. 217 (1854).

Customs. — To be judicially recognized, custom must be one about which there is and can be no dispute and which is known to all men. *Wood v. Frank Graham Co.*, 91 Ga. App. 621, 86 S.E.2d 691 (1955).

Uncertified copies of pleadings and orders from other Georgia courts were not competent evidence to show that landlord, a Tennessee corporation, was an ousted mortgagor, out of possession and not in control of premises at the time of the incident. *Commerce Properties, Inc. v. Linthicum*, 209 Ga. App. 853, 434 S.E.2d 769 (1993).

Matters of public knowledge. — Court will take judicial cognizance of matters of common and public knowledge. *McGraw v. State*, 85 Ga. App. 857, 70 S.E.2d 141 (1952).

Test of public knowledge is whether the fact is one of common, everyday knowledge that all persons of average intelligence are presumed to know, and whether it is certain and indisputable. *Cole v. Cates*, 110 Ga. App. 820, 140 S.E.2d 36 (1964).

Municipal ordinances. — In a trial before a municipal court, the recorder may take judicial notice of the ordinances of the city, defining offenses against the city, but neither the Supreme Court, nor any other court than the municipal court, can take judicial cognizance of a municipal ordinance. *Slaughter v. City of La Grange*, 60 Ga. App. 555, 4 S.E.2d 410 (1939).

Superior and appellate courts do not take judicial notice of a municipal ordinance. *Police Benevolent Ass’n v. Brown*, 268 Ga. 26, 486 S.E.2d 28 (1997).

Plaintiffs’ argument that a city’s procedures for allocating funds violated the city code could not be considered on appeal because the relevant ordinances were not properly made a part of the record, and courts could not take judicial notice of municipal ordinances. *Bailey v. City of Atlanta*, 296 Ga. App. 679, 675 S.E.2d 564 (2009).

County ordinances. — Court could not review the merits of a developer’s arguments

as to a county ordinance when there was no evidence in the record demonstrating that the ordinance was properly proven below. County ordinances constituted foreign law, and a court could not take judicial notice of those ordinances under O.C.G.A. § 24-1-4. *Prime Home Props., LLC v. Rockdale County Bd. of Health*, 290 Ga. App. 698, 660 S.E.2d 44 (2008), cert. denied, 2008 Ga. LEXIS 685 (Ga. 2008).

Judicial notice must be requested. — Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it. *Reserve Life Ins. Co. v. Peavy*, 98 Ga. App. 268, 105 S.E.2d 465 (1958).

Cited in *Bank of Thomasville v. Lester*, 177 Ga. 307, 170 S.E. 189 (1933); *Williamson-Inman & Co. v. Thompson*, 53 Ga. App. 821, 187 S.E. 194 (1936); *Stephens v. Reid*, 189 Ga. 372, 6 S.E.2d 728 (1939); *Gainesville M.R.R. v. Tyner*, 204 Ga. 535, 50 S.E.2d 108 (1948); *Sharpe v. Savannah River Lumber Corp.*, 211 Ga. 570, 87 S.E.2d 398 (1955); *R.G. Foster & Co. v. Fountain*, 216 Ga. 113, 114 S.E.2d 863 (1960); *Sewell v. Gould*, 103 Ga. App. 456, 119 S.E.2d 598 (1961); *Hamby v. Hamby*, 103 Ga. App. 826, 121 S.E.2d 169 (1961); *Wilson v. Barrow*, 107 Ga. App. 555, 130 S.E.2d 812 (1963); *Atlanta Metallic Casket Co. v. Mosby Truck Serv., Inc.*, 107 Ga. App. 677, 131 S.E.2d 590 (1963); *Brown v. City of Marietta*, 220 Ga. 826, 142 S.E.2d 235 (1965); *Louisville & N.R.R. v. Young*, 112 Ga. App. 608, 145 S.E.2d 700 (1965); *McCluskey v. AMOCO*, 224 Ga. 253, 161 S.E.2d 271 (1968); *Duncan Cleaners, Inc. v. Shuman Co.*, 119 Ga. App. 128, 166 S.E.2d 387 (1969); *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970); *Butts v. Davis*, 126 Ga. App. 311, 190 S.E.2d 595 (1972); *Marger v. Miller*, 129 Ga. App. 44, 198 S.E.2d 709 (1973); *Yancey v. Green*, 129 Ga. App. 705, 201 S.E.2d 162 (1973); *Ryle v. Ryle*, 130 Ga. App. 680, 204 S.E.2d 339 (1974); *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976); *Ellington v. Tolar Constr. Co.*, 142 Ga. App. 218, 235 S.E.2d 729 (1977); *Stephens v. State*, 239 Ga. 446, 238 S.E.2d 29 (1977); *Berry v. Jeff Hunt Mach. Co.*, 148 Ga. App. 35, 250 S.E.2d 813 (1978); *Williams v. State*, 151 Ga. App. 266, 259 S.E.2d 671 (1979); *Brand v. State*, 154 Ga. App. 781, 270 S.E.2d

206 (1980); *Kuller v. Beard Properties, Inc.*, 157 Ga. App. 57, 276 S.E.2d 111 (1981); *Jester v. Hill*, 161 Ga. App. 778, 288 S.E.2d 870 (1982); *Price v. Fulton County Comm'n*, 170 Ga. App. 736, 318 S.E.2d 153 (1984); *Hufstetler v. State*, 171 Ga. App. 106, 319 S.E.2d 869 (1984); *State v. Williams*, 172 Ga. App. 708, 324 S.E.2d 557 (1984); *Cochran v. State*, 256 Ga. 113, 344 S.E.2d 402 (1986); *Green v. State*, 182 Ga. App. 695, 356 S.E.2d 673 (1987); *Hayes v. State*, 249 Ga. App. 857, 549 S.E.2d 813 (2001); *Graham v. State*, 275 Ga. 290, 565 S.E.2d 467 (2002).

Judicial Notice Proper

Statutory provisions need not be set out in full. — Courts are bound to take judicial cognizance of an Act of the General Assembly, and it is not essential that a pleader should set out an entire Act in the pleadings in order to insist upon some paragraph or provision of the Act. *Heard v. Pittard*, 210 Ga. 549, 81 S.E.2d 799 (1954).

Tennessee “slip opinions” were not “published by authority” and were, therefore, not binding on the trial court, with or without introduction of proof. *Swafford v. Globe Am. Cas. Co.*, 187 Ga. App. 730, 371 S.E.2d 180, cert. denied, 187 Ga. App. 909, 371 S.E.2d 180 (1988).

Judicial notice of federal summary judgment order. — In a legal malpractice case based on attorneys’ representation in a 42 U.S.C. § 1983 action brought in federal court, the trial court properly took judicial notice of the federal district court’s summary judgment order. The federal order was published in a case reporter and thus was “published by authority” under O.C.G.A. § 24-1-4, and the very nature of the present action meant that all parties and the trial court necessarily had notice that the federal court’s opinion would be relied upon. *Kramer v. Yokely*, 291 Ga. App. 375, 662 S.E.2d 208 (2008), cert. denied, U.S. , 129 S. Ct. 1671, 173 L. Ed. 2d 1037 (2009).

Judicial notice was held proper in the following cases. — See *Davis v. Bank of Fulton*, 31 Ga. 69 (1860) (bank charter); *Ragland v. Barringer*, 41 Ga. 114 (1870) (Governor’s proclamation); *Stafford v. Hightower*, 68 Ga. 394 (1882) (federal court districts); *Wells v. Gress*, 118 Ga. 566, 45 S.E. 418 (1903) (foreign state statutes); *Jossey v. Brown*, 119 Ga. 758, 47 S.E. 350 (1904)

Judicial Notice Proper (Cont'd)

(judge's tenure of office); *Abrams v. State*, 121 Ga. 170, 48 S.E. 965 (1904) (who is a public officer; abbreviation constituting officer's official designation); *Taylor v. State*, 123 Ga. 133, 51 S.E. 326 (1905) (existence of county as corporate body); *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S.E. 93 (1907) (foreign state statutes); *Towler v. Carithers*, 4 Ga. App. 517, 61 S.E. 1132 (1908) (abbreviation for public officer's title); *O'Connell v. State*, 5 Ga. App. 234, 62 S.E. 1007 (1908) (what is an intoxicating beverage); *Central of Ga. Ry. v. Gwynes*, 153 Ga. 606, 113 S.E. 183 (1922) (congressional Acts and presidential proclamations); *Whitley v. Virginia-Carolina Chem. Co.*, 31 Ga. App. 226, 120 S.E. 436 (1923) (crops not mature in May); *Skinner v. Stewart Plumbing Co.*, 42 Ga. App. 42, 155 S.E. 97 (1930) (recording of mortgages); *Marshall v. Walker*, 47 Ga. App. 195, 170 S.E. 267 (1933) (public officers appointed by Governor); *Watkins v. Augusta Chronicle Publishing Co.*, 49 Ga. App. 43, 174 S.E. 199 (1934) (election dates); *Daniel v. Citizens & S. Nat'l Bank*, 182 Ga. 384, 185 S.E. 696 (1936) (public officers commissioned by Governor; legality of suspending such officers); *Southern Ry. v. Lee*, 59 Ga. App. 316, 200 S.E. 569 (1938) (state statutes); *Decatur County v. Tampa Whsle. Liquor Co.*, 62 Ga. App. 716, 9 S.E.2d 701 (1940) (state statutes); *Thacker v. Morris*, 196 Ga. 167, 26 S.E.2d 329 (1943) (computation of time); *Guess v. Morgan*, 196 Ga. 265, 26 S.E.2d 424 (1943) (county location and territory); *Leonard v. State ex rel. Lanier*, 204 Ga. 465, 50 S.E.2d 212 (1948) (county legalization of alcoholic beverages); *Steed v. State*, 80 Ga. App. 360, 56 S.E.2d 171 (1949) (normal periods of gestation); *Thigpen v. Town of Davisboro*, 81 Ga. App. 610, 59 S.E.2d 522 (1950) (incorporation of town); *Dawson v. General Disct. Corp.*, 82 Ga. App. 29, 60 S.E.2d 653 (1950) (state agency seal); *Hubbard v. State*, 208 Ga. 472, 67 S.E.2d 562 (1951) (county and municipal location); *McGraw v. State*, 85 Ga. App. 857, 70 S.E.2d 141 (1952) (primary physical laws); *Brown v. State*, 87 Ga. App. 244, 73 S.E.2d 502 (1952) (county legalization of alcoholic beverages); *Wright Contracting Co. v. Waller*, 89 Ga. App. 827, 81 S.E.2d 541 (1954) (primary physical laws; holding

power of automobile brakes); *Peggy Ann of Ga., Inc. v. Scoggins*, 90 Ga. App. 18, 81 S.E.2d 859 (1954) (holding power of automobile brakes); *Jordon v. State*, 212 Ga. 337, 92 S.E.2d 528 (1956) (land lots and location as shown in state survey); *McGowans v. Speed Oil Co.*, 94 Ga. App. 35, 93 S.E.2d 597 (1956) (corporate name and existence); *Williams v. Lawler Hosiery Mills, Inc.*, 212 Ga. 617, 94 S.E.2d 699 (1956) (public officers commissioned by Governor); *Daniels v. State*, 95 Ga. App. 862, 99 S.E.2d 292 (1957) (definition of "moonshine liquor"); *Peebles v. State*, 96 Ga. App. 836, 101 S.E.2d 726 (1958) (county legalization of alcoholic beverages); *Williams v. State*, 96 Ga. App. 833, 101 S.E.2d 747 (1958) (highways approved by State Highway Board are public highways); *Browne v. Snipes*, 97 Ga. App. 149, 102 S.E.2d 634 (1958) (dates and time); *City of Carrollton v. Walker*, 215 Ga. 505, 111 S.E.2d 79 (1959) (federal laws); *City of Atlanta v. Gower*, 216 Ga. 368, 116 S.E.2d 738 (1960) (state statutes); *Jones v. Mills*, 216 Ga. 616, 118 S.E.2d 484 (1961) (public officers commissioned by Governor); *Purcell v. Hill*, 107 Ga. App. 85, 129 S.E.2d 341 (1962) (sunrise and sunset); *South Am. Managers, Inc. v. Reeves*, 220 Ga. 493, 140 S.E.2d 201 (1965) (court's records in case at bar); *Clark v. Rich's, Inc.*, 114 Ga. App. 242, 150 S.E.2d 716 (1966) (customary department store hours); *Kelly v. Kelly*, 115 Ga. App. 700, 155 S.E.2d 732 (1967) (foreign state statutes and court cases); *Dye v. State*, 118 Ga. App. 570, 165 S.E.2d 183 (1968) (county legalization of alcoholic beverages); *Irwin v. Busbee*, 241 Ga. 567, 247 S.E.2d 103 (1978) (incumbent holding office on certain date); *Melton v. State*, 149 Ga. App. 506, 254 S.E.2d 732 (1979) (currency denomination in circulation on certain date); *Thompson v. Cheatham*, 244 Ga. 117, 259 S.E.2d 62 (1979) (state statutes; organization and terms of court); *Brown v. Citizens & S. Nat'l Bank*, 245 Ga. 515, 265 S.E.2d 791 (1980) (court records in case at bar); *Price v. State*, 155 Ga. App. 206, 270 S.E.2d 203 (1980) (state agency list of dangerous substances); *In re G.G.*, 177 Ga. App. 639, 341 S.E.2d 13 (1986) (county of location of incorporated city); *Dayoub v. Yates-Astro Termite Pest Control Co.*, 239 Ga. App. 578, 521 S.E.2d 600 (1999) (rules and regulations of the Georgia Department of Agriculture, Pest

Control Commission); *Enchanted Valley RV Resort, Ltd. v. Weese*, 241 Ga. App. 415, 526 S.E.2d 124 (1999) (rules and regulations of the Department of Human Resources).

Judicial Notice Improper

Judicial notice was taken. — Judicial notice was taken of the deaths of the trial judge and the court reporter handling the case below, which, alone, satisfied O.C.G.A. § 50-2-21(b)(5). *Triguero v. ABN AMRO Bank N.V.*, 273 Ga. App. 92, 614 S.E.2d 209 (2005).

In pleading the statute of a foreign state, it is not necessary that it should be set forth in haec verba, but the substance of those portions that are relied on should be stated with sufficient distinctness to enable the court to judge of the meaning and effect of the law. *Rodale v. Grimes*, 211 Ga. 50, 84 S.E.2d 68 (1954).

Pleadings in a related action. — Trial court erred in failing to grant a client's request for a hearing on a former attorney's motion to dismiss claims for legal malpractice and intentional infliction of emotional distress, because the trial court considered matters outside the pleadings. The trial court could not properly make factual findings based on the pleadings in the divorce action under O.C.G.A. § 24-1-4 because such issues are a matter of proof that could not be judicially noticed. *Fitzpatrick v. Harrison*, 300 Ga. App. 672, 686 S.E.2d 322 (2009).

Courts cannot judicially know whether or not a defendant has actually been convicted, unless that fact is verified by the answer of the magistrate. *Rutland v. City of Dublin*, 50 Ga. App. 242, 177 S.E. 819 (1934).

Notice of intent to seek attorney's fees. — Judicial notice could be taken that the exhibit purported to be a notice of intent to seek attorney's fees under O.C.G.A. § 13-1-11; however, judicial notice cannot be taken that the attached notice was, in fact, what it purported to be, because such issues are a matter of proof that cannot be judicially noticed. *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

Judicial notice was held improper in the following cases. — See *Clifton v. State*, 53 Ga. 241 (1874) (previous proceedings before court); *Crouch v. Fisher*, 43 Ga. App. 484, 159 S.E. 746 (1931) (adoption of

agency rules pursuant to statute); *Causey v. Swift & Co.*, 57 Ga. App. 604, 196 S.E. 228 (1938) (location of city streets and distances between streets); *Livingston v. Schmeer's Atlanta, Inc.*, 61 Ga. App. 637, 7 S.E.2d 190 (1940) (municipal ordinance not pleaded); *Matheson v. Brady*, 202 Ga. 500, 43 S.E.2d 703 (1947) (inclusion of a certain high school in the state school system); *Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949), later appeal, 207 Ga. 308, 61 S.E.2d 282 (1950) (foreign state statutes; foreign state cases reported in an unofficial publication); *Harmon v. Harmon*, 209 Ga. 474, 74 S.E.2d 75 (1953) (location of city street); *Atlanta Gas Light Co. v. Newman*, 88 Ga. App. 252, 76 S.E.2d 536 (1953) (rules and regulations of state agency); *Rodale v. Grimes*, 211 Ga. 50, 84 S.E.2d 68 (1954) (foreign state statutes); *Shirley v. Woods*, 98 Ga. App. 111, 105 S.E.2d 399 (1958) (meaning of yellow curb under traffic laws); *Davis v. General Gas Corp.*, 106 Ga. App. 317, 126 S.E.2d 820 (1962) (state agency regulations); *Leger v. Ken Edwards Enters., Inc.*, 223 Ga. 536, 156 S.E.2d 651 (1967) (city or county ordinances); *Staggers v. State*, 119 Ga. App. 85, 166 S.E.2d 411 (1969) (state agency, municipal, or private agency rules or regulations affecting start of school year); *Lackey v. DeKalb County*, 156 Ga. App. 309, 274 S.E.2d 705 (1980) (local practice rules); *In re G.G.*, 177 Ga. App. 639, 341 S.E.2d 13 (1986) (county of location of incorporated city); *Dayoub v. Yates-Astro Termite Pest Control Co.*, 239 Ga. App. 578, 521 S.E.2d 600 (1999) (standards of the National Pest Control Association).

Unfiled depositions. — Trial court is authorized by law to take judicial notice only of certain narrowly prescribed categories of information, none of which includes deposition testimony. Therefore, the trial court committed reversible error when the court based the court's conclusions on depositions never filed with the court during the proceedings. *Buchanan v. City of Clayton*, 180 Ga. App. 740, 350 S.E.2d 320 (1986).

Building Code violation. — In a negligence action, plaintiffs based their contention regarding the construction of a stairwell on a claimed violation of the Georgia State Building Code, in that there was no landing on the stairway as required by the Code for exit stairways. Since the only reference to

Judicial Notice Improper (Cont'd)

the Code in the record, however, was its quotation in the brief submitted by the plaintiffs in opposition to a motion for summary judgment, such a quotation was not evidence, nor was such a rule or regulation a matter of which a court could take judicial notice. *Joel Properties, Inc. v. Reed*, 203 Ga. App. 257, 416 S.E.2d 570 (1992).

City ordinance. — In an appeal from the denial of a subdivision application, the trial court could not take judicial notice of city

ordinances; city ordinances have to be alleged and proven. *City of St. Marys v. Fulford*, 286 Ga. App. 506, 649 S.E.2d 807 (2007).

Venue. — Prerequisites for judicial notice of venue were not satisfied by reference to ambiguous Uniform Traffic Citations. *Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing *Graves v. State*, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 44, 117.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 5.

C.J.S. — 31 C.J.S., Evidence, § 6 et seq.

ALR. — Judicial notice of the coincidence of the days of the week with the days of the month, 8 ALR 63.

Effect of absence of seal from execution, 28 ALR 936.

Judicial notice of banking customs or other matters relating to banks or trust companies, 89 ALR 1336.

Judicial notice of municipal ordinances where action originates in a municipal court, 111 ALR 959.

Distinction between judicial notice and judicial knowledge, 113 ALR 258.

Presumption of regular passage of statute as affected by legislative records showing that bill was defeated, 119 ALR 460.

Admissibility, upon issue of negligence, of evidence of custom or practice of others, 137 ALR 611.

Propriety of instructions on matters of common knowledge, 144 ALR 932.

Uniform Judicial Notice of Foreign Law Act, 23 ALR2d 1437.

Reception of evidence to contradict or

rebut matters judicially noticed, 45 ALR2d 1169.

Blood grouping tests, 46 ALR2d 1000.

Judicial notice of matters relating to public thoroughfares and parks, 48 ALR2d 1102; 86 ALR3d 484.

Judicial notice of diseases or similar conditions adversely affecting human beings, 72 ALR2d 554.

Judicial notice of drivers' reaction time and of stopping distance of motor vehicles travelling at various speeds, 84 ALR2d 979.

Choice of law in application of automobile guest statutes, 95 ALR2d 12.

Judicial notice as to assessed valuations, 42 ALR3d 1439.

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations, 47 ALR3d 822.

Admissibility of evidence of neutron activation analysis, 50 ALR3d 117.

Judicial notice as to location of street address within particular political subdivision, 86 ALR3d 484.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Judicial notice of attorney customs and practices, 61 ALR5th 707.

24-1-5. Procedure to be followed upon arrest of hearing impaired person.

In the event a hearing impaired person is arrested for any alleged violation of a criminal law of this state, the arresting officer shall comply with the provisions of Article 5 of Chapter 9 of this title. (Ga. L. 1974, p. 484, § 2; Ga. L. 1983, p. 852, § 1.)

Cross references. — Use of sign language interpreters in administrative and judicial proceedings, § 24-9-100 et seq.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Cited in *Newman v. State*, 237 Ga. 376, 228 S.E.2d 790 (1976).

CHAPTER 2

RELEVANCY

Sec.		Sec.	
24-2-1.	Relevancy required.		
24-2-2.	Character and conduct of parties generally irrelevant; exception.		tions for certain sex offenses; exception; in camera hearing; court order.
24-2-3.	Complainant's past sexual behavior not admissible in prosecu-	24-2-4.	How much of document or record admissible.

Law reviews. — For annual survey of the law of evidence, see 41 Mercer L. Rev. 175 (1989). For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998).

RESEARCH REFERENCES

ALR. — Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal injury or death action carries liability insurance, 4 ALR2d 761.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in action for personal injury or death, 81 ALR2d 733.

Admissibility on issue of value of real property of evidence of sale price of other real property, 85 ALR2d 110.

Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 ALR2d 1044.

Admissibility, in damage action arising out of explosion or blasting, of evidence of damage to other property in vicinity, 45 ALR2d 1121.

Admissibility of testimony of transferee as to his knowledge, purpose, intention, or good faith on issue whether conveyance was in fraud of transferor's creditors, 52 ALR2d 418.

Admissibility and conclusiveness, as against insured, of statements in proof of loss, 58 ALR2d 429.

Admissibility and effect, in criminal case, of evidence as to juror's statements, during deliberations, as to facts not introduced into evidence, 58 ALR2d 556.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test, 95 ALR2d 819.

Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit, 21 ALR3d 9.

Admissibility, in civil action, of disposal of property as bearing on question of liability, 38 ALR3d 996.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 ALR3d 148.

Admissibility on defendant's behalf, as matter in mitigation of punitive damages, of evidence as to his lack of financial resources, 79 ALR3d 1138.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 ALR3d 569.

Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun, 1 ALR4th 1072.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 ALR4th 472.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Proof of mailing by evidence of business or office custom, 45 ALR4th 476.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 ALR4th 1049.

Thermographic tests: admissibility of test

results in personal injury suits, 56 ALR4th 1105.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 ALR4th 897.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

Admissibility of evidence not related to air travel security, disclosed by airport security procedures, 108 ALR Fed. 658.

24-2-1. Relevancy required.

Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded. (Orig. Code 1863, § 3679; Code 1868, § 3703; Code 1873, § 3756; Code 1882, § 3756; Civil Code 1895, § 5158; Civil Code 1910, § 5744; Code 1933, § 38-201.)

Law reviews. — For article, “The Myth of Conditional Relevancy,” see 14 Ga. L. Rev. 435 (1980). For article, “‘They Say He’s Gay’: The Admissibility of Evidence of Sexual Orientation,” see 37 Ga. L. Rev. 793 (2003).

For note discussing the possible uses of video tape and its admissibility as evidence, see 5 Ga. St. B.J. 393 (1969).

For comment discussing the admissibility of ex parte affidavit in nonjury situations, in light of *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957), see 20 Ga. B.J. 392 (1958). For comment discussing admissibility of relevant motion picture films, in light of *Long v. General Elec. Co.*, 213 Ga. 809, 102 S.E.2d 9 (1958), see 22 Ga. B.J. 92 (1959).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RELEVANCY DEFINED

CRITERIA OF ADMISSIBILITY

CIVIL CASES

CRIMINAL CASES

1. RELEVANT EVIDENCE

2. IRRELEVANT EVIDENCE

General Consideration

It is error to admit irrelevant evidence. *Mercer v. Woodard*, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

But error waived unless objected to at trial. — Defendants are not entitled to appellate review of the issue of relevancy when the defendants fail to raise the issue at trial. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Admission of irrelevant evidence is not a ground for reversal unless it can be shown the evidence was prejudicial. *Hill v. State*, 177 Ga. App. 850, 341 S.E.2d 322 (1986).

Observations of teacher’s conduct in stu-

dent’s class were relevant and material to the issue of the teacher’s alleged mistreatment of the student. *Houston v. Kinder-Care Learning Ctrs., Inc.*, 208 Ga. App. 235, 430 S.E.2d 24 (1993).

Objecting party failed to carry burden of proving that admission of evidence unduly prejudicial to that party’s rights. *DOT v. 2,734 Acres of Land*, 168 Ga. App. 541, 309 S.E.2d 816 (1983).

Where testimony is part material and in part irrelevant, a general objection to the whole is not well taken; if however, the objecting party points out the irrelevant portion of the testimony offered, it is not

General Consideration (Cont'd)

error for the court to reject the evidence in toto, when the party offering the evidence fails to segregate the relevant portions from those which are irrelevant; and when it is shown that designated portions of the evidence are irrelevant, but the court over such objection admits the testimony as a whole, a new trial will be granted provided such irrelevant testimony could have been harmful to the complaining party. *Taintor v. Rogers*, 197 Ga. 872, 30 S.E.2d 892 (1944).

Cited in *Swinney v. Wright*, 35 Ga. App. 45, 132 S.E. 228 (1926); *Davis v. State*, 60 Ga. App. 772, 5 S.E.2d 89 (1939); *Manry v. First Nat'l Bank*, 195 Ga. 163, 23 S.E.2d 662 (1942); *Ammons v. State*, 88 Ga. App. 791, 78 S.E.2d 63 (1953); *Livingston v. Livingston*, 211 Ga. 420, 86 S.E.2d 288 (1955); *Rooker v. State*, 211 Ga. 361, 86 S.E.2d 307 (1955); *Montos v. State*, 212 Ga. 764, 95 S.E.2d 792 (1956); *Story v. State*, 95 Ga. App. 455, 98 S.E.2d 42 (1957); *Kitchin v. Kitchin*, 219 Ga. 417, 133 S.E.2d 880 (1963); *Lanier v. Lee*, 111 Ga. App. 876, 143 S.E.2d 487 (1965); *Dukes v. Pure Oil Co.*, 112 Ga. App. 111, 143 S.E.2d 769 (1965); *Boatright v. Tyre*, 112 Ga. App. 179, 144 S.E.2d 471 (1965); *Security Dev. & Inv. Co. v. Williamson*, 112 Ga. App. 524, 145 S.E.2d 581 (1965); *Prather v. State*, 223 Ga. 721, 157 S.E.2d 734 (1967); *McKeever v. State*, 118 Ga. App. 386, 163 S.E.2d 919 (1968); *Gaskin v. State*, 119 Ga. App. 593, 168 S.E.2d 183 (1969); *Seaboard Coast Line R.R. v. Clark*, 122 Ga. App. 237, 176 S.E.2d 596 (1970); *Williams v. State*, 126 Ga. App. 302, 190 S.E.2d 807 (1972); *Petty v. Folsom*, 229 Ga. 477, 192 S.E.2d 246 (1972); *Morrison v. State*, 129 Ga. App. 558, 200 S.E.2d 286 (1973); *Reed v. City of Atlanta*, 136 Ga. App. 193, 220 S.E.2d 492 (1975); *Roberts v. State*, 137 Ga. App. 208, 223 S.E.2d 208 (1976); *Sturdivant v. Polk*, 140 Ga. App. 152, 230 S.E.2d 115 (1976); *Gilbert v. Arneson*, 142 Ga. App. 205, 235 S.E.2d 647 (1977); *Fuqua v. State*, 142 Ga. App. 632, 236 S.E.2d 685 (1977); *Ameagle Contractors v. Couch Constr. Co.*, 143 Ga. App. 209, 237 S.E.2d 695 (1977); *Kosikowski v. Kosikowski*, 240 Ga. 381, 240 S.E.2d 846 (1977); *Burnett v. State*, 240 Ga. 681, 242 S.E.2d 79 (1978); *Walker v. Liberty Mut. Ins. Co.*, 147 Ga. App. 201, 248 S.E.2d 330 (1978); *Tenant v. State*,

151 Ga. App. 891, 262 S.E.2d 204 (1979); *Georgia S. & Fla. Ry. v. Odom*, 152 Ga. App. 664, 263 S.E.2d 469 (1979); *Turnbow v. State*, 153 Ga. App. 479, 265 S.E.2d 832 (1980); *Leonardi v. State*, 154 Ga. App. 402, 268 S.E.2d 380 (1980); *McConnell v. Barrett*, 154 Ga. App. 767, 270 S.E.2d 13 (1980); *Moore v. State*, 155 Ga. App. 149, 270 S.E.2d 339 (1980); *Hamilton v. State*, 155 Ga. App. 799, 272 S.E.2d 763 (1980); *Morgan v. State*, 161 Ga. App. 484, 287 S.E.2d 739 (1982); *Slaughter v. State*, 162 Ga. App. 136, 290 S.E.2d 338 (1982); *Freeman v. Freeman*, 162 Ga. App. 433, 291 S.E.2d 770 (1982); *Glennville Hatchery, Inc. v. Thompson*, 164 Ga. App. 819, 298 S.E.2d 512 (1982); *Smith v. State*, 251 Ga. 229, 304 S.E.2d 716 (1983); *Gardiner v. State*, 252 Ga. 422, 314 S.E.2d 202 (1984); *Parker v. State*, 170 Ga. App. 333, 317 S.E.2d 209 (1984); *Chance v. State*, 172 Ga. App. 299, 322 S.E.2d 741 (1984); *Jordan v. State*, 172 Ga. App. 496, 323 S.E.2d 657 (1984); *Sagon v. Awtrey*, 173 Ga. App. 377, 326 S.E.2d 566 (1985); *Scott Hous. Sys. v. Hickox*, 174 Ga. App. 23, 329 S.E.2d 154 (1985); *Waller v. Scheer*, 175 Ga. App. 1, 332 S.E.2d 293 (1985); *Teasley v. State*, 177 Ga. App. 554, 340 S.E.2d 32 (1986); *King v. State*, 177 Ga. App. 788, 341 S.E.2d 307 (1986); *Ketcham v. State*, 181 Ga. App. 868, 354 S.E.2d 171 (1987); *Davis v. Glaze*, 182 Ga. App. 18, 354 S.E.2d 845 (1987); *Boyce v. State*, 184 Ga. App. 578, 362 S.E.2d 229 (1987); *Southeastern Ambulance Corp. v. Freeman*, 185 Ga. App. 119, 363 S.E.2d 571 (1987); *Palmer v. State*, 186 Ga. App. 892, 369 S.E.2d 38 (1988); *Brookhaven Assocs. v. DeKalb County*, 187 Ga. App. 749, 371 S.E.2d 231 (1988); *Santone v. State*, 187 Ga. App. 789, 371 S.E.2d 428 (1988); *Union Camp Corp. v. Daley*, 188 Ga. App. 756, 374 S.E.2d 329 (1988); *Gully v. Glover*, 190 Ga. App. 238, 378 S.E.2d 411 (1989); *Armech Serv. Co. v. Rose Elec. Co.*, 192 Ga. App. 829, 386 S.E.2d 709 (1989); *Ballentine v. State*, 194 Ga. App. 560, 390 S.E.2d 887 (1990); *Elrod v. State*, 195 Ga. 571, 394 S.E.2d 548 (1990); *Isaacs v. Williams Bros.*, 195 Ga. App. 812, 395 S.E.2d 11 (1990); *DeKalb County v. Orwig*, 196 Ga. App. 255, 395 S.E.2d 824 (1990); *Moore v. Sinclair*, 196 Ga. App. 667, 396 S.E.2d 557 (1990); *Harris v. State*, 196 Ga. App. 796, 397 S.E.2d 68 (1990); *Parks v. State*, 199 Ga. App. 736, 406 S.E.2d 229 (1991); *Hunt v. State*, 205 Ga. App. 344, 422

S.E.2d 75 (1992); Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc., 207 Ga. App. 693, 428 S.E.2d 687 (1993); Macon Tel. Publishing Co. v. Tatum, 208 Ga. App. 111, 430 S.E.2d 18 (1993); Lowery v. State, 209 Ga. App. 5, 432 S.E.2d 576 (1993); Loper v. Drury, 211 Ga. App. 478, 440 S.E.2d 32 (1994); Hathcock v. State, 214 Ga. App. 188, 447 S.E.2d 104 (1994); Lund v. Commonwealth Mtg. Assurance Co., 216 Ga. App. 322, 454 S.E.2d 194 (1995); Andrews v. State, 222 Ga. App. 129, 473 S.E.2d 247 (1996); Mann v. State, 244 Ga. App. 756, 536 S.E.2d 608 (2000); Haney v. State, 261 Ga. App. 136, 581 S.E.2d 626 (2003); Jackson v. Jackson, 282 Ga. 459, 651 S.E.2d 92 (2007); Newsome v. State, 287 Ga. App. 356, 651 S.E.2d 764 (2007); Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008).

Relevancy Defined

Any evidence is relevant which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. *Sample v. Lipscomb*, 18 Ga. 554 (1855); *Walker v. Roberts*, 20 Ga. 15 (1856); *Alexander v. State*, 7 Ga. App. 88, 66 S.E. 274 (1909); *Carter v. Marble Prods., Inc.*, 179 Ga. 122, 175 S.E. 480 (1934); *Rogers v. State*, 80 Ga. App. 585, 56 S.E.2d 633 (1949); *MacNerland v. Johnson*, 137 Ga. App. 541, 224 S.E.2d 431 (1976); *Citizens & S. Nat'l Bank v. Hodnett*, 139 Ga. App. 839, 229 S.E.2d 792 (1976); *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979); *Bunge v. State*, 149 Ga. App. 712, 256 S.E.2d 23 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Kelly v. Floor Bazaar, Inc.*, 153 Ga. App. 163, 264 S.E.2d 697 (1980); *Williams v. State*, 153 Ga. App. 890, 267 S.E.2d 305 (1980); *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980); *Guest v. State*, 155 Ga. App. 374, 270 S.E.2d 904 (1980); *DOT v. Delta Mach. Prods. Co.*, 157 Ga. App. 423, 278 S.E.2d 73 (1981).

Every fact or circumstance serving to elucidate or throw light upon the issue being tried constitutes proper evidence in the case. *A.A.A. Hwy. Express, Inc. v. Hagler*, 72 Ga. App. 519, 34 S.E.2d 462 (1945); *Miller Serv., Inc. v. Miller*, 76 Ga. App. 143, 45 S.E.2d 466 (1947), later appeal, 77 Ga. App. 413, 48

S.E.2d 761 (1948); *Hodnett v. Hodnett*, 99 Ga. App. 285, 109 S.E.2d 285 (1959); *DOT v. Delta Mach. Prods. Co.*, 157 Ga. App. 423, 278 S.E.2d 73 (1981).

Evidence is relevant if the evidence renders the desired inference more probable than it would be without the evidence. *Baker v. State*, 246 Ga. 317, 271 S.E.2d 360 (1980).

Evidence which does not in any reasonable degree tend to establish the probability of the issues of fact in controversy is irrelevant and inadmissible. *Horne v. State*, 125 Ga. App. 40, 186 S.E.2d 542 (1971).

Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. *Owens v. State*, 248 Ga. 629, 284 S.E.2d 408 (1981).

Any fact is relevant which, when taken alone or in connection with another or others, would warrant the drawing by the jury of a logical inference with reference to the issue on trial. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981).

Irrelevant evidence is inadmissible. — Most acceptable test for relevancy is whether the evidence offered renders the desired inference more probable than it would be without the evidence. *Southern Ry. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987).

Evidence of witness's feelings towards parties. — O.C.G.A. §§ 24-2-1 and 24-9-68 should be considered in *pari materia*; thus, even if testimony sought to be admitted relates to the feelings a witness has toward a party, if that particular feeling would have no relevance to the questions being tried by the jury, then such evidence may be excluded in the sound discretion of the trial court. *Lockett v. State*, 217 Ga. App. 328, 457 S.E.2d 579 (1995).

Criteria of Admissibility

Questions as to the relevancy and admissibility of the testimony are properly for the court, and the question must be determined in each case according to the facts of that particular case and in accordance with the teachings of reason and judicial experience. *Dumas v. State*, 131 Ga. App. 79, 205 S.E.2d 119 (1974); *MacNerland v. Johnson*, 137 Ga. App. 541, 224 S.E.2d 431 (1976); *Downs v.*

Criteria of Admissibility (Cont'd)

State, 145 Ga. App. 588, 244 S.E.2d 113 (1978); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980); Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305 (1980); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206 (1980); Guest v. State, 155 Ga. App. 374, 270 S.E.2d 904 (1980); Baker v. State, 246 Ga. 317, 271 S.E.2d 360 (1980).

Admissibility of evidence is a matter which rests largely within the sound discretion of the trial court, and if an item of evidence has a tendency to help establish a fact in issue, that is sufficient to make the evidence relevant and admissible. *Lewis v. State*, 158 Ga. App. 586, 281 S.E.2d 331 (1981).

Question for the jury. — When facts are such that the jury, if permitted to hear the facts, may or may not make an inference pertinent to the issue, according to the view which the jury may take of the facts, in connection with the other facts in evidence, the facts are such that the jury ought to be permitted to hear the facts. *Williams v. State*, 153 Ga. App. 890, 267 S.E.2d 305 (1980); *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980); *Brand v. State*, 154 Ga. App. 781, 270 S.E.2d 206 (1980); *Paxton v. State*, 160 Ga. App. 19, 285 S.E.2d 741 (1981).

Relevant evidence cannot be kept from the jury by admission of the fact or waiver of the requirement of proof. *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357 (1981).

If the evidence offered by a party is of doubtful relevancy, the evidence should nevertheless be admitted and the weight of the evidence left to the jury. *Continental Trust Co. v. Bank of Harrison*, 36 Ga. App. 149, 136 S.E. 319 (1926); *Brown v. Wilson*, 55 Ga. App. 262, 189 S.E. 860 (1937); *A.A.A. Hwy. Express, Inc. v. Hagler*, 72 Ga. App. 519, 34 S.E.2d 462 (1945); *Smith v. Davis*, 76 Ga. App. 154, 45 S.E.2d 237 (1947); *Miller Serv., Inc. v. Miller*, 76 Ga. App. 143, 45 S.E.2d 466 (1947), later appeal, 77 Ga. App. 413, 48

S.E.2d 761 (1948); *Manners v. State*, 77 Ga. App. 843, 50 S.E.2d 158 (1948); *Burton v. Campbell Coal Co.*, 95 Ga. App. 338, 97 S.E.2d 924 (1957); *Carroll v. Hayes*, 98 Ga. App. 450, 105 S.E.2d 755 (1958); *Smith v. Morning News, Inc.*, 99 Ga. App. 547, 109 S.E.2d 639 (1959); *Citizens & S. Nat'l Bank v. Hodnett*, 139 Ga. App. 839, 229 S.E.2d 792 (1976); *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979); *Calhoun v. Branan*, 149 Ga. App. 160, 253 S.E.2d 838 (1979); *Williams v. State*, 153 Ga. App. 890, 267 S.E.2d 305 (1980); *DOT v. Delta Mach. Prods. Co.*, 157 Ga. App. 423, 278 S.E.2d 73 (1981); *Lewis v. State*, 158 Ga. App. 586, 281 S.E.2d 331 (1981); *Owens v. State*, 248 Ga. 629, 284 S.E.2d 408 (1981).

Question as to admissibility of evidence is not to be determined by the evidence's weight; if the evidence has any probative value, however small, and is otherwise competent, the evidence should be admitted. *Fuller v. State*, 196 Ga. 237, 26 S.E.2d 281 (1943).

Res gestae. — In a murder trial, the trial court did not err in admitting the defendant's own evidence that the defendant had been free-basing cocaine the night before the killing and again on the day of the killing; this evidence, as part and parcel of the crime and as *res gestae*, was admissible even though the killing did not appear to have directly involved drug usage and even though the evidence incidentally put the defendant's character in issue. *Latham v. State*, 195 Ga. App. 355, 393 S.E.2d 498 (1990).

Mere circumstance that certain evidence may fall short of proving a fact is not a sufficient reason for excluding that evidence; unless otherwise objectionable, the evidence should be admitted, even though the evidence may only tend to prove the matter in issue. *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942); *Miller Serv., Inc. v. Miller*, 76 Ga. App. 143, 45 S.E.2d 466 (1947), later appeal, 77 Ga. App. 413, 48 S.E.2d 761 (1948); *Rogers v. State*, 80 Ga. App. 585, 56 S.E.2d 633 (1949); *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980).

When the admissibility of evidence is doubtful, the burden is on the objecting party to show wherein it is inadmissible. *Smith v. Morning News, Inc.*, 99 Ga. App.

547, 109 S.E.2d 639 (1959).

Even when irrelevant evidence is admitted over timely objection, it affords no cause for a new trial, unless the nature of the evidence is such as reasonably to prejudice the rights of the objecting party. *Continental Trust Co. v. Bank of Harrison*, 36 Ga. App. 149, 136 S.E. 319 (1926).

When evidence is admitted for one purpose, it is not error for the court to fail to instruct the jury to limit the jury's consideration to the one purpose for which the evidence is admissible, in the absence of a request to so instruct the jury. *Tankersley v. State*, 155 Ga. App. 917, 273 S.E.2d 862 (1980).

Relevant evidence is not subject to an objection that the evidence might inflame the minds of the jury or prejudice the jury and this is true even when the offered evidence is only cumulative; this rule favors the admission of any relevant evidence, no matter how slight the probative value. *Sprouse v. State*, 242 Ga. 831, 252 S.E.2d 173 (1979).

Evidence indirectly relevant. — Evidence which is only indirectly relevant to the issue on trial, but which tends somewhat to illustrate the issue, and to aid the jury in arriving at the truth of the matter, should be admitted. *Brown v. Wilson*, 55 Ga. App. 262, 189 S.E. 860 (1937); *A.A.A. Hwy. Express, Inc. v. Hagler*, 72 Ga. App. 519, 34 S.E.2d 462 (1945); *Smith v. Davis*, 76 Ga. App. 154, 45 S.E.2d 237 (1947); *Kalish v. King Cabinet Co.*, 140 Ga. App. 345, 232 S.E.2d 86 (1976); *Bituminous Cas. Corp. v. Mowery*, 145 Ga. App. 45, 244 S.E.2d 573 (1978).

Evidence of similar occurrences is admitted when it appears that all the essential physical conditions on two occasions are identical; for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to matters which cannot reasonably be expected to have affected the result. *McCrea v. Georgia Power Co.*, 46 Ga. App. 276, 167 S.E. 540 (1933).

Evidence excludable. — It is not error to refuse to receive evidence not pertinent to the proceeding. *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937); *Gaskill v. Brown*, 103 Ga. App. 33, 118 S.E.2d 113 (1961); *Roberts v. Farmer*, 127 Ga. App. 237, 193 S.E.2d 216 (1972).

County was properly precluded from introducing evidence of a school district's condemnation of a landowner's property to indirectly show that the value of the property the county was condemning was less than that proposed by the landowner's expert. The admission of such evidence would have been improper because: (1) the landowner's compulsory sale of the property to the school district a year after the county initiated the county's condemnation action would not have affected the value of the land at the time of the county's taking a year earlier; and (2) the school district's inability to use the property as rezoned did not change the fact that the property was already in the process of being rezoned in a manner that affected the property's value for purposes of just and adequate compensation to the landowner at the time of the county's taking. *Gwinnett County v. Howington*, 280 Ga. App. 347, 634 S.E.2d 157 (2006).

In a medical malpractice action, even if evidence of the doctor's professional liability policy, which a decedent's executrix sought as impeachment evidence, consisted of a prior inconsistent statement by the doctor, the trial court properly excluded evidence of the policy, as well as its inclusion in the court's instruction to the jury, as it involved a collateral matter and was more prejudicial than probative. *King v. Zakaria*, 280 Ga. App. 570, 634 S.E.2d 444 (2006).

It is not reversible error to admit evidence that is merely irrelevant and immaterial. *Mickle v. Moore*, 188 Ga. 444, 4 S.E.2d 217 (1939); *Henderson v. State*, 153 Ga. App. 801, 266 S.E.2d 522 (1980).

Evidence immaterial. — If evidence is offered to prove a fact not in issue, the evidence is then properly said to be immaterial. *MacNerland v. Johnson*, 137 Ga. App. 541, 224 S.E.2d 431 (1976).

Immateriality need not require reversal. — Mere fact that evidence is "immaterial" does not necessarily mean that its admission into evidence constitutes reversible error. Evidence which is immaterial will not always require reversal, since prejudice also must appear. *Clarke v. State*, 159 Ga. App. 843, 285 S.E.2d 270 (1981).

Grounds for new trial. — While generally the admission of irrelevant testimony or illegal evidence, which is wholly immaterial, will not be cause for the grant of a new trial,

Criteria of Admissibility (Cont'd)

it will be such ground if it appears of sufficient consequence to injuriously affect the complaining party. *Travelers Ins. Co. v. Thornton*, 119 Ga. 455, 46 S.E. 678 (1904); *McGriff v. McGriff*, 154 Ga. 560, 115 S.E. 21 (1922); *McDaniel v. State*, 197 Ga. 757, 30 S.E.2d 612 (1944); *Dismuke v. State*, 142 Ga. App. 381, 236 S.E.2d 12 (1977); *Drew v. Collins*, 153 Ga. App. 794, 266 S.E.2d 570 (1980); *Murdock v. Godwin*, 154 Ga. App. 824, 269 S.E.2d 905 (1980).

In a negligent misrepresentation action filed by a business against the business's accountants, the business was entitled to a new trial as the trial court twice erred by admitting irrelevant and prejudicial evidence that: (1) the business was sold for \$65.5 million in 2005, in order to establish the business's 1993 value, as the sale was too remote, the business had undergone physical changes since the sale, and the market conditions had also changed; and (2) the loans from a shareholder to purchase and operate the business were later reclassified as a shareholder investment of capital, and that the debt owed to the shareholder was forgiven in exchange for the issuance of additional stock in the business as such was irrelevant to the determination of whether the business was entitled to direct damages. *Atlando Holdings, LLC v. BDO Seidman, LLP*, 290 Ga. App. 665, 660 S.E.2d 463 (2008).

Evidence which is relevant may be excluded because the probative worth or value of the evidence is outweighed by the tendency of the evidence confuse the issues, or the jury. *MacNerland v. Johnson*, 137 Ga. App. 541, 224 S.E.2d 431 (1976).

Trial court properly excluded the patients' request to admit photographs of their stillborn fetus in their medical malpractice action as there was no dispute that the fetus suffered from skin peeling, and while the issue was slightly probative in the case, it was substantially outweighed by the danger of unfair prejudice. *Steele v. Atlanta Maternal-Fetal Med., P.C.*, 271 Ga. App. 622, 610 S.E.2d 546 (2005), overruled on other grounds, *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009).

Specific objection showing harmful error must be offered at the time irrelevant and

immaterial evidence is presented, and it is too late to set forth for the first time in a ground of a motion for new trial, even though valid. *McDaniel v. State*, 197 Ga. 757, 30 S.E.2d 612 (1944).

In order to raise on appeal contentions concerning admissibility of evidence, the specific ground of objection must be made at the time the evidence is offered, and a failure to do so will be considered as a waiver; all evidence is admitted as a matter of course unless a valid ground of objection is interposed. *Sutphin v. McDaniel*, 157 Ga. App. 732, 278 S.E.2d 490 (1981).

Objection to evidence on grounds of prejudice and irrelevance does not constitute a proper objection and does not therefore present the Court of Appeals with an issue for review. *Bynum v. Standard (Chevron) Oil Co.*, 157 Ga. App. 819, 278 S.E.2d 669, cert. dismissed, 248 Ga. 429, 285 S.E.2d 186 (1981).

Erroneous admission of evidence not grounds for reversal. — Judgment will not be reversed because of the erroneous admission of evidence since at a subsequent stage of the trial, the evidence became relevant and admissible upon an issue later injected into the case. *Fuller v. State*, 197 Ga. 714, 30 S.E.2d 608 (1944).

Conjectural testimony not competent evidence. — Testimony as to what one thinks would have been the result of an occurrence had the occurrence happened in a particular way is not competent evidence, being merely conjectural and without probative value. *Queen v. Patent Scaffolding Co.*, 46 Ga. App. 364, 167 S.E. 789 (1933).

Foundation for introduction of evidence must be laid. — There is no legal ground to complain of the failure to admit certain evidence or testimony when it is not shown what the evidence or testimony would have been. *Lakeview Estates Homeowners Corp. v. Hilltop Enters. of Ga., Inc.*, 153 Ga. App. 323, 265 S.E.2d 120 (1980).

Civil Cases

Evidence relevant. — See *Benton v. Roberts*, 41 Ga. App. 189, 152 S.E. 141 (1930) (issue not raised in pleadings); *Queen v. Patent Scaffolding Co.*, 46 Ga. App. 364, 167 S.E. 789 (1933); *Miller v. Clermont Banking Co.*, 180 Ga. 556, 179 S.E. 718 (1935); *A.A.A. Hwy. Express, Inc. v. Hagler*, 72 Ga. App. 519,

34 S.E.2d 462 (1945) (custom, practice, and habit); *Wade v. Drinkard*, 76 Ga. App. 159, 45 S.E.2d 231 (1947); *Norton v. Norton*, 213 Ga. 384, 99 S.E.2d 139 (1957) (treatment of one spouse by another in divorce proceedings); *Gallant v. Gallant*, 223 Ga. 397, 156 S.E.2d 61 (1967) (financial status of spouse in divorce proceedings); *Bituminous Cas. Corp. v. Mowery*, 145 Ga. App. 45, 244 S.E.2d 573 (1978) (medical treatment for accidental injury); *Harley-Davidson Motor Co. v. Daniel*, 244 Ga. 284, 260 S.E.2d 20 (1979) (manufacturer's recall letter); *Gwinnett Com. Bank v. Flake*, 151 Ga. App. 578, 260 S.E.2d 523 (1979) (documentary evidence); *Sasser v. Lester*, 153 Ga. App. 220, 264 S.E.2d 728 (1980) (insurance); *Ponder v. Ponder*, 251 Ga. 323, 304 S.E.2d 61 (1983); *Spencer v. Kyle Realty Co.*, 225 Ga. App. 203, 483 S.E.2d 639 (1997) (income tax returns).

Evidence of the abusive and violent relationship between a murder victim and a defendant was relevant under O.C.G.A. § 24-2-1 to show defendant's motive, intent, and bent of mind, and the remoteness of events relating to such relationship affected the weight of the evidence but not the admissibility of the evidence. *Mote v. State*, 277 Ga. 429, 588 S.E.2d 748 (2003), cert. denied, 541 U.S. 1066, 124 S. Ct. 2395, 158 L. Ed. 2d 968 (2004).

Evidence that a college had removed credit hours from a student's transcript was relevant to the student's claim for breach of contract damages as the student could recover the cost of tuition for classes the student was forced to repeat due to the college's actions. *Morehouse College, Inc. v. McGaha*, 277 Ga. App. 529, 627 S.E.2d 39 (2005).

In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to evidence showing a legal property owner's record title. The evidence was not hearsay, as alleged by a claimant who sought title to that property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. *Smith v. Stacey*, 281 Ga. 601, 642 S.E.2d 28 (2007).

In a divorce case after the wife was awarded child support, the trial court did not abuse the court's discretion in overruling the husband's objection to the wife's

questions regarding checks that had been paid to him but that he had not deposited into his bank account. The wife was entitled to inquire whether the deposited and undeposited checks matched the amount of income reported by the husband. *Leggette v. Leggette*, 284 Ga. 432, 668 S.E.2d 251 (2008).

Homeowner countersued a contractor for fraud. Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. *Lumpkin v. Deventer N. Am., Inc.*, 295 Ga. App. 312, 672 S.E.2d 405 (2008).

A trial court did not err in admitting evidence that a nursing home was short staffed, lacked various supplies, that residents, including the deceased patient, were observed soiled with urine and waste, and that residents, including the patient, were not turned as often as required, as relevant under O.C.G.A. § 24-2-1. The witnesses were certified nursing assistants who were directly involved in patient care while the patient was a resident, and the evidence showed both negligence and that the nursing home was aware of these conditions and did nothing to correct them. *Tucker Nursing Ctr., Inc. v. Mosby*, No. A09A1756, 2010 Ga. App. LEXIS 277 (Mar. 24, 2010).

Evidence in legal malpractice cases. — Rules of the State Bar of Georgia, while not determinative of the standard of care applicable in a legal malpractice case, may be considered along with other facts and circumstances to determine whether an attorney treated a client with the requisite degree of skill and care. *Watkins & Watkins, P.C. v. Williams*, 238 Ga. App. 646, 518 S.E.2d 704 (1999).

In a legal malpractice action arising from attorney's alleged filing of a voluntary dismissal based upon the erroneous and negligent assumption that the underlying medical malpractice case could be re-filed, the trial court abused its discretion in granting defendant attorneys' motion in limine effectively prohibiting plaintiffs from introducing expert testimony related to the issue of whether, but for the attorneys' negligence,

Civil Cases (Cont'd)

the plaintiffs would have prevailed in the underlying action. It was an abuse of discretion to conclude that plaintiffs were categorically restricted to the evidence already in the record at the time the attorneys represented them. *Blackwell v. Potts*, 266 Ga. App. 702, 598 S.E.2d 1 (2004).

Evidence in medical malpractice cases. — In a medical malpractice action, given that the admission of expert testimony that the doctor breached the standard of care in performing two 1998 surgeries on the patient would have arguably forced that doctor to defend against time-barred malpractice claims, the trial court was authorized to conclude that the substantially prejudicial impact of that evidence far outweighed any probative value. *Miller v. Cole*, 289 Ga. App. 471, 657 S.E.2d 585 (2008).

Evidence in condemnation case. — Trial court erred in denying a housing authority's motion in limine in a condemnation case seeking to exclude evidence of the commercial value of the land at issue; since the property was restricted by a federal court order for use as a public playground, there was no basis for the admission of evidence regarding any potential commercial value that the property could have had under other, non-existent circumstances. *Housing Auth. of Macon v. Younis*, 279 Ga. App. 599, 631 S.E.2d 802 (2006).

Trial court properly granted the Georgia Department of Transportation's (DOT) motion in limine to preclude a property owner from questioning an expert witness about the fact that the expert had been originally hired by the DOT in the DOT's condemnation proceeding as that information was not relevant to the just and adequate compensation determination. *H.D. McCondichie Props. v. Ga. DOT*, 280 Ga. App. 197, 633 S.E.2d 558 (2006).

Evidence in negligent construction cases. — Builder sued homeowners to recover for services rendered in constructing a house under a theory of quantum meruit; the homeowners alleged negligent construction. The trial court properly admitted evidence of the homeowners' listing price for the home as the court instructed the jury that this evidence could be considered only to show the homeowners' opinion of the

home's value, in regard to the quantum meruit and negligent construction claims, not to show the home's fair market value. *Biederbeck v. Marbut*, 294 Ga. App. 799, 670 S.E.2d 483 (2008).

Similar transaction evidence on failure to pay. — In an action alleging an automobile company's negligent design and placement of the fuel system in a car model, evidence relating to crash tests on vehicles from which the car model involved in the automobile collision evolved, a composite video tape of crash tests and related exhibits and internal documents were relevant to the issue of the automobile manufacturer's continuing negligence in regard to its knowledge of the safety hazard, its failure to warn the public of the danger and its continued marketing of the dangerous product, as well as to the issue of callous disregard upon which basis punitive damages were sought. *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

In an action to recover expert fees, admitting evidence of defendant's failure to pay another expert was not error because of the similarity of the transactions involved and the issues of bad faith and fraud. *Kent v. White*, 238 Ga. App. 792, 520 S.E.2d 481 (1999).

Evidence of FTC order as to medical procedures may be admissible when the probative value of the evidence is not substantially outweighed by the fact that the admission of the evidence will create undue prejudice, confuse the issues, or mislead the jury. *Pound v. Medney*, 176 Ga. App. 756, 337 S.E.2d 772 (1985).

Contract damages. — In an action alleging that defendant company breached a sales representative agreement by removing areas from the representative's territory and by repeatedly reducing the commission rate below that provided in the agreement, evidence of actual commissions earned in the representative's territory was relevant to prove the representative's claim for damages. *Douglas & Lomason Co. v. Hall*, 212 Ga. App. 475, 441 S.E.2d 870 (1994).

Summary judgment affidavit was not relevant to material issue. — Partial summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to a labor supplier in a construction company's counterclaim alleging tortious interference with the compa-

ny's contractual relations, based on an allegedly illegal lien filed by the supplier against a property, when no factual basis was found for the counterclaim and, accordingly, it was dismissed; it was noted that the affidavit of the administrative manager of the company contained irrelevant matter which was properly excluded under O.C.G.A. § 24-2-1, as it related to the supplier's failure to sign a lien waiver and it had no logical bearing to the material fact in issue and, further, it was found to be inadmissible hearsay under O.C.G.A. § 24-3-1(a). *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Prior lease violations. — Trial court did not abuse the court's discretion by admitting evidence of previous lease violations in eviction proceedings instituted primarily for a tenant's child's criminal activity, but secondarily based on serious and repeated violations of the material terms of the tenant's lease with a public housing authority; the prior violations were relevant to the secondary reason for terminating the tenant's lease. *Martinez v. Hous. Auth.*, 264 Ga. App. 282, 590 S.E.2d 245 (2003).

Autopsy photographs. — In a wrongful death action, it was not error for the trial court to refuse to allow publication to the jury of autopsy pictures of the decedent's bowel. *Cornelius v. Macon-Bibb County Hosp. Auth.*, 243 Ga. App. 480, 533 S.E.2d 420 (2000).

Testimony by officer regarding merger. — Testimony by an officer and agent of the successor legal entity regarding the merger was relevant and material to explain the course of conduct and corporate intent of the successor corporation after the merger and how the official came to have custody of the records. *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

Evidence not relevant. — See *Atlantic Coca-Cola Bottling Co. v. Shipp*, 170 Ga. 817, 154 S.E. 243, answer conformed to, 41 Ga. App. 705, 154 S.E. 385 (1930) (race); *Gaskill v. Brown*, 103 Ga. App. 33, 118 S.E.2d 113 (1961); *Taylor v. Marsh*, 107 Ga. App. 575, 130 S.E.2d 770 (1963); *DeFreese v. Beasley*, 114 Ga. App. 832, 152 S.E.2d 772 (1966); *Schaefer v. Mayor of Athens*, 120 Ga. App. 301, 170 S.E.2d 339 (1969); *Butler v. Garrison*, 123 Ga. App. 645, 182 S.E.2d 185 (1971) (materialman's dealing with contractor un-

related to case); *Lane v. Morrison*, 124 Ga. App. 316, 183 S.E.2d 533 (1971) (documentary evidence); *City Council v. Lee*, 153 Ga. App. 94, 264 S.E.2d 683 (1980); *Ideal Pool Corp. v. Champion*, 157 Ga. App. 380, 277 S.E.2d 753 (1981) (insurance); *Auto Rental & Leasing, Inc. v. Blizzard*, 159 Ga. App. 533, 284 S.E.2d 47 (1981) (net worth); *Wyatt v. State*, 179 Ga. App. 327, 346 S.E.2d 387 (1986) (nonsuspension of driver's license in DUI case); *Craig v. State*, 205 Ga. App. 691, 423 S.E.2d 417 (1992) (defendant's previous encounters with arresting officers).

When defendant was allowed to call as witnesses those grandchildren that the victims testified were molested by defendant, and have them deny that they were molested, because the victims never alleged that defendant had molested the other grandchildren, the testimony of those other grandchildren were simply not relevant to either the victims' credibility or any other issue in the case; accordingly, their testimony was properly excluded. *Pope v. State*, 266 Ga. App. 602, 597 S.E.2d 632 (2004).

Trial court properly refused to admit photos of a subdivision, tendered by a utility to rebut testimony by the condemnees' appraiser that property around power lines was usually the last piece of residential property to be developed, and was usually relegated to low income housing because the utility: (1) failed to authenticate the pictures by showing the identity or address of the subdivision; (2) failed to present any evidence as to the value of the property in the pictures; and (3) failed to demonstrate whether the subdivision was built before or after the power lines were installed. *Ga. Power Co. v. Jones*, 277 Ga. App. 332, 626 S.E.2d 554 (2006).

Trial court did not err in preventing an invitee from providing the jury with background information regarding the effects of the injuries on the parties as: (1) the invitee cited no authorities to support this proposition; (2) lost wages were not an element of damages in a loss of consortium claim; (3) witness after witness testified about the effects of the invitee's injury on the invitee and the family; and (4) the issue was moot because a loss of consortium claim was derivative of the invitee's claim, and the jury declined to award the invitee any damages. *Magill v. Edd Kirby Chevrolet, Inc.*, 277 Ga. App. 619, 627 S.E.2d 207 (2006).

Civil Cases (Cont'd)

In a breach of contract suit brought by a contractor who was engaged to advertise a computer program, the trial court properly excluded as irrelevant evidence regarding the purported illegality of the sale of the program as the reason why the defendants stopped selling the program was irrelevant to the issue of whether the contractor was owed commissions from past sales; even if it was relevant, the trial court was authorized to conclude that the substantially prejudicial impact of the evidence far outweighed any probative value. *Smith v. Saulsbury*, 286 Ga. App. 322, 649 S.E.2d 344 (2007).

Because the trial court properly found that testimony tending to show that the defendant's daughter possessed the methamphetamine the defendant was charged with possessing was hearsay, and testimony from the defendant's grandson was irrelevant, the defendant's conviction for possession was affirmed on appeal. *Corbin v. State*, 287 Ga. App. 194, 651 S.E.2d 101 (2007).

With regard to debtor's claim against creditor for intentional infliction of emotional distress, trial court properly excluded as irrelevant the testimony of debtor's co-worker that creditor had been calling co-worker at work because it mistook coworker for debtor; this conduct did not affect debtor, who was not aware of it until after debtor had a confrontation with creditor and its employees, and thus the conduct was irrelevant to issue of whether creditor's and employees' conduct was extreme or outrageous. *Cook v. Covington Credit of Ga., Inc.*, 290 Ga. App. 825, 660 S.E.2d 855 (2008).

Witness failure to appear for lack of timely subpoena service. — In a personal injury action, because a driver waited until the eve of trial to serve the doctor with a subpoena, the trial court: (1) did not abuse the court's discretion in determining that such service was not reasonable under O.C.G.A. § 24-10-25(a); and (2) did not err in refusing to grant the driver a continuance or citing the physician in contempt for failing to appear in court; moreover, since the subpoena was unenforceable, evidence surrounding the doctor's failure to appear became irrelevant under O.C.G.A. § 24-2-1. *Buster v. Poole*, 279 Ga. App. 828, 632 S.E.2d 680 (2006).

Document which is not relevant to any issue in a civil action is properly excluded. *Farris v. Pazol*, 166 Ga. App. 760, 305 S.E.2d 472 (1983); *City of Dalton v. Smith*, 210 Ga. App. 858, 437 S.E.2d 827 (1993).

Evidence of settlements with other tortfeasors. — In an action against a vascular surgeon for medical negligence in ordering an arteriogram to be performed on a patient and in not being available to direct complications resulting therefrom, it was error to admit evidence of plaintiff's settlements with other alleged tortfeasors since the relevant issues were whether the defendant doctor was negligent and, if so, the damages for which the plaintiff should be compensated. *Allison v. Patel*, 211 Ga. App. 376, 438 S.E.2d 920 (1993).

Fact and amount of a settlement with other parties is not relevant to the amount of damages to be awarded and were properly excluded from the jury's consideration. *Bryant v. Haynie*, 216 Ga. App. 430, 454 S.E.2d 533 (1995).

Prejudicial effect of evidence of insurance coverage. — Pedestrian and the pedestrian's spouse sued a driver over an auto accident. The trial court properly refused to allow plaintiffs to ask whether the driver had entered into an agreement with their uninsured motorist (UM) carrier in exchange for testifying as the trial court could have reasonably concluded that the prejudice resulting from revealing the UM policy outweighed any probative value of evidence of the carrier's waiver of subrogation claims against the driver. *McClellan v. Evans*, 294 Ga. App. 595, 669 S.E.2d 554 (2008).

Ethnic identity of unknown driver not irrelevant. — In a wrongful death case where the jury determined that an unknown third driver was 90 percent at fault in causing an accident, it was not error to allow a witness to characterize the third driver as Hispanic. The evidence was relevant to show that the witness was paying sufficient attention and was close enough to the vehicle to identify the driver, and the court would not assume that characterizing someone as Hispanic was prejudicial or that the jurors acted out of prejudice. *State Farm v. Nelson*, 296 Ga. App. 47, 673 S.E.2d 588 (2009).

Testimony on date rape drug admitted. — Trial court did not abuse the court's discretion in denying an auto driver's motion in

limine and in permitting a man, with whom the driver had been prior to an auto accident, to testify that the driver of the car, who collided the driver's car with another vehicle, had been at the man's residence to provide sex for money as the evidence was relevant to the driver's defense that the man had secretly slipped the driver a date rape drug, causing the driver to flee from the man. Further, the trial court did not abuse the court's discretion in granting the motion to the extent that the man could only testify as to the woman being a prostitute as impeachment evidence. *Jackson v. Heard*, 264 Ga. App. 620, 591 S.E.2d 487 (2003).

Criminal Cases

Character. — General character of the defendant and the defendant's conduct in other transactions is irrelevant unless the defendant chooses to put the defendant's character in issue. *Bacon v. State*, 209 Ga. 261, 71 S.E.2d 615 (1952); *Brown v. State*, 118 Ga. App. 617, 165 S.E.2d 185 (1968); *Dawson v. State*, 120 Ga. App. 242, 170 S.E.2d 45 (1969); *Wooten v. State*, 125 Ga. App. 635, 188 S.E.2d 409 (1972); *Nooner v. State*, 131 Ga. App. 563, 206 S.E.2d 660 (1974); *Mikle v. State*, 236 Ga. 748, 225 S.E.2d 275 (1976); *Brown v. State*, 237 Ga. 467, 228 S.E.2d 853 (1976).

For cases concerning evidence of state of mind, plan, intent, or motive. — See *Thomas v. State*, 244 Ga. 608, 261 S.E.2d 389 (1979); *Smith v. State*, 151 Ga. App. 697, 261 S.E.2d 439 (1979); *Walker v. State*, 156 Ga. App. 842, 275 S.E.2d 755 (1980).

As defendant, a sheriff, was not empowered to use the sheriff's department as defendant's personal domain, evidence of corruption in the sheriff's office was relevant and admissible, and the prosecution was well within bounds when the prosecution theorized that defendant killed the victim, a political opponent, to prevent the victim from uncovering evidence of defendant's corruption. *Dorsey v. State*, 279 Ga. 534, 615 S.E.2d 512 (2005).

Halloween mask was properly admitted in a trial for child molestation, aggravated child molestation, and aggravated sexual battery because the mask was relevant to the victim's state of mind as the victim testified that the defendant wore a Halloween mask on the

night of the incident. *Ward v. State*, 274 Ga. App. 511, 618 S.E.2d 154 (2005).

Prior crimes committed by defendant, including the murder of a store owner and an armed robbery, were properly admitted, not as similar transactions, but as evidence to show the motive, course of conduct, and bent of mind; moreover, evidence of the robbery was sufficiently similar to the current armed robbery charges. *Grimes v. State*, 280 Ga. 363, 628 S.E.2d 580 (2006).

In a prosecution for the murder of a woman, the state was properly permitted to adduce evidence of defendant's attempted rape of one woman and the kidnapping and sexual molestation of another; as both incidents showed a pattern of tricking women into vulnerable situations, then restraining the women for the purpose of sexual assault; thus, the incidents were admissible to show defendant's plan, scheme, motive, intent, and frame of mind, including lustful disposition. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

Defendant's demeanor at the time of arrest. — Trial court did not abuse the court's discretion by allowing a detective who arrested defendant after defendant took a woman's purse to testify that, when defendant was arrested, defendant was uncooperative, verbally combative, and smelled of alcohol. *Moore v. State*, 265 Ga. App. 511, 594 S.E.2d 734 (2004).

Circumstances of defendant's arrest. — Gun was properly admitted into evidence at a trial on sex offenses because the gun was relevant to the issue of a witness's alleged bias and was also admissible as evidence of the circumstances of the defendant's arrest; on the night of the defendant's arrest, the witness told the police that the defendant had just raped the witness's niece and was carrying a 9mm gun. *Ward v. State*, 274 Ga. App. 511, 618 S.E.2d 154 (2005).

Trial court did not err in admitting evidence that police were at the defendant's residence to serve defendant with an arrest warrant because that evidence did not improperly place the issue of character into evidence, but was necessary to explain why police were able to detain, handcuff, and search the defendant. Moreover, a limiting instruction was also issued advising the jurors that they were not to consider the warrant for any purpose other than to ex-

Criminal Cases (Cont'd)

plain the officers' presence at the defendant's home. *Thrasher v. State*, 289 Ga. App. 399, 657 S.E.2d 316 (2008).

Defendant's statement of prior altercation with victim. — Introduction of evidence of a prior altercation between defendant and the victim contained in defendant's exculpatory statement was proper as the evidence was relevant to defendant's motive, intent, and bent of mind; the fact that the evidence placed defendant's character at issue did not require exclusion of the evidence. *Reed v. State*, 279 Ga. 81, 610 S.E.2d 35 (2005).

Commission of independent offenses. — Evidence which in any manner shows or tends to show that the accused has committed another crime separate and distinct from that for which the accused is on trial is generally irrelevant and inadmissible, unless there be shown some logical connection between the two from which it can be said that proof of the one tends to establish the other. *Patterson v. State*, 121 Ga. App. 159, 172 S.E.2d 873 (1970); *Wooten v. State*, 125 Ga. App. 635, 188 S.E.2d 409 (1972); *Banks v. State*, 169 Ga. App. 645, 314 S.E.2d 480 (1984).

Evidence which shows or tends to show that the defendant has committed another crime independent of the offenses for which defendant is on trial is irrelevant and inadmissible. *Laney v. State*, 159 Ga. App. 609, 284 S.E.2d 114 (1981).

Evidence showing *res gestae*. — Trial court did not err in denying defendant's motion for mistrial after one of the child victims testified that defendant battered the child's grandmother shortly after the grandmother stumbled upon defendant molesting that child as the evidence supported a finding that this battering was part of the *res gestae* of the child molestation crime. *Prather v. State*, 279 Ga. App. 552, 631 S.E.2d 758 (2006).

Because the evidence presented against both the defendants showed numerous connections between the crimes such that proof of the former tended to prove the latter, and a vehicle theft committed by both the defendants earlier in the day could be considered a continuation of a crime spree and therefore admissible as part of the *res gestae*, the trial court did not err in admitting the

evidence as similar crimes evidence. *Richard v. State*, 287 Ga. App. 399, 651 S.E.2d 514 (2007).

Evidence that the defendant was a drug dealer and gave the police a false name when questioned after the alleged crime was committed was admissible as relevant and part of the *res gestae* as the former was incidental to and followed directly from the defendant's participation in the sale of marijuana to the victim, and the latter was part of what transpired shortly after the commission of the victim's murder; moreover, this was true even if the defendant's character was incidentally placed in issue. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

Evidence that the defendant hid under a bed when police came to execute an arrest warrant was properly admitted as the evidence was part of the *res gestae* of the arrest. *Gilford v. State*, 295 Ga. App. 651, 673 S.E.2d 40 (2009), cert. denied, No. S09C0827, 2009 Ga. LEXIS 258 (Ga. 2009).

When evidence of other crime admissible. — When evidence is relevant for purpose of showing circumstances of arrest, it will not be excluded because the evidence incidentally shows commission of another crime. *Ray v. State*, 157 Ga. App. 519, 277 S.E.2d 804 (1981).

Two competing principles must be considered in deciding whether to admit testimony relating to an offense other than the one charged: on the one hand, there is the rule that evidence of the commission of a crime other than the one charged is generally not admissible; on the other hand, there is the rule that testimony as to the circumstances connected with the arrest is admissible. *Bryan v. State*, 157 Ga. App. 635, 278 S.E.2d 177 (1981).

Evidence of other crimes may be admitted if there is sufficient similarity or connection between the other crimes and the crime charged that proof of the former tends to prove the latter. *Ballweg v. State*, 158 Ga. App. 576, 281 S.E.2d 319 (1981).

While no gun was used in committing the crimes for which the defendant was being tried, evidence of the gun used in a prior aggravated assault and armed robbery of a separate victim was relevant to the charges being tried because the evidence connected the defendant to the identification documents presented to police in close proximity

to the instant victim's body by the person who had custody of the victim's car on the day the victim was killed. *Brooks v. State*, 281 Ga. 514, 640 S.E.2d 280 (2007).

Because evidence of the defendant's prior drug use, and history of crimes committed against family members fueled by that drug use, were properly admitted as relevant to the crime's charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal. *Jones v. State*, 283 Ga. App. 812, 642 S.E.2d 887 (2007).

Prior conviction of person not testifying inadmissible. — Defendant's attempt to introduce a prior conviction of a person who did not testify or appear at the trial was correctly rejected by the trial court as irrelevant to the issues on trial. *Holder v. State*, 194 Ga. App. 790, 391 S.E.2d 808 (1990).

Criminal convictions of a person not called as a witness were not admissible for purposes of impeachment, and since the person's criminal history was not otherwise relevant, its exclusion under O.C.G.A. § 24-2-1 was proper. *Gadson v. State*, 252 Ga. App. 347, 556 S.E.2d 449 (2001).

Testimony that defendant was suspected of the theft of a gun used in committing offenses was probative of whether defendant was in possession of a particular gun, the purpose for which the testimony was offered. *Baker v. State*, 225 Ga. App. 848, 485 S.E.2d 548 (1997).

Prior difficulties evidence. — When the defendant was charged with aggravated assault, evidence of a previous incident when the defendant had punched the victim in the face while the victim was sleeping was admissible as prior difficulties evidence because the evidence was relevant to show the defendant's motive, intent, and bent of mind. *McCullors v. State*, 291 Ga. App. 393, 662 S.E.2d 197 (2008).

Prior conduct by victim. — In a murder prosecution in which the defendant admitted that the defendant killed the victim, but claimed that the defendant was justified in doing so because of his daughter's molestation by the victim, evidence of the alleged molestation was not relevant since the law will not justify a killing for deliberate revenge no matter how grievous the past wrong may have been. *Brown v. State*, 270 Ga. 601, 512 S.E.2d 260 (1999).

Testimony that defendant was suspected of the theft of a gun used in committing offenses was probative of whether defendant was in possession of a particular gun, the purpose for which the testimony was offered. *Baker v. State*, 225 Ga. App. 848, 485 S.E.2d 548 (1997).

In a prosecution for rape, the trial court properly barred defendant's cross-examination of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. *Lee v. State*, 241 Ga. App. 182, 525 S.E.2d 426 (1999).

Trial court's error in not permitting the defendant to show that the wife's minor daughter, whom the defendant was charged with molesting, made an allegation of molestation with respect to another individual that the daughter later denied, was harmless given the overwhelming evidence against defendant, including the facts that there was photographic evidence that the daughter was molested in the defendant's bedroom, that the wife and the daughter's uncle both identified the daughter in the photographs, that a Polaroid camera like that used to take the photographs was found in defendant's home, that the wife had testified that she had not left the daughter alone in the house with any man other than defendant, and that the photographs were found in a house owned by defendant in a file containing personal items. *Holloway v. State*, 278 Ga. App. 709, 629 S.E.2d 447 (2006).

In a felony murder and aggravated assault prosecution, the trial court did not err in excluding evidence of the victim's prior violent acts, given that at the time of the confrontation with the defendant, the victim was no longer the aggressor, any prior confrontation between the two had already ended, and when the defendant confronted the victim with a loaded gun, the defendant became the aggressor, precipitating the deadly confrontation that ensued; hence, the defendant failed to make a prima facie showing of justification. *Milner v. State*, 281 Ga. 612, 641 S.E.2d 517 (2007).

In a prosecution for child molestation, aggravated child molestation, and statutory rape allegedly committed by the defendant against three of the defendant's children, testimony from one of the defendant's other sons concerning similar transactions com-

Criminal Cases (Cont'd)

mitted against him was properly admitted in order to show the defendant's bent of mind and lustful disposition towards the defendant's own children. *McCoy v. State*, 278 Ga. App. 492, 629 S.E.2d 493 (2006).

Evidence of victim's relationship. — In a murder prosecution in which the victim's body was never found, evidence of the victim's relationships at the time of the victim's disappearance was relevant because it rendered the inference that the victim did not run away but was killed more probable than it would be without the evidence. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

In a murder trial, testimony from the victim's girlfriend regarding their relationship was not irrelevant; the girlfriend called police to report that the victim was missing, and she explained that she did so because of their relationship. *Simmons v. State*, 282 Ga. 183, 646 S.E.2d 55 (2007).

Because the victim's understanding of what the state had to prove to obtain a conviction was irrelevant, the defendant was properly curtailed from questioning the victim on this matter. *Mayhew v. State*, 299 Ga. App. 313, 682 S.E.2d 594 (2009), cert. denied, No. S09C2059, 2009 Ga. LEXIS 786 (Ga. 2009).

Items found at the scene of the defendant's arrest are relevant and are admissible at trial. *Thompson v. State*, 168 Ga. App. 734, 310 S.E.2d 725 (1983).

Evidence of defendant's 28 years of physical and psychological abuse by defendant's two former spouses was properly excluded at defendant's trial for murder since the defendant was permitted to adequately testify as to the facts in the defendant's relationship with the victim which allegedly caused the defendant's fear of the victim. *Clenney v. State*, 256 Ga. 116, 344 S.E.2d 216 (1986).

Flight, even an escape from jail after the offense, is a circumstance which may be weighed by the jury in connection with other circumstances to determine the guilt of the accused. The fact that an escape from the courthouse during trial was involved does not remove such conduct from O.C.G.A. § 24-2-1. *Smith v. State*, 184 Ga. App. 739, 362 S.E.2d 384, cert. denied, 184 Ga. App. 910, 362 S.E.2d 384 (1987).

Chain of custody and tampering. — In proving chain of custody, the state is not

required to show that a substance is guarded each minute the substance is in one's custody, and in the absence of a showing to the contrary, the chain is not thereby broken. *Williams v. State*, 153 Ga. App. 421, 265 S.E.2d 341 (1980).

When there is only a bare speculation of tampering, it is proper to admit the evidence and let what doubt remains go to the weight of the evidence. *Williams v. State*, 153 Ga. App. 421, 265 S.E.2d 341 (1980); *Mayfield v. State*, 153 Ga. App. 459, 265 S.E.2d 366 (1980); *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Because defendant produced no affirmative evidence of tampering, substitution, or mishandling of the methamphetamine at the crime lab, there was no error in treating the crime lab as a single link in the chain of custody for admissibility purposes. *Eaton v. State*, 294 Ga. App. 124, 668 S.E.2d 770 (2008).

Exclusion of battered person's syndrome evidence. — If the defendant suffered from a psychological condition that caused the defendant to believe the defendant had to hurt the defendant's child to help the child, the only way the jury could know about such a condition was through expert testimony, and thus, it was error to exclude the defendant's proffered expert testimony of battered person syndrome; however, such error was harmless given the overwhelming weight of evidence which established that the defendant's conduct was knowing, if not intentional. *Pickle v. State*, 280 Ga. App. 821, 635 S.E.2d 197 (2006), cert. denied, 2007 Ga. LEXIS 110, 111 (Ga. 2007).

Refusal to allow defendant to stipulate to intercourse in rape trial. — Trial court did not abuse the court's discretion when the court refused to allow a defendant to stipulate to having sex with a rape victim in an effort to keep evidence of the victim's rape related pregnancy, her subsequent abortion, and DNA evidence that showed that there was a 99.9969% probability that the defendant had fathered the aborted fetus from being presented to the jury; the evidence was relevant to the state's case against the defendant, particularly because the defendant had denied any sexual contact with the victim, and the defendant could not selectively choose which incriminating evidence the defendant would admit to. *Mims v. State*,

291 Ga. App. 777, 662 S.E.2d 867 (2008), cert. denied, 2008 Ga. LEXIS 768 (Ga. 2008).

For cases concerning photographic and diagrammatic evidence. — See *Smith v. State*, 202 Ga. 851, 45 S.E.2d 267 (1947) (general admissibility); *Crittenden v. State*, 98 Ga. App. 329, 105 S.E.2d 778 (1958) (skid marks); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979) (photograph of rape victim's injuries); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979) (videotape recording); *Williams v. State*, 151 Ga. App. 683, 261 S.E.2d 430 (1979) (shoes and footprints); *Wofford v. State*, 152 Ga. App. 739, 263 S.E.2d 707 (1979) (diagrams of scene of crime); *Miller v. State*, 94 Ga. App. 259, 94 S.E.2d 120 (1956) (photographs of liquor); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979) (photograph of teeth marks on victim's breast); *City Council v. Lee*, 153 Ga. App. 94, 264 S.E.2d 683 (1980) (movie film); *Craft v. State*, 154 Ga. App. 682, 269 S.E.2d 490 (1980) (authentication); *Craft v. State*, 154 Ga. App. 682, 269 S.E.2d 490 (1980) (change in scene photographed); *Tatum v. State*, 206 Ga. 171, 56 S.E.2d 518 (1949) (photographs of deceased after death); *Blount v. State*, 214 Ga. 433, 105 S.E.2d 304 (1958) (photographs of deceased, an ax, and wooden bar); *Williams v. State*, 151 Ga. App. 765, 261 S.E.2d 487 (1979) ("gruesome" photographs of deceased victim); *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916 (1980), overruled on other grounds, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993) (photograph of deceased); *Gaylor v. State*, 247 Ga. 759, 279 S.E.2d 207 (1981) (photograph of deceased); *Williams v. State*, 255 Ga. 97, 335 S.E.2d 553 (1985) (photograph of child in hospital bed surrounded by medical equipment); *Gosdin v. State*, 176 Ga. App. 381, 336 S.E.2d 261 (1985) (photograph of defendant printed from negative taken from camera allegedly stolen by defendant); *Pittman v. State*, 178 Ga. App. 693, 344 S.E.2d 511 (1986) (anatomically correct diagram of child molestation victim's body).

Exhibits properly admitted. — There was no prejudice to the defendant in the admission of exhibits which merely showed the lead fragments, displayed against a neutral background, that were removed from the victim's head; admission of evidence of "prior difficulties" between the two groups

was proper to explain how two people became the innocent victims of the two groups' hostilities. *Perry v. State*, 276 Ga. 836, 585 S.E.2d 614, rev'd, 276 Ga. 839, 584 S.E.2d 253 (2003).

Photographs of the victim of a crime are admissible when the photographs are relevant on the issues in the case, although the photographs may be inflammatory and prejudicial to the accused. *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980).

When defendants contended defendants were not responsible for the injuries and poor physical condition of deceased child, 12 photos of the body and one of clothing were relevant to the issues in the case to show the unlikelihood that these injuries would have been self-inflicted or accidental, as were autopsy photographs of a fractured rib. *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

Photographs of body of victim showing the body's location when found and various aspects of the wounds causing death were relevant and material to show that the victim was bludgeoned and shot twice in the head. *Knowles v. State*, 246 Ga. 378, 271 S.E.2d 615 (1980); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Strickland v. State*, 247 Ga. 219, 275 S.E.2d 29, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981) (photographs of victims of crime, wounds, location).

In a prosecution for a violation of O.C.G.A. § 16-5-21(a)(2), as the indictment alleged that the aggravated assault was committed with objects likely to cause serious bodily injury (a broom handle and the defendant's feet and hands), photos depicting the condition of the victim, one of which depicted the defendant's foot print on the victim's face, were relevant to establish the nature and extent of the injury. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

Trial court did not err by admitting three photographs of a victim's bullet wound to the head and two photographs of defendant's handgun as the photographs were not repetitive or cumulative, and the photographs presented the evidence from different distances and vantage points in order to accurately depict the nature and location of the victim's wound and the location of the weapon when the weapon was found; more-

Criminal Cases (Cont'd)

over, the victim's injuries and the weapon used to inflict those injuries were obviously relevant to the charges against defendant. *Smith v. State*, 279 Ga. App. 211, 630 S.E.2d 833 (2006).

Trial court properly admitted one of three photographs of the victim's body which showed an exterior mark of strangulation as such was not overly gruesome and inflammatory; moreover, pre-incision photos of a victim which depicted the location and nature of the victim's wounds were admissible as both relevant and material. *McWilliams v. State*, 280 Ga. 724, 632 S.E.2d 127 (2006).

Defendant's motion for a mistrial based on the admission of a photograph of the victim's head was not an abuse of discretion as: (1) if pre-autopsy photographs were relevant and material to any issue in the case, those photographs were admissible even if those photographs were duplicative and might inflame the jury; (2) photographs showing the extent and nature of the victim's wounds were material and relevant, even if the cause of death was not in dispute; (3) the state had the burden to prove beyond a reasonable doubt that the defendant caused the death of the victim with malice aforethought; and (4) the photograph was relevant to the state's claim that the defendant had done so by shooting a single shot into the victim's head. *Bradley v. State*, 281 Ga. 173, 637 S.E.2d 19 (2006).

Photographs of a victim's body, after the body had been taken to the crime lab, were material, relevant, and admissible as the photographs showed the location, nature, and extent of the victim's multiple gunshot wounds. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Photograph showing the victim's vagina and bloody underwear was relevant to show that the victim had been raped and to refute the defendant's assertion that her injuries resulted from a kick to the groin. *Smith v. State*, 291 Ga. App. 545, 662 S.E.2d 323 (2008).

Skeletal remains. — Trial court did not err in admitting the victim's skeletal remains in a murder trial since the remains were used to illustrate portions of the testimony of an expert forensic anthropologist. *Quedens v. State*, 280 Ga. 355, 629 S.E.2d 197 (2006).

Tape of prior telephone conversation with witness admissible for impeachment. — In a trial for theft by deception, the trial court erred in ruling inadmissible the tape recording of a telephone conversation between a witness and defendant's father after a determination was made, through questions posed to the witness and defendant's father, that it was authentic, accurate and complete and since it was offered for impeachment by showing discrepancies between the witness's representations about certain facts made during the telephone conversation and the witness's trial testimony regarding those same facts pertaining to the issues of whether defendant intended to deceive clients. *Riceman v. State*, 166 Ga. App. 825, 305 S.E.2d 595 (1983).

Trial court properly disallowed forensic pathologist (as defense witness) to testify: (1) why neurologists and neurosurgeons consulted with the pathologist; and (2) that many cases of suspected child abuse in which the pathologist had been consulted had been determined to be accidental; as neither response would have tended to show the guilt or innocence of the defendant of the offense of aggravated battery for which defendant was being tried. *Cohn v. State*, 186 Ga. App. 816, 368 S.E.2d 572 (1988).

Police dogs. — Even when it is shown that a dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. *O'Quinn v. State*, 153 Ga. App. 467, 265 S.E.2d 824 (1980).

Prior verdict of not guilty by reason of insanity irrelevant in subsequent prosecution. — Defendant's mental state at defendant's previous trial for burglary and assault to commit rape at which defendant was found not guilty by reason of insanity was irrelevant to any issue in defendant's subsequent trial for another rape and thus was properly excluded. *Crapse v. State*, 180 Ga. App. 321, 349 S.E.2d 190 (1986).

Prior acquittals irrelevant in perjury trial. — Prior acquittals in two trials for child molestation had no probative value in a trial

for perjury committed at those trials because evidence of the acquittals was neither relevant nor material to any issue in the perjury case. *West v. State*, 228 Ga. App. 713, 492 S.E.2d 576 (1997).

Pretrial identifications. — Victim's pretrial identifications of defendant and codefendant, as being the persons riding together in the automobile in which they ultimately were arrested and in which a .25 caliber pistol was found, were relevant within the meaning of O.C.G.A. § 24-2-1. If evidence is relevant, no matter how slightly, the evidence generally should be admitted and the weight of the evidence left to the jury. *Buckner v. State*, 209 Ga. App. 107, 433 S.E.2d 94 (1993).

Trial court did not err in denying a motion in limine to exclude the testimony of a state witness that allegedly placed the defendant's character in issue because the testimony was relevant to establish the defendant's identity and appearance on that date of the charged crime, and was not rendered inadmissible merely because the testimony incidentally placed the defendant's character in issue. Moreover, the defendant's trial counsel conceded that the witness's testimony regarding the description was admissible. *Buice v. State*, 289 Ga. App. 415, 657 S.E.2d 326 (2008).

Movie about body disposal. — In a joint trial of two defendants, the trial court did not err in showing the jury portions of a movie which depicted a method of disposing of a murdered victim's body as: (1) such was relevant to show a bent of mind, despite the fact that it could have placed the first defendant's character in issue; and (2) the jury could have made the permissible inference that the first defendant was encouraged by the movie to order the manner of disposing of the victim's body; moreover, because the second defendant failed to request a cautionary instruction to adequately protect from this inference, the second defendant could not complain of the inference on appeal. *Oree v. State*, 280 Ga. 588, 630 S.E.2d 390 (2006).

Expert testimony on Chinese culture which defendant claimed would have cast light on the defendant's motivations, state of mind, and actions was properly excluded since such evidence would not have aided the jury in the jury's search for the truth.

Lee v. State, 262 Ga. 593, 423 S.E.2d 249 (1992).

1. Relevant Evidence

Relevance of evidence found. — See *Posey v. State*, 46 Ga. App. 290, 167 S.E. 340 (1933) (exhibit of child); *Miller v. State*, 53 Ga. App. 275, 185 S.E. 372 (1936) (burglary); *Wynes v. State*, 182 Ga. 434, 185 S.E. 711 (1936) (experiments); *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944) (other person as guilty party); *Ledbetter v. State*, 51 Ga. App. 560, 181 S.E. 120 (1935) (possession of liquor); *Rogers v. State*, 80 Ga. App. 585, 56 S.E.2d 633 (1949) (chain of circumstances); *Hatcher v. State*, 94 Ga. App. 270, 94 S.E.2d 110 (1956) (unlawful possession of whiskey); *Yawn v. State*, 94 Ga. App. 400, 94 S.E.2d 769 (1956) (stolen goods); *Duffey v. State*, 151 Ga. App. 673, 261 S.E.2d 421 (1979) (photographic lineup in armed robbery); *Gray v. State*, 151 Ga. App. 684, 261 S.E.2d 402 (1979) (identification procedure); *Riden v. State*, 151 Ga. App. 654, 261 S.E.2d 409 (1979) (documentary evidence); *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980) (statement indicating consciousness of guilt); *Hudgins v. State*, 153 Ga. App. 601, 266 S.E.2d 283 (1980) (escape from confinement); *Clark v. State*, 149 Ga. App. 641, 255 S.E.2d 110 (1979) (deadly weapons); *Whitacre v. State*, 155 Ga. App. 359, 270 S.E.2d 894 (1980) (drug paraphernalia); *Marshall v. State*, 153 Ga. App. 198, 264 S.E.2d 718 (1980) (contents of paper bag); *Herron v. State*, 155 Ga. App. 791, 272 S.E.2d 756 (1980) (child molestation case); *Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983) (identity and background of murder victim); *Wortham v. State*, 158 Ga. App. 19, 279 S.E.2d 287 (1981) (drug paraphernalia); *Kelley v. State*, 160 Ga. App. 343, 287 S.E.2d 68 (1981) (value of stolen items); *Harrell v. State*, 249 Ga. 48, 288 S.E.2d 192 (1982) (psychiatric testimony); *Williams v. State*, 250 Ga. 553, 300 S.E.2d 301 (1983) (murder case); *Ponder v. Ponder*, 251 Ga. 323, 304 S.E.2d 61 (1983) (dispute between parents and family member); *Hubbard v. State*, 167 Ga. App. 32, 305 S.E.2d 849 (1983) (theft by taking case); *Griffin v. State*,

Criminal Cases (Cont'd)**1. Relevant Evidence (Cont'd)**

243 Ga. App. 282, 531 S.E.2d 175 (2000) (fingerprints).

Testimony of medical examiner relevant.

— Trial court did not err in permitting a medical examiner to testify that inasmuch as the victim's body was discovered in a wooded area approximately 20 miles from the victim's house, the victim's death was "most likely" a homicide; defendant did not object to the testimony and the testimony was not improper under the circumstances of the case. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Hypnotic session was relevant evidence.

— Witness was properly permitted to testify even though the recording of the witness's hypnotic session was unavailable and the witness's pre-hypnotic oral statement was not reduced contemporaneously to a writing as the trial court went to great lengths to ensure that the witness's testimony was not tainted or corrupted by hypnotic suggestion and all of the testimony was cumulative of other evidence admitted. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Officer's testimony relevant. — Trial court properly admitted a police officer's testimony that the officer learned from independent sources that the officer was searching for a suspect named "Little B" as several witnesses referred to defendant by the defendant's nickname and it was necessary to establish that "Little B" and defendant were the same person. *Lewis v. State*, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Although the state prematurely bolstered a child victim's testimony, the parties knew that the victim's credibility would be immediately undermined; evidence that defendant told the victim that a relative had been imprisoned for improper "touching" and that defendant masturbated with the victim's underwear were admissible as relevant. *Robinson v. State*, 275 Ga. App. 537, 621 S.E.2d 770 (2005).

Defendant did not receive ineffective assistance of counsel for the failure of counsel to object to a passing reference to defendant's incarceration as the reason for defendant not being arrested sooner and to the

initial arrest as being part of a "roundup"; all of the circumstances connected with a defendant's arrest were admissible, even those that established the commission of another criminal offense, if they were relevant and the testimony was relevant to counter any accusation that defendant's arrest was delayed due to lack of identification. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Testimony of nurse treating child relevant.

— In a defendant's trial for cruelty to a child, a nurse's testimony as to the nurse's decision to report an incident to explain the hospital's course of conduct regarding a child services agency was relevant to the child's care and future well-being; the trial court had wide discretion in determining relevancy and materiality and, where relevancy was doubtful, the evidence was properly admitted and the weight of the evidence left for the jury's determination. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

Written note relevant. — Because a note found in the defendant's truck contained information that could have linked the note's author to the armed robbery charged, such was properly admitted as relevant; any issue as to whether the note was written by the defendant or by someone else was an issue affecting the weight of the evidence, not the admissibility of the evidence, and therefore was for the jury to decide. *Clark v. State*, 283 Ga. App. 884, 642 S.E.2d 900 (2007).

Possession of a handgun was relevant. — Evidence that the defendant was in possession of a handgun "around the time of the shooting" was relevant and material to a charge of possession of a weapon by a convicted felon. *Jones v. State*, 282 Ga. 306, 647 S.E.2d 576 (2007).

In an assault trial, after the defendant claimed that the victim had raped the defendant's sibling, evidence that one of the defendant's parents was indicted for extortion and other offenses in connection with the rape charge and that the parent pled guilty to some charges was properly admitted; the indictment and plea, as well as the fact that the indictment led to the dismissal of the rape charges, were relevant to the issue of the victim's credibility. *Gonzales v. State*, 286 Ga. App. 821, 650 S.E.2d 401 (2007), cert. denied, 2008 Ga. LEXIS 70 (Ga. 2008).

Because the trial court erroneously excluded evidence relevant to the defendant's claim that there was provocation sufficient to excuse the use of the fighting words the defendant uttered and made the basis of a disorderly conduct charge, the defendant's conviction was reversed; moreover, in determining whether or not there was sufficient provocation for the defendant's use of the fighting words uttered, the jury was entitled to consider all the facts and circumstances tending to prove provocation, not just facts and circumstances contemporaneous with the use of the fighting words. *Talmadge v. State*, 287 Ga. App. 332, 651 S.E.2d 469 (2007).

Testimony about drugs was relevant. — In a child molestation case, the victim's testimony that the defendant gave the victim drugs and that this always led up to sexual intercourse was relevant, as the testimony had some bearing on the issues being tried. *Boynton v. State*, 287 Ga. App. 778, 653 S.E.2d 110 (2007).

Evidence that a drug defendant went to a hotel room to have sex was relevant and admissible to support the state's theory that the defendant was at the hotel room to exchange sex for drugs. *Gassett v. State*, 289 Ga. App. 792, 658 S.E.2d 366 (2008).

Testimony about blood test relevant. — Trial court did not abuse the court's discretion in allowing an arresting officer to testify that the defendant had requested and received an independent blood test in accordance with the defendant's rights under implied consent laws as the defendant contested the results of the state's blood test, arguing that the results were skewed and unreliable due to the unknown storage conditions of the defendant's blood sample while in route to a lab. Consequently, the fact that the defendant requested and received an independent test which the defendant failed to produce at trial was relevant to a material issue in the case. *Schlanger v. State*, 290 Ga. App. 407, 659 S.E.2d 823 (2008).

Admission of weapon relevant. — There was no merit to the defendant's claim that it was error to admit a knife into evidence. The fact that a knife was found on the defendant's person at the time of the defendant's arrest was clearly relevant to the issue of whether the defendant, who was convicted

of aggravated assault, had assaulted the victim with a deadly weapon. *Brown v. State*, 293 Ga. App. 224, 666 S.E.2d 600 (2008).

Because the crimes committed by defendant following the shooting of the victim were relevant to show defendant's attempt to obtain money and vehicles to flee following the shooting, the trial court did not err in admitting the evidence in question. *Hardnett v. State*, 285 Ga. 470, 678 S.E.2d 323 (2009).

Discovery of relevant evidence properly allowed. — In a prosecution for DUI, the trial court did not err in denying the defendant's motion to suppress the blood test evidence, as the trial court properly allowed the discovery of notes, memoranda, graphs, or computer printouts pertaining to the blood sample taken, as well as all chain of custody documentation, because they were the only items deemed relevant to the prosecution; suppression of the blood test results was not required as the defendant waived error on appeal as to the absence of one of the two lab testers. *Cottrell v. State*, 287 Ga. App. 89, 651 S.E.2d 444 (2007), cert. denied, 2007 Ga. LEXIS 816 (Ga. 2007).

2. Irrelevant Evidence

Evidence not relevant. — See *Walker v. State*, 86 Ga. App. 875, 72 S.E.2d 774 (1952); *Davis v. State*, 115 Ga. App. 338, 154 S.E.2d 462 (1967); *Brown v. State*, 118 Ga. App. 617, 165 S.E.2d 185 (1968); *Dawson v. State*, 120 Ga. App. 242, 170 S.E.2d 45 (1969); *Mikle v. State*, 236 Ga. 748, 225 S.E.2d 275 (1976) (prior criminal record); *Strickland v. State*, 247 Ga. 219, 275 S.E.2d 29, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981) (mental capability of accused to stand trial at a future date).

Results of drug test irrelevant. — Trial court did not err in disallowing defendant's testimony as to results of a test for use of illegal drugs. Whether defendant tested negative for drug use at any time is not relevant to, and did not tend to prove or disprove, whether defendant trafficked in or possessed cocaine as charged in the indictment. *Montgomery v. State*, 204 Ga. App. 534, 420 S.E.2d 67 (1992).

Name of bookie irrelevant. — Even though inquiry concerning a victim's gambling activities in general may have been relevant, the name of the bookie's bookie

Criminal Cases (Cont'd)**2. Irrelevant Evidence (Cont'd)**

had no direct or indirect relevancy to defendant's guilt or innocence. *Sorrells v. State*, 236 Ga. 571, 476 S.E.2d 571 (1996).

Expert's testimony on Intoxilyzer 5000 irrelevant. — Trial court did not err when it excluded an expert witness's testimony about the Intoxilyzer 5000 and the proper procedures pertaining to refusals of the breath test because the state was simply required to show that the defendant was a less safe driver as a result of alcohol that the defendant had consumed and the expert's testimony about the breath test was irrelevant. *Stone v. State*, 248 Ga. App. 190, 546 S.E.2d 787 (2000).

Trial court did not abuse the court's discretion in excluding expert evidence defendant sought to introduce that allegedly would have attacked the results of defendant's breath test in defendant's driving while under the influence of alcohol case as the expert evidence was too remote and uncertain to be relevant to the issue for which defendant sought to introduce the evidence, that of whether the breath test machine malfunctioned. *Viau v. State*, 260 Ga. App. 96, 579 S.E.2d 52 (2003).

Videotape evidence irrelevant and excluded. — In action alleging obstruction of an officer, the trial court did not err in excluding a videotape of the party from evidence as not relevant because the videotape could not have been used to impeach the deputy's testimony; the videotape did not depict the encounter between the deputy and defendant but only depicted events prior to the deputy's arrival at defendant's home. *Schroeder v. State*, 261 Ga. App. 879, 583 S.E.2d 922 (2003).

Trial court did not err in excluding a videotape of a statement defendant gave to a detective at the time of the defendant's arrest as the statement was not offered to rebut a charge of recent fabrication, improper influence, or improper motive and was pure hearsay. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Threadbare evidence based on bare suspicion of a third party held inadmissible and excluded. — Defendant's proffered evidence that a third party told the proffered witness that the third party had killed people

before and buried the people in the woods and that the third party then asked the witness if the witness remembered a policeman, who did not work for the city anymore, was properly excluded as it was too threadbare to be admissible and did nothing more than toss a bare suspicion in the direction of a third party. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Questions about drug involvement irrelevant. — Trial court properly limited defendant's cross-examination of a drug dealer who defendant claimed was the actual shooter who killed the victim by excluding all questions about the drug dealer's involvement in selling drugs as those questions were irrelevant to the murder trial. *Lewis v. State*, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

While a defendant was entitled to introduce relevant and admissible testimony tending to show that another person committed the crime for which the defendant was tried, the trial court did not abuse the court's discretion in excluding evidence that an individual the defendant went to go visit on the night of the arrest was a known drug dealer and had been arrested on drug charges, as there was no evidence tending to connect that person to the marijuana found in the defendant's vehicle; hence, the evidence failed to raise a reasonable inference of the defendant's innocence, and did not directly connect the other person with the corpus delicti, or show that the other person recently committed a crime of the same or similar nature. *Gerlock v. State*, 283 Ga. App. 229, 641 S.E.2d 240 (2007).

Questions about relationship with nondefendant irrelevant. — Trial court did not abuse the court's discretion in disallowing a defendant's cross-examination of a victim's mother, about her marriage to the defendant's son as to whether the mother was "debating" with her husband "over someone giving the other person venereal disease," on relevancy grounds as the line of questioning involved the mother's relationship with her husband, rather than with the defendant. *Brown v. State*, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

Expert on alco-sensor test properly excluded. — Trial court did not abuse the court's discretion in refusing to admit the

testimony of a defendant's expert because the mistake charged to an arresting officer in administering an alco-sensor test too soon after the officer first stopped the defendant would not have affected the test result to which the arresting officer testified since the defendant admitted that defendant had been drinking, and the trial court admitted only the officer's testimony that the alco-sensor produced a positive result. *Oliver v. State*, 294 Ga. App. 299, 669 S.E.2d 162 (2008).

Admission of challenged evidence deemed harmless error. — In a prosecution against the defendant for child molestation, enticing a child for indecent purposes, and exhibiting pornography to a minor, even if the appeals court assumed that the word "catheter" should have been redacted from what the defendant apparently conceded

was an otherwise relevant list of items found in a search, the trial court's failure to do so was harmless error, because it was highly improbable that such failure contributed to the verdict given the overwhelming evidence of the defendant's guilt. *Goldey v. State*, 289 Ga. App. 198, 656 S.E.2d 549 (2008).

Evidence of abuse of victim's sibling irrelevant. — In a child molestation case involving the defendant's child, the trial court properly excluded as irrelevant evidence that the child's stepparent had sexually molested the child's sibling. There was no evidence that the child had been molested by the stepparent or by anyone else besides the defendant, and the defendant did not show how the child might have been affected or improperly influenced by the sibling's allegations. *French v. State*, 288 Ga. App. 775, 655 S.E.2d 224 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 301, 537.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

Am. Jur. Trials. — Excluding Illegally Obtained Evidence, 5 Am. Jur. Trials 331.

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C.J.S. — 31A C.J.S., Evidence, § 245 et seq. 32 C.J.S., Evidence, § 808 et seq.

ALR. — Evidence of intemperate habits on question of damages from death or personal injuries, 9 ALR 1405.

Admissibility of evidence as to insurance on issue of negligence in operation or care of automobile, 28 ALR 516.

Competency or qualification of witness who had not seen or examined property before fire to testify as to damage by fire, 33 ALR 297.

Evidence of experience with intruders on other occasions as admissible on issue of justification in defending premises, 45 ALR 1418.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 56 ALR 141; 74 ALR 849; 95 ALR 388; 105 ALR 1319; 4 ALR2d 761.

Evidence as to what was seen by use of mirror, 57 ALR 409.

Evidence as to threats made to keep witness away from criminal trial, 62 ALR 136.

Admissibility of expressions of pain or suffering by person injured, 64 ALR 557.

Admissibility on question of justification for dismissal or discharge of officer or employee for incompetency, of evidence as to his experience in other similar office or employment, 65 ALR 1096.

Admissibility on question as to quality, condition, or capacity of articles, machines, or apparatus, of evidence in regard to similar things manufactured or sold by the same person, 66 ALR 81.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 ALR 170; 150 ALR 623.

Relevancy of race, color, nationality, sex, age, etc., of person whose conduct is in question, 71 ALR 1301; 145 ALR 1362.

Admissibility of test or experiment after accident as bearing on condition of automobile at time of accident, 72 ALR 863.

Admissibility in behalf of defendant in action for libel or slander of similar charges made by other persons against plaintiff, 74 ALR 732.

Physical condition of place before or after event as evidence of condition at time of event, 80 ALR 446.

Admissibility of evidence of other accidents on issue of negligence in respect of maintenance of electric wires, rails, etc., 81 ALR 685.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 ALR 825.

Admissibility and weight on issue of mental capacity or undue influence in respect of will or conveyance, of instruments previously executed by the person in question, 82 ALR 963.

Right of expert to give an opinion based on testimony of other witnesses not incorporated in a hypothetical question, 82 ALR 1460.

Admissibility in prosecution for homicide of declarations indicating suicidal disposition on part of deceased, 83 ALR 434.

Admissibility, and effect of admission, in condemnation proceedings of plans and specifications as regards the work to be done on, or the particular use to be made of, the land in question, 89 ALR 879.

Admissibility in action for slander or libel of evidence of aversion or contempt manifested as consequence of libelous or slanderous publication, to show its hurtful tendency, 105 ALR 944.

Admissibility and weight on question of materiality of misrepresentation, of testimony of officers or employees of insurer to effect that application would not have been accepted but for the misrepresentation, or that there was a rule or policy to reject risks of the kind that would have been shown but for the misrepresentation, 115 ALR 100.

Liability as for malpractice as affected by failure to take or advise the taking of an X-ray picture after operation, or to resort to other means of determining advisability of a supplementary operation or special treatment, 115 ALR 298.

Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 ALR 1149.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Admissibility in criminal prosecution of evidence of motive of one other than defendant to commit the crime, 121 ALR 1362.

Evidence which indirectly or incidentally suggests poverty or wealth of party not in itself proper matter of proof, 122 ALR 1408.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 ALR 119; 91 ALR2d 1046.

Discretion of trial court in criminal case as to permitting or denying view of premises where crime was committed, 124 ALR 841.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Right, in civil action for malicious prosecution, to prove or rely on facts not known to defendant when he began prosecution or action which show or tend to show guilt or liability of plaintiff, 125 ALR 897.

Admissibility against defendant in criminal case of evidence, otherwise competent, as to other offense as affected by fact that a charge for such offense is pending against him, 125 ALR 1036.

Admissibility, in action against manufacturer, packer, or bottler for personal injury due to defective or injurious condition of article, of evidence that like products were free from, or were subject to, defective or injurious conditions, 127 ALR 1194.

Admissibility in action for death of evidence as to pecuniary condition of deceased, 128 ALR 1084.

Admissibility, to show bias or interest of witness, of evidence that he or his employer had compensated the party for whom he testified, in circumstances creating right to subrogation, 128 ALR 1110.

Expert and opinion evidence as regards fire, 131 ALR 1113.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached, of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 ALR 1266.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 ALR 1199.

Conduct of jury in nature of demonstration, test, or experiment during authorized view, 150 ALR 958.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 ALR 604.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 159 ALR 1413; 73 ALR2d 769.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 170 ALR 7; 64 ALR2d 1151.

Admissibility of declarations by testator on issue of revocation of will, 172 ALR 354.

Application of statute excluding testimony of one person because of death of another when invoked by or against one who sues or defends in two capacities, only one of which is within the statute, 172 ALR 714.

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death, 1 ALR2d 365.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 4 ALR2d 761.

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt, 9 ALR2d 205.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Admissibility of declaration of persons other than members of family as to pedigree, 15 ALR2d 1412.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 ALR2d 304.

Admissibility of evidence as to tire tracks or marks on or near highway, 23 ALR2d 112.

Physiological or psychological truth and deception tests, 23 ALR2d 1306.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 ALR2d 972.

Mode of establishing that information obtained by illegal wire tapping has or has not led to evidence introduced by prosecution, 28 ALR2d 1055.

Lack of proper automobile registration or operator's license as evidence of operator's negligence, 29 ALR2d 963.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 31 ALR2d 190.

Footprints as evidence, 35 ALR2d 856.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 ALR2d 1055.

Admissibility, in railroad crossing accident case, of evidence of other functional failures of railroad crossing devices and appliances of the same kind at other times, 46 ALR2d 935.

Blood grouping tests, 46 ALR2d 1000.

Prejudicial effect of prosecuting attorney's misconduct in physically exhibiting to jury objects or items not introduced as evidence, 46 ALR2d 1423.

Admissibility in evidence of rules of defendant in action for negligence, 50 ALR2d 16.

Admissibility in evidence of colored photographs, 53 ALR2d 1102.

Admissibility of evidence as to experiments or tests in civil action for death, injury, or property damage against electric power company or the like, 54 ALR2d 922.

Admissibility and permissible use, in malicious prosecution action, of documentary evidence showing that prior criminal proceedings against instant plaintiff were terminated in his favor, 57 ALR2d 1086.

Admissibility in evidence of aerial photographs, 57 ALR2d 1351.

Propriety, in trial of civil action, of use of skeleton or model of human body or part, 58 ALR2d 689.

Prejudicial effect of admission, in personal injury action, of evidence as to financial or domestic circumstances of plaintiff, 59 ALR2d 371.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 ALR2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 64 ALR2d 1151.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 64 ALR2d 1296; 15 ALR5th 119.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 ALR2d 945.

Propriety of permitting plaintiff in personal injury action to exhibit his person to jury, 66 ALR2d 1334.

Admissibility, in civil case involving usury issue, of evidence of other assertedly usurious transactions, 67 ALR2d 232.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 ALR2d 731.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 ALR2d 903.

Admissibility, on issue of defendant's negligence in respect of condition of place where plaintiff was injured, of evidence of prior accidents or injuries at same place, 70 ALR2d 167; 21 ALR4th 472.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 ALR2d 769.

Counsel's right in arguing civil case to read medical or other learned treatises to the jury, 72 ALR2d 931.

Admissibility, in wrongful death action, of photograph of decedent made in his lifetime, 74 ALR2d 928.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354.

Admissibility of experimental evidence as to explosion, 76 ALR2d 402.

Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 ALR2d 218.

Admissibility, in wrongful death action brought for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, or the like, of said children, 79 ALR2d 819.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating

to damages or the value of the property condemned, 80 ALR2d 1270.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, 81 ALR2d 733.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part, 83 ALR2d 1097.

Admissibility in evidence of braces, crutches, or other prosthetic or orthopedic devices used by injured party, 83 ALR2d 1271.

Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 ALR2d 512.

Propriety of reopening criminal case in order to present omitted or overlooked evidence, after submission to jury but before return of verdict, 87 ALR2d 849.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 926.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 ALR2d 968.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Ruling on offer of proof as error, 89 ALR2d 279.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 ALR2d 1046.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 ALR2d 681.

Admissibility, in wrongful death action for pecuniary loss suffered by next of kin, etc., of evidence as to decedent's personal qualities with respect to sobriety or morality, 99 ALR2d 972.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 ALR3d 572.

Workmen's compensation: use of medical books or treatises as independent evidence, 17 ALR3d 993.

Eminent domain: admissibility of photographs or models of property condemned, 23 ALR3d 825.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land in issue of value in eminent domain proceedings, 26 ALR3d 780.

Race or color of child as admissible in evidence on issue of legitimacy or paternity, or as basis of rebuttal or exception to presumption of legitimacy, 32 ALR3d 1303.

Admissibility of evidence of family circumstances of parties in personal injury actions, 37 ALR3d 1082.

Products liability: admissibility of evidence of other accidents to prove hazardous nature of product, 42 ALR3d 780.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability, 47 ALR3d 234.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Admissibility of lie detector test taken upon stipulation that the result will be admissible in evidence, 53 ALR3d 1005.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 ALR3d 659.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 ALR3d 1001; 38 ALR4th 583.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 ALR3d 1156.

Municipal corporation's safety rules or regulations as admissible in evidence in action by private party against municipal corporation or its officers or employees for negligent operation of vehicle, 82 ALR3d 1285.

Products liability: admissibility, against manufacturer, of product recall letter, 84 ALR3d 1220.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 ALR3d 1170.

Propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence, 88 ALR3d 227.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 ALR3d 926.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 ALR3d 783.

Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442.

Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place, 92 ALR3d 545.

Admissibility of photographs of stolen property, 94 ALR3d 357.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 ALR4th 330.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 ALR4th 500.

Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 ALR4th 1298.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 ALR4th 810.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 ALR4th 472.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution of sexual offense, 31 ALR4th 120.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 877.

Admissibility of bare footprint evidence, 45 ALR4th 1178.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 ALR4th 621.

Admissibility of voice stress evaluation test results or of statements made during test, 47 ALR4th 1202.

Products liability: admissibility of evidence of absence of other accidents, 51 ALR4th 1186.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 ALR4th 588.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 ALR4th 131.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 ALR5th 371.

Admissibility of evidence of polygraph test results, or offer or refusal to take test, in action for malicious prosecution, 10 ALR5th 663.

Admissibility of evidence in homicide case that victim was threatened by other than defendant, 11 ALR5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 ALR5th 871.

Admissibility of evidence of repairs, change of conditions, or precautions taken

after accident—modern state cases, 15 ALR5th 119.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 ALR5th 841.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 ALR5th 672.

Admissibility of government factfinding in products liability actions, 29 ALR5th 534.

Admissibility of evidence relating to accused's attempt to commit suicide, 73 ALR5th 615.

Evidence of trailing by dogs in criminal cases, 81 ALR5th 563.

Admissibility of results of presumptive tests indicating presence of blood on object, 82 ALR5th 67.

Admissibility of computer-generated animation, 111 ALR5th 529.

Admissibility and use of evidence of nonuse of bicycle helmets, 2 ALR6th 429.

Admissibility in state criminal case of results of polygraph (lie detector) test Post *Daubert* cases, 10 ALR6th 463.

Admissibility of evidence of prior accidents or injuries at same place, 15 ALR6th 1.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 24 ALR6th 747.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

24-2-2. Character and conduct of parties generally irrelevant; exception.

The general character of the parties and especially their conduct in other transactions are irrelevant matter unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct. (Orig. Code 1863, § 3680; Code 1868, § 3704; Code 1873, § 3757; Code 1882, § 3757; Civil Code 1895, § 5159; Penal Code 1895, § 993; Civil Code 1910, § 5745; Penal Code 1910, § 1019; Code 1933, § 38-202.)

Law reviews. — For article, "Admissibility of Evidence of a Party's Prior Intemperate Habits on the Issue of Intoxication at the Time of An Accident," see 17 Mercer L. Rev. 347 (1966). For article surveying developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer

L. Rev. 95 (1981). For annual survey of law of evidence, see 40 Mercer L. Rev. 225 (1988). For annual survey on law of evidence, see 42 Mercer L. Rev. 223 (1990). For annual survey article on evidence law, see 52 Mercer L. Rev. 263 (2000). For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev.

1273 (2005); and 57 Mercer L. Rev. 1083 (2006). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157

(2007). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

For note discussing *res gestae*, see 3 Ga. B.J. 69 (1940).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CIVIL CASES

CRIMINAL CASES

- 1. CHARACTER
- 2. OTHER CONDUCT OR CRIMES
- 3. VICTIM’S CHARACTER
- 4. JURY INSTRUCTIONS

General Consideration

Character defined. — Character in legal parlance has the same meaning as reputation; that is, what one’s fellows say about one. *Simpkins v. State*, 149 Ga. App. 763, 256 S.E.2d 63 (1979).

Character evidence restricted to general reputation. — Admissibility of character evidence depends upon the general reputation of the person in the community, not what the witness knows personally about the subject. *Smith v. State*, 153 Ga. App. 519, 265 S.E.2d 852 (1980).

Use of character evidence. — Evidence as to character is irrelevant and inadmissible unless the evidence is used to show the character of the witness for veracity, or intended specifically to be used in the impeachment of witnesses for bad character, or equally to rebut an attempt at impeachment by a showing of good character. *Edwards v. Simpson*, 123 Ga. App. 44, 179 S.E.2d 266 (1970).

Evidence regarding the character of a defendant is generally inadmissible unless the defendant puts defendant’s character in issue, and evidence of independent offenses committed by a defendant is generally inadmissible due to the inherently prejudicial nature and minimal probative value of the evidence. *Henderson v. State*, 204 Ga. App. 884, 420 S.E.2d 813 (1992).

General character of parties and especially their conduct in other transactions are irrelevant matters unless the nature of the action involves such character and renders necessary or proper the investigation of such

conduct. *Vaughn v. Metro. Prop. & Cas. Ins. Co.*, 260 Ga. App. 573, 580 S.E.2d 323 (2003).

When character is relevant, it must be the general character and not one specific act. *Stanley v. Hudson*, 78 Ga. App. 834, 52 S.E.2d 567 (1949); *Taylor v. Marsh*, 107 Ga. App. 575, 130 S.E.2d 770 (1963).

Introduction of character by defendant. — Defendant may offer proof of defendant’s good character as a relevant fact tending to make defendant’s guilt doubtful. *Rentfrow v. State*, 123 Ga. 539, 51 S.E. 596 (1905); *Ware v. State*, 18 Ga. App. 107, 89 S.E. 155 (1916).

Introduction of character by prosecution. — State cannot put the general character of the defendant in a criminal case in issue. *Moulder v. State*, 9 Ga. App. 438, 71 S.E. 682 (1911).

When defendant puts the defendant’s character in issue, it is the right of the state to show that the character is bad. *Strickland v. State*, 12 Ga. App. 640, 77 S.E. 1070 (1913).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant’s unsolicited assertion that the drug screen that was the basis of defendant’s prosecution was defendant’s only positive drug screen; accordingly, although character and conduct in other transactions is generally irrelevant unless defendant first puts defendant’s character in issue, pursuant to O.C.G.A. §§ 24-2-2 and 24-9-20(b), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to

General Consideration (Cont'd)

O.C.G.A. § 24-9-82. *Lockaby v. State*, 265 Ga. App. 527, 594 S.E.2d 729 (2004).

Questioning of witness about potential offer by defendant to pay for testimony. — Trial court properly denied a motion for mistrial based on the prosecution's question to a witness as to whether a defendant offered money to the witness to testify on the defendant's behalf because evidence that the defendant attempted to influence the witness's testimony could be offered to show consciousness of guilt, and in any event, any harm was mitigated by the fact that the witness answered in the negative. *Branton v. State*, 292 Ga. App. 104, 663 S.E.2d 414 (2008), cert. denied, 2008 Ga. LEXIS 873 (Ga. 2008).

Admitting evidence of independent offenses. — Evidence of independent offenses may be admitted if the state introduces the evidence for a proper purpose, if there is sufficient evidence to establish that the defendant actually committed the independent offenses, and if there is sufficient similarity between the charged offense and the independent offenses. *Henderson v. State*, 204 Ga. App. 884, 420 S.E.2d 813 (1992).

Transactions of a similar nature or like character to those charged in the petition in which the defendant had engaged previously to the one in question are admissible in evidence. *Deckner-Willingham Lumber Co. v. Turner*, 171 Ga. 240, 155 S.E. 1 (1930).

Similar acts are admissible in evidence, if committed or proposed at or about the same time, and when the same motive reasonably may be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against the defendant in the petition; this is so in transactions of similar nature or like character in which the defendant had engaged previously to the one in question. *Tapley v. Youmans*, 95 Ga. App. 161, 97 S.E.2d 365 (1957).

Similar acts or omissions on other and different occasions are not generally admissible to prove like acts or omissions at a different time and place. *Genins v. Geiger*, 144 Ga. App. 244, 240 S.E.2d 745 (1977), cert. denied, 444 U.S. 991, 100 S. Ct. 521, 62 L. Ed. 2d 420 (1979).

Trial court erred in admitting defendant's statement to an investigating officer that

defendant had not been alone with the eight-year-old molestation victim in the room where the victim alleged the molestation occurred since defendant had learned defendant's lesson when the defendant lost the defendant's spouse after the defendant ran off with a 15-year-old girl from defendant's church and got her pregnant since the statement was an improper reference to defendant's character; however, admission of the statement was not reversible error since it was highly-probable that defendant would have been convicted even absent the statement being admitted given the direct and circumstantial evidence against the defendant. *Lowther v. State*, 263 Ga. App. 282, 587 S.E.2d 335 (2003).

Cross-examination as to specific acts or transactions. — When the good character of a defendant is put in issue, evidence as to general bad character with respect to the particular trait may be shown in rebuttal; but in so doing it is not permissible to prove specific acts, except on cross-examination for the purpose of testing the knowledge of the defendant's witnesses, and except for the purpose of impeaching knowingly false statements made by the defendant personally to the jury or by the defendant's witnesses on cross-examination. *Mimbs v. State*, 189 Ga. 189, 5 S.E.2d 770 (1939); *Johnson v. State*, 84 Ga. App. 745, 67 S.E.2d 246 (1951); *Underwood v. Atlanta & W. Point R.R.*, 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962); *Horton v. State*, 228 Ga. 690, 187 S.E.2d 677 (1972); *Cowan v. State*, 130 Ga. App. 320, 203 S.E.2d 311 (1973); *Compher v. Georgia Waste Sys.*, 155 Ga. App. 819, 273 S.E.2d 200 (1980); *Curry v. State*, 155 Ga. App. 829, 273 S.E.2d 411 (1980).

Transactions with third parties. — It was error for the court to permit the defendant, over objection, to be interrogated on cross-examination about a transaction between the defendant and a third party, which was entirely separate and distinct. *Head v. John Deere Plow Co.*, 71 Ga. App. 276, 30 S.E.2d 662 (1944); *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968); *Dennis v. Dennis*, 227 Ga. 164, 179 S.E.2d 238 (1971).

"Mug shots" and other court appearances. — Admission in evidence of a "mug shot" of the defendant does not inject the defen-

dant's character into evidence nor does the mere presence of the defendant on trial in some other court without more inject the defendant's character into evidence. *Creamer v. State*, 229 Ga. 704, 194 S.E.2d 73 (1972); *Tankersley v. State*, 155 Ga. App. 917, 273 S.E.2d 862 (1980); *Jones v. State*, 156 Ga. App. 56, 274 S.E.2d 99 (1980); *Price v. State*, 159 Ga. App. 662, 284 S.E.2d 676 (1981).

Bolstering of testimony. — It is permissible to strengthen a witness's testimony by evidence of matters showing its consistency and reasonableness, and tending to indicate that the facts probably were as stated by the witness. *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968).

Evidence of a compromise is inherently harmful in spite of anything a judge might say in instructing a jury as to the weight to be given such evidence, and to allow testimony concerning evidence of compromise deprives a defendant of a fair and impartial trial. *Boyd v. State*, 146 Ga. App. 359, 246 S.E.2d 396 (1978), overruled on other grounds, *Sabel v. State*, 250 Ga. 640, 300 S.E.2d 663 (1983).

Similar transaction hearing sufficient despite only summary of testimony. — Similar transaction hearing was sufficient even though, instead of calling a witness to testify, the state merely proffered a summary of a witness's testimony; the state introduced no hearsay evidence during trial, and the defendant had ample opportunity to cross-examine the similar transaction witness at trial. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Standard of review. — Absent an abuse of discretion, a trial court's ruling as to the admissibility of similar transaction evidence will not be disturbed. *Hostetler v. State*, 261 Ga. App. 237, 582 S.E.2d 197 (2003).

Appellate court will not disturb a trial court's determination that similar transaction evidence is admissible absent an abuse of discretion. *Cain v. State*, 268 Ga. App. 39, 601 S.E.2d 415 (2004).

Cited in *Cox v. State*, 165 Ga. 145, 139 S.E. 861 (1927); *Oberlain v. State*, 42 Ga. App. 796, 157 S.E. 357 (1931); *Humphreys v. State*, 175 Ga. 705, 165 S.E. 733 (1932); *Fitzgerald v. State*, 184 Ga. 19, 190 S.E. 602 (1937); *Caldwell v. Caldwell*, 59 Ga. App.

637, 1 S.E.2d 764 (1939); *Davis v. State*, 60 Ga. App. 722, 5 S.E.2d 89 (1939); *Smith v. State*, 189 Ga. 169, 5 S.E.2d 762 (1939); *Gunter v. State*, 63 Ga. App. 65, 10 S.E.2d 264 (1940); *Ricks v. State*, 70 Ga. App. 395, 28 S.E.2d 303 (1943); *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946); *Price v. State*, 202 Ga. 205, 42 S.E.2d 728 (1947); *Hawkins v. Benton Rapid Express, Inc.*, 82 Ga. App. 819, 62 S.E.2d 612 (1950); *Flint Explosive Co. v. Edwards*, 84 Ga. App. 376, 66 S.E.2d 368 (1951); *Harris v. Giles*, 85 Ga. App. 688, 69 S.E.2d 892 (1952); *Henderson v. State*, 209 Ga. 72, 70 S.E.2d 713 (1952); *Rooker v. State*, 211 Ga. 361, 86 S.E.2d 307 (1955); *Pressley v. State*, 91 Ga. App. 693, 86 S.E.2d 655 (1955); *Thomas v. State*, 91 Ga. App. 804, 87 S.E.2d 239 (1955); *Healan v. Powell*, 91 Ga. App. 787, 87 S.E.2d 332 (1955); *Kryder v. State*, 212 Ga. 272, 91 S.E.2d 612 (1956); *Tucker v. State*, 94 Ga. App. 468, 95 S.E.2d 296 (1956); *Montos v. State*, 212 Ga. 764, 95 S.E.2d 792 (1956); *Story v. State*, 95 Ga. App. 455, 98 S.E.2d 42 (1957); *Gordy v. Powell*, 95 Ga. App. 822, 99 S.E.2d 313 (1957); *Johnson v. Johnson*, 96 Ga. App. 84, 99 S.E.2d 352 (1957); *Rodgers v. State*, 213 Ga. 797, 102 S.E.2d 10 (1958); *Williams v. Slusser*, 104 Ga. App. 412, 121 S.E.2d 796 (1961); *Pinkerton Nat'l Detective Agency, Inc. v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963); *Smithey v. State*, 219 Ga. 247, 132 S.E.2d 666 (1963); *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916 (N.D. Ga. 1964); *Lewis v. State*, 113 Ga. App. 714, 149 S.E.2d 596 (1966); *Atlantic Coast Line R.R. v. Daugherty*, 116 Ga. App. 438, 157 S.E.2d 880 (1967); *McKeever v. State*, 118 Ga. App. 386, 163 S.E.2d 919 (1968); *Patterson v. State*, 121 Ga. App. 159, 172 S.E.2d 873 (1970); *Sparks v. State*, 121 Ga. App. 115, 173 S.E.2d 239 (1970); *Smith v. State*, 124 Ga. App. 581, 184 S.E.2d 681 (1971); *G.E.C. Corp. v. Levy*, 126 Ga. App. 604, 191 S.E.2d 461 (1972); *Clark v. State*, 230 Ga. 880, 199 S.E.2d 786 (1973); *Fair v. State*, 129 Ga. App. 565, 200 S.E.2d 296 (1973); *Brunson v. Bridges*, 130 Ga. App. 102, 202 S.E.2d 553 (1973); *Nooner v. State*, 131 Ga. App. 563, 206 S.E.2d 660 (1974); *Hess v. State*, 132 Ga. App. 26, 207 S.E.2d 580 (1974); *Atcheson v. State*, 136 Ga. App. 152, 220 S.E.2d 483 (1975); *Cross v. State*, 136 Ga. App. 400, 221 S.E.2d 615 (1975); *Ates v. State*, 137 Ga. App. 647, 224 S.E.2d 767 (1976); *Brooks v. Steele*, 139 Ga.

General Consideration (Cont'd)

App. 496, 229 S.E.2d 3 (1976); French v. State, 237 Ga. 620, 229 S.E.2d 410 (1976); Decker v. State, 139 Ga. App. 707, 229 S.E.2d 520 (1976); Jackson v. State, 140 Ga. App. 288, 231 S.E.2d 805 (1976); Inn of Dalton, Inc. v. Hill, 141 Ga. App. 317, 233 S.E.2d 275 (1977); Carter v. State, 142 Ga. App. 351, 235 S.E.2d 750 (1977); McClendon v. State, 142 Ga. App. 575, 236 S.E.2d 541 (1977); Clemson v. State, 239 Ga. 357, 236 S.E.2d 663 (1977); Hodge v. State, 239 Ga. 612, 238 S.E.2d 404 (1977); Lahr v. State, 239 Ga. 813, 238 S.E.2d 878 (1977); Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Young v. State, 146 Ga. App. 391, 246 S.E.2d 711 (1978); Roberts v. State, 242 Ga. 634, 250 S.E.2d 482 (1978); Dixon v. State, 243 Ga. 46, 252 S.E.2d 431 (1979); Ruffin v. State, 242 Ga. 95, 252 S.E.2d 472 (1979); Emmett v. State, 243 Ga. 550, 255 S.E.2d 23 (1979); United States Shoe Corp. v. Jones, 149 Ga. App. 595, 255 S.E.2d 73 (1979); Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979); Rogers v. Eckerd Drugs of Ga., Inc., 149 Ga. App. 788, 256 S.E.2d 130 (1979); Barnes v. State, 244 Ga. 302, 260 S.E.2d 40 (1979); R.O.H. Properties, Inc. v. Westside Elec. Co., 151 Ga. App. 857, 261 S.E.2d 767 (1979); Johnson v. State, 151 Ga. App. 887, 262 S.E.2d 201 (1979); Hardin v. State, 152 Ga. App. 278, 262 S.E.2d 565 (1979); Craft v. State, 152 Ga. App. 486, 263 S.E.2d 263 (1979); Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980); Gilliam v. State, 245 Ga. 708, 267 S.E.2d 8 (1980); Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685 (1980); Hamilton v. State, 155 Ga. App. 799, 272 S.E.2d 763 (1980); Shiloh v. State, 156 Ga. App. 173, 274 S.E.2d 146 (1980); Cook v. State, 157 Ga. App. 23, 276 S.E.2d 84 (1981); Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593 (1981); Tommie v. State, 158 Ga. App. 216, 279 S.E.2d 510 (1981); Wallin v. State, 248 Ga. 29, 279 S.E.2d 687 (1981); Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7 (1981); Henderson v. State, 161 Ga. App. 211, 288 S.E.2d 284 (1982); Jones v. State, 161 Ga. App. 610, 288 S.E.2d 788 (1982); Henderson v. State, 162 Ga. App. 320, 292 S.E.2d 77 (1982); Florence v. State, 162 Ga. App. 830, 292 S.E.2d 923 (1982); Hudson v. State, 163 Ga. App. 845, 295 S.E.2d 123

(1982); Miller Distrib. Co. v. Rollins, 163 Ga. App. 635, 295 S.E.2d 187 (1982); Stanley v. State, 250 Ga. 3, 295 S.E.2d 315 (1982); Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197 (1983) (testimony of doctors that injuries to child could have been caused by sexual device); Anderson v. State, 252 Ga. 103, 312 S.E.2d 113 (1984); Weaver v. State, 169 Ga. App. 890, 315 S.E.2d 467 (1984); Wilson v. State, 175 Ga. App. 41, 332 S.E.2d 352 (1985); Butler v. State, 254 Ga. 637, 332 S.E.2d 654 (1985); Roberts v. State, 255 Ga. 170, 336 S.E.2d 246 (1985); Smith v. State, 177 Ga. App. 504, 340 S.E.2d 28 (1986); Whidby v. Columbine Carrier, Inc., 182 Ga. App. 638, 356 S.E.2d 709 (1987); Vuong v. State, 183 Ga. App. 37, 357 S.E.2d 818 (1987); Dubberly v. P.F. Moon & Co., 184 Ga. App. 221, 361 S.E.2d 223 (1987); McBride v. State, 185 Ga. App. 271, 363 S.E.2d 802 (1987); Gibson v. State, 187 Ga. App. 769, 371 S.E.2d 413 (1988); Bramblett v. Bass, 189 Ga. App. 10, 375 S.E.2d 106 (1988); Hayes v. State, 189 Ga. App. 39, 375 S.E.2d 114 (1988); Foster v. State, 259 Ga. 206, 378 S.E.2d 681 (1989); Watkins v. State, 191 Ga. App. 325, 382 S.E.2d 107 (1989); Ingram v. Harper, 194 Ga. App. 209, 390 S.E.2d 416 (1990); Moore v. Sinclair, 196 Ga. App. 667, 396 S.E.2d 557 (1990); Walker v. State, 197 Ga. App. 265, 398 S.E.2d 217 (1990); Worley v. State, 201 Ga. App. 704, 411 S.E.2d 760 (1991); Hall v. State, 201 Ga. App. 626, 411 S.E.2d 777 (1991); Lynd v. State, 262 Ga. 58, 414 S.E.2d 5 (1992); Dawson v. State, 205 Ga. App. 394, 422 S.E.2d 280 (1992); Hanie v. Barnett, 213 Ga. App. 158, 444 S.E.2d 336 (1994); Cosby v. State, 234 Ga. App. 723, 507 S.E.2d 551 (1998); Scruggs v. State, 273 Ga. 752, 545 S.E.2d 888 (2001); Roderick v. State, 257 Ga. App. 73, 570 S.E.2d 382 (2002); Izzo v. State, 265 Ga. App. 143, 592 S.E.2d 915 (2004); Battise v. State, 295 Ga. App. 833, 673 S.E.2d 262 (2009); Hardnett v. State, 285 Ga. 470, 678 S.E.2d 323 (2009); Stallworth v. State, No. A10A0102, 2010 Ga. App. LEXIS 397 (Apr. 15, 2010).

Civil Cases

Question established credibility. — Testimony was not prejudicial to the plaintiff when defense counsel asked the defendants' expert witness whether the expert had participated in a particular religious program and to describe the program. This question

served only to help introduce the witness to the jury and to contribute to establishment of the expert's credibility; it did not present a basis for reversing the jury's verdict. *Brannen v. Prince*, 204 Ga. App. 866, 421 S.E.2d 76 (1992), overruled on other grounds, *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009).

Similar transaction evidence on failure to pay. — In a complaint alleging failure to pay pursuant to a contract for accounting services, it was not an abuse of discretion to allow testimony which stated that the charges of other accountants and attorneys who worked for the defendant on the same project were approximately twice as much as their original estimates and that the defendant had failed to pay when the plaintiffs claimed that their charges were also double the amount originally estimated due to delays caused by the defendant in light of the similarity of the transactions involved and the issue of bad faith. *Candler v. Davis & Upchurch*, 204 Ga. App. 167, 419 S.E.2d 69 (1992).

In an action involving an insurer's attempt to cancel a policy for nonpayment of a premium, evidence of the insured's history of tardy payment of bills was properly excluded. *State Farm Mut. Auto. Ins. Co. v. Drury*, 222 Ga. App. 196, 474 S.E.2d 64 (1996).

Evidence of defendant's character is admissible in fraud cases. *German Am. Mut. Life Ass'n v. Farley*, 102 Ga. 720, 29 S.E. 615 (1897); *Mays v. Mays*, 153 Ga. 835, 113 S.E. 154 (1922), aff'd on other grounds, 33 Ga. App. 335, 126 S.E. 299 (1924); *Wimberly v. Toney*, 175 Ga. 416, 165 S.E. 257 (1932); *Lawler v. Life Ins. Co. of Ga.*, 90 Ga. App. 481, 83 S.E.2d 281, rev'd on other grounds, 211 Ga. 246, 85 S.E.2d 1 (1954); *Kilgore v. United States*, 467 F.2d 22 (5th Cir. 1972).

While evidence of the insured's general good character is relevant and admissible in a suit on the insured's policy of insurance, since the insurer defends on the ground that the insured perpetrated a fraud on the insurer in procuring the insured's policy; yet, in a case where such fraud is shown by witnesses who swear positively to facts sustaining the defense of fraud, the jury is not authorized to find from evidence of the insured's good character alone that the plaintiff has shown plaintiff's right to re-

cover by a preponderance of evidence. *Life Ins. Co. v. Lawler*, 211 Ga. 246, 85 S.E.2d 1 (1954).

Other transactions showing fraud. — Evidence that parties charged with having been engaged in a fraudulent scheme to defraud laborers and materialmen in a building transaction had proposed, or had been engaged in, similar fraudulent schemes, is admissible to show fraudulent intent in the transaction in controversy, if it is shown that the other transactions were fraudulent and that the transactions were so connected in point of time and otherwise with the one in issue as to make it apparent that all were proposed or carried out in pursuance of a common fraudulent purpose. *Deckner-Willingham Lumber Co. v. Turner*, 171 Ga. 240, 155 S.E. 1 (1930).

Other transactions showing fraud are admissible to show intent. *Tapley v. Youmans*, 95 Ga. App. 161, 97 S.E.2d 365 (1957).

In an action for fraud involving a construction contract, evidence of unrelated contract disputes that defendant had purportedly evincing fraudulent intent was admissible. *John W. Rooker & Assocs., Inc. v. Wilen Mfg. Co.*, 211 Ga. App. 519, 439 S.E.2d 740 (1993).

Character irrelevant in negligence cases. — In actions arising out of automobile collisions, the issue is the negligence or nonnegligence of the operator at the time and place of the event, and each such transaction is to be ascertained by its own circumstances and not by the reputation or character of the parties. *Grannemann v. Salley*, 95 Ga. App. 778, 99 S.E.2d 338 (1957).

Reputation of a defendant or defendant's employee for exercising care in the defendant's actions is not admissible to show that due care was exercised on the occasion in question. *Georgia Ports Auth. v. Mitsubishi Int'l Corp.*, 156 Ga. App. 304, 274 S.E.2d 699 (1980).

In an action arising out of an auto accident, evidence of deceased's prior drug and alcohol use and prior conduct was irrelevant to the question of liability and the issue of damages. *Taylor v. RaceTrac Petroleum, Inc.*, 238 Ga. App. 761, 519 S.E.2d 282 (1999).

Habit and customs. — Witness may testify as to the witness's fixed and uniform habit but not as to the habit and customs of another, when the actor is available to testify

Civil Cases (Cont'd)

personally. *Feinberg v. Durga*, 189 Ga. App. 733, 377 S.E.2d 33 (1988).

Evidence of quality of work from other employees. — In a suit to recover commissions advanced to an agent prior to termination of the agent's employment, testimony from the agent's other employers that the service the agent had rendered the agent's customers was not valuable, was properly excluded; the agent's conduct in transactions involving other employers was not relevant, and would unduly prejudice the jury. *Duggan Ins. Agency, Inc. v. Altschul*, 195 Ga. App. 458, 394 S.E.2d 119 (1990).

Evidence physician failed board exam irrelevant. — In a medical malpractice case, the court's refusal to allow evidence that a physician did not pass the physician's board examination was not an abuse of discretion. *Williams v. Memorial Medical Ctr., Inc.*, 218 Ga. App. 107, 460 S.E.2d 558 (1995).

Evidence on lack of CPA license. — Trial court did not err in precluding the corporation's purported impeachment evidence about why the investor had not obtained the investor's CPA license as the evidence was irrelevant to the issues being tried. *Kothari v. Patel*, 262 Ga. App. 168, 585 S.E.2d 97 (2003).

Evidence in legal malpractice cases. — Rules of the State Bar of Georgia, while not determinative of the standard of care applicable in a legal malpractice case, may be considered along with other facts and circumstances to determine whether an attorney treated a client with the requisite degree of skill and care. *Watkins & Watkins, P.C. v. Williams*, 238 Ga. App. 646, 518 S.E.2d 704 (1999).

Outdated financial affidavit was relevant to claim that a spouse hid or dissipated assets. — In a divorce proceeding, it was not an abuse of discretion to reject the relevancy objection of a spouse to the admission of a financial affidavit that the spouse prepared several months before the trial on the ground that the affidavit was prejudicial because the affidavit made it appear that the spouse had attempted to hide assets; the relevancy objection was properly rejected because it was the position of the other spouse that the spouse had hidden or dissipated assets during the pendency of the

divorce proceedings. *Moxley v. Moxley*, 281 Ga. 326, 638 S.E.2d 284 (2006).

Evidence of similar acts in negligence cases. — Allegation that the defendant in a personal injury suit was aware that other persons had slipped and fallen under substantially the same circumstances was not subject to special demurrer as immaterial and irrelevant matter. *Belk-Matthews Co. of Macon v. Thompson*, 94 Ga. App. 331, 94 S.E.2d 516 (1956).

It is a general rule that in a suit for negligence, evidence of similar acts or omissions on other and different occasions is not admissible. *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970) (but see *CSX Transp. v. Trism Specialized Carriers*, 9 F. Supp. 2d 1374 (N.D. Ga. 1998)).

As a general rule in all negligence actions, evidence of similar acts or omissions is not admissible; however, if proof of a similar accident or similar method of acting tends to prove some fact of the case on trial, the testimony falls within an exception — such as to show knowledge of a defect or causation, or to rebut a contention that it was impossible for the accident to happen in the manner claimed, or to show the prior existence of a dangerous condition or hazardous situation. *Gunthorpe v. Daniels*, 150 Ga. App. 113, 257 S.E.2d 199 (1979).

Evidence of absence of similar acts in negligence cases. — If evidence of prior similar acts of negligence is not admissible, it follows that evidence of the absence of any such prior acts is equally inadmissible. *Williams v. Naidu*, 168 Ga. App. 539, 309 S.E.2d 686 (1983).

Evidence of injuries sustained by other parties on prior occasions may be admitted for the purpose of showing that the defendant had been given notice of a dangerous condition and was thus negligent in allowing the condition to continue. *Norfolk S. Ry. v. Thompson*, 208 Ga. App. 240, 430 S.E.2d 371 (1993).

Evidence of prior impairment from injuries admissible. — Trial court properly denied a nurse's motion in limine to exclude evidence of injuries that the nurse sustained in a prior car accident pursuant to O.C.G.A. § 24-2-2 in an action against a medical practice, arising from alleged injuries that the nurse sustained when an office door opened and hit the nurse in the face and head, as the

injuries in the doorway accident were related to the prior injuries because the nurse claimed a permanent impairment to the nurse's ability to work in both situations; the nurse's claim that the permanent impairment claims from the injuries were not substantially similar went to the weight of the evidence and not to the admissibility. *Kilday v. Kennestone Physicians Ctr., L.P.*, 296 Ga. App. 818, 676 S.E.2d 271 (2009).

Evidence of subsequent careless occurrence excluded. — Testimony of a police officer, regarding the subsequent occurrence of a dog breaking loose and running into a bite-victim's yard, should have been excluded since the only logical purpose of such testimony was to raise the inference that if the dog owners were careless in their management of the dog on one occasion, the owners were probably careless on the occasion in question. *Torrance v. Brennan*, 209 Ga. App. 65, 432 S.E.2d 658 (1993).

In product liability actions, evidence of other incidents involving the product is admissible and relevant to the issues of notice of a defect and punitive damages, provided there is a showing of substantial similarity; without a showing of substantial similarity, the evidence is irrelevant as a matter of law. *Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 461 S.E.2d 877 (1995), *aff'd*, 276 Ga. 226, 476 S.E.2d 565 (1996).

Evidence plaintiff filed prior lawsuit not irrelevant. — Testimony elicited from plaintiff in a negligence action during cross-examination which showed that plaintiff had been involved in a single lawsuit 22 years prior to trial was not irrelevant or prejudicial because it was not indicative of litigiousness. *Wages v. Sibran, Inc.*, 171 Ga. App. 14, 318 S.E.2d 679 (1984).

Evidence of continuing process. — Preparation of 125 turkeys was a continuous process which took some time to complete. The jury could properly infer from the evidence showing and tending to show a lack of negligence in the handling of all of the turkeys during the continuance of the undertaking that the same lack of negligence attended the handling of the one turkey by which plaintiffs were injured. *Carsten v. Wilkes Supermarket of Gwinnett County, Inc.*, 181 Ga. App. 834, 353 S.E.2d 922 (1987).

In a wrongful death action against a truck

manufacturer based on product liability and negligence, evidence that no truck of the type and design involved had ever been recalled or had been the subject of a regulatory proceeding was relevant and admissible to show that defendant's design and manufacture was not negligent. *Browning v. Paccar, Inc.*, 214 Ga. App. 496, 448 S.E.2d 260 (1994).

Insurer's mishandling of related claim. — Trial court, in an employee's action against an employer for failure to pay no-fault insurance benefits, properly excluded evidence of the insurer's mishandling of a related workers' compensation claim on the issue of punitive damages. *Williams v. Aetna Cas. & Sur. Co.*, 182 Ga. App. 684, 356 S.E.2d 690 (1987).

Witness's testimony that defendant had a reputation for hurting people was admissible to explain the witness's reason for lying even though it incidentally put the defendant's character in issue. *Smith v. State*, 165 Ga. App. 669, 302 S.E.2d 414 (1983).

Evidence of severance pay under similar circumstances. — In a suit to recover severance pay by employee remaining on job until sale of the company was consummated, the trial court did not err in allowing two former employees to testify that those employees had received severance pay upon their voluntary departure from the company after the sale of the corporation. *Amax, Inc. v. Fletcher*, 166 Ga. App. 789, 305 S.E.2d 601 (1983).

Conversation with a person since deceased which would otherwise be objectionable may be admitted for the purpose of explaining conduct. *J.M. Beeson Co. v. Knowles*, 149 Ga. App. 732, 256 S.E.2d 44 (1979).

Evidence of prior claims against defendant. — In an action alleging that defendant jewelry store substituted a flawed diamond in a ring plaintiff brought in to be re-set, the trial court did not err in excluding evidence of prior disputes between defendant and other customers. *Ament v. Bennett's Fine Jewelry*, 249 Ga. App. 683, 549 S.E.2d 501 (2001).

General partners' (GP's) motion for a new trial was properly denied as evidence of a GP's involvement in a prior suit was properly admitted. The prior suit was relevant to show a course of conduct because the prior suit

Civil Cases (Cont'd)

also involved a breach of a partnership agreement, a breach of fiduciary duty, a nursing home, and accusations that the GP violated the plain language of the partnership agreement by failing to pay the limited partners their preferred returns. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Character evidence was admissible in the following cases. — See *McNabb v. Lockhart & Thomas*, 18 Ga. 495 (1855) (reputation of one charged with loss of money); *DuBose v. DuBose*, 75 Ga. 753 (1885) (character of spouse charged with cruelty); *McClure v. State Banking Co.*, 6 Ga. App. 303, 65 S.E. 33 (1909) (character of one accused of forgery); *Georgia Southern & Florida Ry. v. Ransom*, 5 Ga. App. 740, 63 S.E. 525 (1909), *aff'd* on other grounds, 10 Ga. App. 558, 73 S.E. 858 (1912) (character of employee against whom damages were sought for insulting conduct); *Conley v. Conley*, 152 Ga. 184, 108 S.E. 777 (1921) (character of spouse charged with adultery); *Dalton v. Jackson*, 66 Ga. App. 625, 18 S.E.2d 791 (1942) (character in civil action for rape); *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961) (character of spouse charged with cruelty); *Murray v. Clayton*, 151 Ga. App. 720, 261 S.E.2d 455 (1979) (reputation of one for being married); *Shivers v. Webster*, 224 Ga. App. 254, 480 S.E.2d 304 (1997) (action to enforce oral promise).

Admission of character evidence in deprivation proceeding. — Evidence that a father had emotionally abused and neglected a child by repeatedly beating and threatening to kill the child's mother in the child's presence, along with evidence that the father also repeatedly beat the first wife, was relevant to whether the cause of the child's deprivation was likely to continue under O.C.G.A. § 15-11-94 and was admissible under O.C.G.A. § 24-2-2. *Davis v. Rathel*, 273 Ga. App. 183, 614 S.E.2d 823 (2005).

Evidence that parent missed medical appointments for child. — Evidence of the mother's missed health care appointments for her child did not relate to her conduct in other transactions, as contemplated by O.C.G.A. § 24-2-2, but was probative of causation, and thus, was admissible in the mother's medical malpractice action against the

health care providers who reviewed the child's case before the child died. *Fulton-DeKalb Hosp. Auth. v. Dawson*, 270 Ga. 376, 509 S.E.2d 28 (1998).

Evidence of parent's alleged suicide attempt in custody modification case. — In ruling on a parent's petition to modify custody, as the trial court made no finding of the existence of family violence under O.C.G.A. § 19-9-3(a)(4), whether the other parent had sought the help of a mental health professional or had attempted to commit suicide many years earlier was not probative of any material issue in the case. Therefore, such evidence was properly excluded. *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Character evidence was inadmissible in the following cases. — See *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S.E. 18 (1890) (beneficiary's character in insurance case); *Stanley v. Willingham*, 93 Ga. App. 421, 91 S.E.2d 791 (1956); *Dennis v. Dennis*, 227 Ga. 164, 179 S.E.2d 238 (1971) (evidence from spouse's former divorce); *Ginsberg v. Termotto*, 175 Ga. App. 265, 333 S.E.2d 120 (1985) (evidence of past good act irrelevant to issue of liability for utility expenses).

Evidence of prior consensual adulterous relationship not admitted. — Evidence of a dentist's prior consensual adulterous relationship was properly excluded from the evidence as the evidence was irrelevant to a former employee's claim against the dentist for assault and battery and would only have served to impugn the general character of the dentist. *Ferman v. Bailey*, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Character evidence is admissible in termination of parental rights cases. — Evidence of a parent's character is admissible in a termination of parental rights proceeding as the proceeding inherently involves character issues, specifically the parent's ability to provide proper parental care and control; while most civil cases require the factfinder to determine the truth only with regard to the discrete transactions in issue, termination cases require the factfinder to predict a parent's future conduct and ability to parent. *Davis v. Rathel*, 273 Ga. App. 183, 614 S.E.2d 823 (2005).

Evidence admissible in negligent hiring and retention claim. — Evidence of a dentist's harassment of other employees and a

patient was admissible under O.C.G.A. § 24-2-2 as to a former employee's claim of negligent hiring and retention because the evidence tended to show that the dental center that hired the dentist should have known that the dentist posed a risk of committing the same type of harassing behavior against the former employee. *Ferman v. Bailey*, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Criminal Cases

1. Character

Good character may of itself generate a reasonable doubt in the minds of the jury as to the defendant's guilt, and for this reason the defendant is allowed when the defendant sees fit to offer defendant's good character in issue. *Clarke v. State*, 52 Ga. App. 254, 183 S.E. 92 (1935).

In criminal trials, the state cannot introduce evidence of the character of the accused unless the accused has personally first put it in issue. *Richardson v. State*, 41 Ga. App. 226, 152 S.E. 599 (1930); *Clarke v. State*, 52 Ga. App. 254, 183 S.E. 92 (1935); *Love v. State*, 70 Ga. App. 529, 28 S.E.2d 781 (1944); *Bacon v. State*, 209 Ga. 261, 71 S.E.2d 615 (1952); *Haire v. State*, 209 Ga. 378, 72 S.E.2d 707 (1952); *Borders v. State*, 114 Ga. App. 90, 150 S.E.2d 306 (1966); *Brown v. State*, 118 Ga. App. 617, 165 S.E.2d 185 (1968); *Dawson v. State*, 120 Ga. App. 242, 170 S.E.2d 45 (1969); *Bowen v. State*, 123 Ga. App. 670, 182 S.E.2d 124 (1971); *Dudley v. State*, 228 Ga. 551, 186 S.E.2d 875 (1972); *Wooten v. State*, 125 Ga. App. 635, 188 S.E.2d 409 (1972); *Askew v. State*, 135 Ga. App. 56, 217 S.E.2d 385 (1975); *Mikle v. State*, 236 Ga. 748, 225 S.E.2d 275 (1976); *Brown v. State*, 237 Ga. 467, 228 S.E.2d 853 (1976); *Posey v. State*, 152 Ga. App. 216, 262 S.E.2d 541 (1979); *Perry v. State*, 154 Ga. App. 559, 269 S.E.2d 63 (1980), overruled on other grounds, 231 Ga. App. 61, 497 S.E.2d 642 (1998); *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980).

General character of defendant and defendant's conduct in other transactions is irrelevant unless the defendant chooses to put defendant's character in issue. *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

Opportunity of state to disprove good character. — Whenever defendant puts defendant's good character in issue as fact state has privilege of disproving this fact, by cross-examination of the witness by whom the accused attempts to make the proof. *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

When nature of the case does not involve defendant's character, and the case does not render necessary and proper the investigation thereof, it is error to allow, over objection of the defendant, prejudicial and irrelevant matter to go before the jury in a trial which tends to place defendant's character and conduct before the jury. *Hartley v. State*, 159 Ga. App. 157, 282 S.E.2d 684 (1981).

After testimony put defendant's character in issue, implying defendant's commission of the offense and such testimony was not necessary or relevant to the circumstances of defendant's arrest, that testimony should not be admitted. *Bryan v. State*, 157 Ga. App. 635, 278 S.E.2d 177 (1981).

A passing reference to a defendant's record does not place defendant's character in evidence. *Johnson v. State*, 256 Ga. 604, 351 S.E.2d 623 (1987).

In a trial for armed robbery, aggravated assault, kidnapping, and possession of a firearm during the commission of certain crimes, the trial court properly denied defendant's motion for a mistrial even though the state placed defendant's character in issue when a police officer testified that defendant was "picked up on charges" when police arrested defendant in Maryland pursuant to a fugitive warrant because the testimony was admissible and relevant to the circumstances surrounding defendant's arrest, even if it did incidentally show that defendant committed another crime. *Blake v. State*, 272 Ga. App. 181, 612 S.E.2d 33 (2005).

When an officer testified that the officer had known the defendant for a long time and "could have charged" the defendant in a couple of cases, this passing reference to prior conduct did not suffice to put the defendant's character in evidence so as to violate O.C.G.A. § 24-2-2; furthermore, a curative instruction remedied any prejudicial impact from the statement. *Height v. State*, 281 Ga. 727, 642 S.E.2d 812 (2007).

When an investigator, asked how the inves-

Criminal Cases (Cont'd)**1. Character (Cont'd)**

tigator knew defendant, replied, "I've made contact with [the defendant] in the streets before and I believe through past cases," this did not warrant a mistrial. A passing reference to a defendant's criminal record did not suffice to put the defendant's character in evidence so as to violate O.C.G.A. § 24-2-2. *Thomas v. State*, 291 Ga. App. 795, 662 S.E.2d 849 (2008).

Defendant's character not "put in issue."

— It is only when a defendant has "put his character in issue," as that term is defined in the context of O.C.G.A. §§ 24-2-2 and 24-9-20(b), that the court is required to give a charge on good character and when, in a trial for aggravated battery, the defendant's statement that defendant never shot anybody was not responsive to the direct question relating to defendant's defenses of accident and self-defense, which the court did fully charge, the volunteered additional statement, merely repeated on redirect, was not legally sufficient to put defendant's character in issue. *Williams v. State*, 187 Ga. App. 355, 370 S.E.2d 210 (1988).

Trial court did not err in denying defendant's motion in limine to exclude evidence that police, in searching defendant's apartment, found not only the murder weapon defendant used to shoot and kill defendant's girlfriend, but also two other handguns; the evidence of the two other handguns was relevant to the accuracy of a statement defendant gave to police that upon searching defendant's apartment, the police would find the two guns hidden in a shoe box and the fact that defendant owned the guns was not, in and of itself, evidence of bad character. *Brinson v. State*, 276 Ga. 671, 581 S.E.2d 548 (2003).

State did not improperly place a defendant's character in evidence by informing the jury that defendant was charged with possession of a firearm by a convicted felon when defendant was charged with possession of a firearm by a convicted felon, not because defendant personally was a convicted felon, but because defendant aided and abetted defendant's cousin, a convicted felon, in receiving and possessing a firearm. *Perry v. State*, 276 Ga. 836, 585 S.E.2d 614, rev'd, 276 Ga. 839, 584 S.E.2d 253 (2003).

Testimony by police officers did not improperly place the defendant's character at issue; statements regarding the charges against the defendant at the time of previous arrests were merely passing references and described the circumstances of the arrests; a statement about the defendant having an open warrant fell short of placing the defendant's character at issue. *Williams v. State*, 285 Ga. App. 190, 645 S.E.2d 676 (2007).

Permitting an officer to testify that the officer had been looking for the defendant because the officer had a warrant for the defendant's arrest did not impermissibly put the defendant's character into issue; the testimony was admissible as relevant to the circumstances leading the police to the residence where the defendant was found. *Smith v. State*, 285 Ga. App. 399, 646 S.E.2d 499 (2007).

Because a mere mention that the defendant had been in jail did not place the defendant's character in issue, and despite this fact the defendant waived any claim of error regarding the placement of character in issue, it did not amount to reversible error; moreover, the challenged testimony, given by the defendant's mother, amounted to a non-responsive answer, which the state did not directly solicit and it did not appear from the record that the state anticipated the response. *Jennings v. State*, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, 2007 Ga. LEXIS 667 (Ga. 2007).

When a witness twice referred to a codefendant's incarceration, these nonresponsive answers did not improperly place the defendant's own character at issue. Moreover, any error was harmless because the evidence of the defendant's guilt was overwhelming. *Walker v. State*, 282 Ga. 703, 653 S.E.2d 468 (2007).

Trial court did not err in admitting evidence that police were at the defendant's residence to serve defendant with an arrest warrant, because that evidence did not improperly place the issue of character into evidence, but was necessary to explain why police were able to detain, handcuff, and search the defendant. Moreover, a limiting instruction was also issued advising the jurors that the jurors were not to consider the warrant for any purpose other than to explain the officers' presence at the defendant's home. *Thrasher v. State*, 289 Ga. App. 399, 657 S.E.2d 316 (2008).

Appellant alleged that the trial court erred by denying appellant's motion for a mistrial because a witness, while testifying about the abduction and murder of the victim, improperly injected the appellant's character in issue by saying, in front of the jury, "these guys are killers." While the state agreed that the reference to "killers" in this comment should not have been made, any error was harmless as the statement did not place the appellants' character in issue because the statement did not concern other transactions. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Testimony that an investigator ran a criminal history check on the defendant and prepared photographic lineups at two police stations did not put the defendant's character into issue under O.C.G.A. § 24-2-2. The testimony did not indicate that the defendant had been convicted of any crime and did not otherwise specify the nature of the defendant's prior dealings with police; moreover, the other evidence against the defendant was substantial and damning, and the action taken by the trial court assured, without drawing attention to the improper evidence, that there would be no other references to the defendant's criminal history. *Young v. State*, 297 Ga. App. 248, 676 S.E.2d 854 (2009).

Character not put in issue in child molestation cases. — When the minor victim testified that she had not initially told her mother about the defendant's sexual offenses because she feared that the defendant, who had been arrested for battery of the mother and who had hit the mother, would harm the victim and her mother, evidence that the defendant had hit the mother and that he had been arrested for assault and battery of the mother did not improperly put the defendant's character into issue; it was properly admitted to explain the victim's delay in reporting the crime. *Borders v. State*, 285 Ga. App. 337, 646 S.E.2d 319 (2007), cert. denied, 2007 Ga. LEXIS 640 (Ga. 2007).

Despite the defendant's claim that the trial court erroneously admitted improper character evidence from the victims' parents when the parents both testified that the defendant agreed to obtain counseling in exchange for the parents' agreement not to

report the incidents of molestation to law enforcement, the evidence was properly admitted as: (1) the defendant cited no case law supporting a finding that amounted to improper character evidence; and (2) the testimony was admissible to explain why the victims and their parents did not immediately report the matter to police. *Head v. State*, 285 Ga. App. 471, 646 S.E.2d 699 (2007).

Child molestation defendant did not put the defendant's good character into issue so as to require a jury charge; the defendant's testimony regarding the defendant's attempts to help the victim was more reasonably construed as an explanation for the inordinate amount of time the defendant spent with the victim than as evidence of good character, and the defendant's testimony regarding the defendant's two part-time jobs only inadvertently placed the defendant's good character into issue. *Kurtz v. State*, 287 Ga. App. 823, 652 S.E.2d 858 (2007), cert. denied, 2008 Ga. LEXIS 184 (Ga. 2008).

Character not placed in issue by prison uniform. — In a prosecution for felony murder, armed robbery, and burglary, the fact that the jury was shown a videotape of the defendant's statement to police depicting the defendant wearing a prison uniform did not place the defendant's character in evidence. *Jackson v. State*, 284 Ga. 484, 668 S.E.2d 700 (2008).

Evidence of relative's "touching" did not put defendant's character in issue. — Although the state prematurely bolstered a child victim's testimony, the parties knew that the victim's credibility would be immediately undermined; evidence that defendant told the victim that a relative had been imprisoned for improper "touching" and that defendant masturbated with the victim's underwear were admissible as relevant. *Robinson v. State*, 275 Ga. App. 537, 621 S.E.2d 770 (2005).

Use of booking photographs. — As the booking photograph in no way suggested that the defendant was guilty of any previous crimes, the trial court did not abuse the court's discretion in admitting the photographs. *Clark v. State*, 285 Ga. App. 182, 645 S.E.2d 671 (2007).

Photographic identification. — In a prosecution for forgery, defendant's photo-

Criminal Cases (Cont'd)**1. Character (Cont'd)**

graphic identification card issued by the Georgia Department of Corrections was admissible as relevant to issues of the identity of the perpetrator and the credibility of witnesses; the card did not refer to any charge or conviction nor indicate that defendant was a parolee. *Biggins v. State*, 229 Ga. App. 297, 494 S.E.2d 45 (1997).

Trial court did not err in denying defendant's motion to exclude evidence and admitting the correctional facility identification card found on defendant's person at the time of arrest for stealing a car as the card was not used to show defendant's criminal character, but, instead, was used to prove that defendant gave a police officer investigating the crime a false name, which was a different crime. *McNeil v. State*, 257 Ga. App. 147, 570 S.E.2d 433 (2002).

Trial court did not err in admitting investigating officer's testimony that the investigating officer obtained from police in another county a prior photograph of defendant for use in a photographic lineup the investigating officer was creating as the investigating officer's testimony, without more, did not indicate that defendant was guilty of any prior crimes, and, thus, did not improperly place defendant's character in issue. *Browne v. State*, 261 Ga. App. 648, 583 S.E.2d 496 (2003).

Defendant waived any error in the admission of a photograph of defendant with a gun as defendant did not argue at trial that the photo was improper character evidence; further, gun ownership did not impute bad character. *Johnson v. State*, 274 Ga. App. 641, 618 S.E.2d 716 (2005).

Admission of fingerprint card. — Admission into evidence of the defendant's fingerprint card taken in connection with a previous crime does not place the defendant's character into evidence when any incriminating evidence was removed from the face of the card. *Williams v. State*, 184 Ga. App. 124, 361 S.E.2d 15 (1987).

In a prosecution for possession of marijuana, it was reversible error to introduce a fingerprint card of defendant that showed the date of a prior arrest and listed charges against defendant. *Jinks v. State*, 229 Ga. App. 18, 493 S.E.2d 214 (1997).

Evidence of prison identification card. —

Defendant's claim that defendant's character was improperly placed into evidence when an officer testified that the officer found defendant's prison identification card in defendant's pocket was waived as defendant failed to make a further objection or renew defendant's motion for a mistrial after a curative instruction was given. *McCullough v. State*, 268 Ga. App. 445, 602 S.E.2d 181 (2004).

Admission of videotape. — Trial court did not err in denying defendant's motion in limine that sought to bar introduction of defendant's videotaped statement to police, as well as defendant's later motion for mistrial after the videotape was played for the jury; although defendant claimed that the videotape was entirely exculpatory and was only introduced by the state to place defendant's character in evidence because defendant referenced in the videotape a murder, separate from the instant crimes, with which defendant had previously been charged, the videotape was not entirely exculpatory and defendant's references in the videotape were relevant to other issues besides defendant's character, such as motive, intent, and course of conduct, and, thus, was material and admissible. *Cummings v. State*, 261 Ga. App. 281, 582 S.E.2d 231 (2003), cert. denied, 543 U.S. 824, 125 S. Ct. 40, 160 L. Ed. 2d 35 (2004).

Evidence of motive. — Evidence that victim's taking of an arrest warrant would have immediately returned defendant to jail was relevant to prove that defendant had a motive to kill the victim and relevant evidence is not rendered inadmissible simply because it incidentally puts the defendant's character in issue. *Terrell v. State*, 271 Ga. 783, 523 S.E.2d 294 (1999).

Evidence that defendant's motive for shooting the victim was the victim's friendship with a person who had apparently bought drugs from defendant, but had refused to pay the amount of money defendant demanded, was admissible, even if it injected defendant's character into evidence. *Sharif v. State*, 272 Ga. App. 660, 613 S.E.2d 176 (2005).

Evidence that defendant was on probation at the time of the crimes was relevant to show defendant's motive for fleeing from the officer, even though the evidence might have

reflected negatively on defendant's character. *Mills v. State*, 273 Ga. App. 699, 615 S.E.2d 824 (2005).

Substantial evidence showed that defendant was using crack cocaine before the crimes and that defendant planned to take the victim's wallet to purchase more; proof of motive was not inadmissible simply because it incidentally put defendant's character into evidence. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

Defendant failed to establish that defendant received ineffective assistance of counsel because, even assuming that the transcript was accurate and that the involvement of drug money was placed before the jury, the question elicited testimony which constituted relevant evidence of defendant's motive, and thus defense counsel was not ineffective in failing to object, since any objection would have been fruitless. *Jones v. State*, 280 Ga. 205, 625 S.E.2d 1 (2005).

Evidence of drug use. — Because evidence of the defendant's prior drug use and history of crimes committed against family members fueled by that drug use were properly admitted as relevant to the crimes charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal. *Jones v. State*, 283 Ga. App. 812, 642 S.E.2d 887 (2007).

Evidence of defendant's Klu Klux Klan affiliation was admissible since the evidence explained defendant's motive for murder and defendant's bent of mind. *Mize v. State*, 269 Ga. 646, 501 S.E.2d 219 (1998), cert. denied, 525 U.S. 1078, 119 S. Ct. 817, 142 L. Ed. 2d 676 (1999).

Evidence incidentally reflecting on character not barred. — O.C.G.A. § 24-2-2 does not bar evidence simply because the evidence might incidentally reflect on the defendant's character. *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984).

In allowing testimony relating to defendant's obtaining possession of a gun used in committing offenses, the trial court refused to allow characterization of defendant's conduct as criminal, denial of a motion to exclude the testimony was proper since the limitation injected defendant's character only minimally. *Baker v. State*, 225 Ga. App. 848, 485 S.E.2d 548 (1997).

Trial court did not err in denying defendant's motion for a mistrial based on admission of a police officer's testimony that defendant, on the night prior to being arrested for theft by receiving stolen property, fled every time the officer turned into a particular parking lot and that the stolen property, a rental car, was parked nearby; even though the evidence might have incidentally put defendant's character in issue, the evidence was relevant and probative on the issue of defendant's consciousness of guilt. *Richardson v. State*, 275 Ga. App. 320, 620 S.E.2d 522 (2005).

Trial court did not abuse the court's discretion in allowing evidence of the previous conflict between defendant and the condominium association because the testimony was relevant to whether defendant made telephone calls with the intent of harassing the victim in violation of O.C.G.A. § 16-11-39.1(a) and only incidentally reflected on defendant's character. *Bozzuto v. State*, 276 Ga. App. 614, 624 S.E.2d 166 (2005).

In a prosecution for armed robbery, the victim's testimony that the defendant looked at the victim with a "mean, just horrible cold-hearted face" was relevant to show the defendant's demeanor during the commission of the crime, even if the testimony incidentally placed the defendant's character in issue. *Fuller v. State*, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Evidence of defendant's prior "touching" of victim did not put defendant's character in issue. — Defendant's character was not erroneously put into issue by the admission of testimony of defendant's niece as to an incident during which defendant, while in the water at the beach and attempting to teach the witness how to float on her stomach, touched the witness in the area of her vagina because the evidence was admissible to show lustful disposition and to corroborate the testimony of the victim as to the acts charged. *Evans v. State*, 180 Ga. App. 1, 348 S.E.2d 561 (1986).

Evidence of good character may not serve to create such doubt, even in the face of apparently conclusive evidence, as to lead jurors to believe the other evidence false or witnesses mistaken. *Edwards v. State*, 255 Ga. 149, 335 S.E.2d 869 (1985).

Criminal Cases (Cont'd)**1. Character (Cont'd)**

Testimony as to defendant's residence. — Defendant's character not injected into evidence after a police officer testified that the officer knew where defendant resided. *Chaney v. State*, 169 Ga. App. 616, 314 S.E.2d 457 (1984).

State's mention of defendant's aliases. — State does not impermissibly place the defendant's character in issue by referring, in a limited manner, to the defendant's uncontestedly correct aliases and nickname. *Veal v. State*, 167 Ga. App. 175, 306 S.E.2d 667 (1983).

Good character is valid defense. — Courts of this state have consistently recognized the validity of a good character defense, and have held that good character should be considered by the court and jury. *Riceman v. State*, 166 Ga. App. 825, 305 S.E.2d 595 (1983).

Specific acts to prove character. — O.C.G.A. § 24-2-2 limits proof of character to evidence of reputation. Proof of conduct in other transactions by evidence of specific instances of such conduct is not authorized but amounts to self-serving declarations of nonculpability to prove a trait of character. *Baine v. State*, 181 Ga. App. 856, 354 S.E.2d 177 (1987); *Barrett v. State*, 192 Ga. App. 705, 385 S.E.2d 785 (1989).

In a prosecution for child molestation, the court properly refused to allow the defendant to present witness evidence of defendant's experience in caring for young girls since character witnesses for a defendant are not permitted to testify about specific instances of conduct by the defendant during direct examination. *Shelnutt v. State*, 234 Ga. App. 655, 506 S.E.2d 643 (1998).

Character testimony need not be based exclusively on community relationships. — Appellate court could not conclude that the trial court erred in restricting the character testimony of one of the defendant's witnesses, which testimony was obtained through business relationships rather than through the community in which the defendant lived, and further, even if the trial court did commit error, the defendant showed no harm in the restriction as the trial court did not completely restrict the witness's testimony, and because of the cumulative testi-

mony of the other character witnesses concerning the defendant's good character. *Burchette v. State*, 260 Ga. App. 739, 580 S.E.2d 609 (2003), *aff'd*, 278 Ga. 1, 596 S.E.2d 162 (2004).

Inadvertant reference did not warrant mistrial. — Given the trial court's prompt and pointed curative instruction after an inadvertent placement of the defendant's character into evidence, the trial court did not abuse the court's discretion in denying the defendant a mistrial. *Hunter v. State*, 281 Ga. 526, 640 S.E.2d 271 (2007).

When a stalking victim was asked if the defendant had ever pulled a gun on the victim, the victim's reply that the victim had seen the defendant pull a gun on someone else was stricken as nonresponsive, and the trial court advised the jury to disregard that response. Even assuming this testimony improperly injected evidence of the defendant's bad character, the defendant was not entitled to a mistrial, particularly in light of the defendant's testimony that admitted each act listed in the indictment. *Seibert v. State*, 294 Ga. App. 202, 670 S.E.2d 109 (2008).

When the nature of the presentence hearing involves the "general character" of the defendant, and when the state has notified the defendant that such evidence will be admitted, evidence of general bad character may be admitted. *Cowan v. State*, 130 Ga. App. 320, 203 S.E.2d 311 (1973); *Cochran v. State*, 144 Ga. App. 820, 242 S.E.2d 735 (1978).

Statements as to defendant's drinking habits. — Prosecution's characterization of defendant as an "experienced drinker" because defendant had testified that defendant was not rendered intoxicated by .21% blood alcohol did not place defendant's character in issue. *Rielli v. State*, 174 Ga. App. 220, 330 S.E.2d 104 (1985).

Voluntary intoxication charge was not "red flag" as to character. — Defendant's claim that the state used a voluntary intoxication charge as a "red flag" to the jury that defendant was drunk and therefore was "an unsavory character," that the victim's parents now might question their decision "to invite this intoxicated man into their home," and that defendant had "major psychological problems" was rejected; there was evidence from which an inference or deduction

might be made that defendant was drunk on the afternoon in question. *Byers v. State*, 276 Ga. App. 295, 623 S.E.2d 157 (2005).

Bent of mind evidence. — In a joint trial of two defendants, the trial court did not err in showing the jury portions of a movie which depicted a method of disposing of a murdered victim's body as: (1) such was relevant to show a bent of mind, despite the fact that it could have placed the first defendant's character in issue; and (2) the jury could have made the permissible inference that the first defendant was encouraged by the movie to order the manner of disposing of the victim's body; moreover, because the second defendant failed to request a cautionary instruction to adequately protect from this inference, the second defendant could not complain of the inference on appeal. *Oree v. State*, 280 Ga. 588, 630 S.E.2d 390 (2006).

Character evidence admissible. — On the trial of a case arising under a municipal ordinance prohibiting street walking, evidence of the general character of the woman arrested was admissible. *Braddy v. City of Milledgeville*, 74 Ga. 516, 58 Am. R. 443 (1885).

On the trial of one for murder when the testimony tended to show that the homicide was committed in consequence of an effort to have some sort of sexual relation with the victim, and the defendant introduced a witness to establish the defendant's good character, it was competent, on cross-examination, to ask such witness if the witness had not heard of certain lascivious acts of the defendant with other females. *Frank v. State*, 141 Ga. 243, 80 S.E.1016, *aff'd* on other grounds, 142 Ga. 741, 83 S.E. 645 (1914); 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 582 (1915).

When defendant put defendant's character in issue by attempting to explain defendant's actions as resulting from devotion to defendant's church, admission of evidence of prior convictions was proper. *Language v. State*, 169 Ga. App. 649, 314 S.E.2d 484 (1984).

Testimony about the characteristics of spousal abuse and a statement that defendant fit the profile of a spouse abuser was properly admitted in defendant's trial for felony murder and aggravated assault of defendant's spouse after defendant claimed

the defense of an accident, thereby putting defendant's character into evidence; the court found such testimony was relevant to rebut defendant's claimed defense. *Jones v. State*, 276 Ga. 253, 577 S.E.2d 560 (2003).

Although the general character of a party and the party's conduct in other transactions were usually irrelevant, the trial court did not err in concluding that defendant's counsel rendered effective assistance and was not ineffective for not objecting to the codefendant's testimony that defendant was not employed and sold drugs for a living, as such testimony, although incidentally involving defendant's character, went to the very central issue in the case of whether defendant was dealing drugs, and, thus, defendant's counsel could not be faulted for not making an objection that would have been meritless because such testimony was admissible. *Pitts v. State*, 260 Ga. App. 553, 580 S.E.2d 618 (2003).

State's introduction of evidence of the defendant's two prior arrests was not improper since the only conceivable purpose of defense counsel's questions to a case agent was to elicit testimony concerning the defendant's character, defense counsel opened the door to the state's rebuttal character evidence on the same specific subject. *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

Evidence of victim's alcoholism not relevant. — Defendant's convictions of aggravated battery and simple battery were affirmed as the trial court properly refused to admit evidence of the victim's alcoholism prior to the victim's involvement with defendant since defendant failed to show any nexus between the victim's alcoholism and the conclusion that the victim had falsely accused defendant of battery. *Harris v. State*, 263 Ga. App. 329, 587 S.E.2d 819 (2003).

Admission of defendant's videotaped statement in which defendant implicated oneself in the commission of other crimes did not improperly place defendant's character in issue. *Griffin v. State*, 243 Ga. App. 282, 531 S.E.2d 175 (2000).

Evidence properly admitted as res gestae and did not amount to bad character evidence. — Introduction of evidence regarding crimes for which the defendant was not charged, specifically two checkbooks that were recovered from the defendant's resi-

Criminal Cases (Cont'd)**1. Character (Cont'd)**

dence at the time of the arrest, and testimony of the defendant's involvement in two uncharged robberies, did not amount to bad character evidence, but was part of the *res gestae*; moreover, premitting whether the trial court properly admitted the aforementioned evidence, any error arising from that admission was harmless. *Cartledge v. State*, 285 Ga. App. 145, 645 S.E.2d 633 (2007).

Trial court did not abuse the court's discretion when the court allowed a passenger in the defendant's car to testify that the defendant "always ran red lights," as such was not used for improper character evidence under O.C.G.A. § 24-2-2, but rather, as part of the *res gestae* of the moments described by the passenger, whereupon a police officer had to swerve away from the defendant's vehicle and the officer eventually died from injuries sustained in a subsequent crash; further, any error in the admission thereof was harmless due to the overwhelming amount of evidence of the defendant's guilt. *Potts v. State*, 296 Ga. App. 242, 674 S.E.2d 109 (2009).

Evidence properly admitted to establish defendant's identity and appearance, and did not amount to bad character evidence. — Trial court did not err in denying a motion in limine to exclude the testimony of a state witness that allegedly placed the defendant's character in issue because the testimony was relevant to establish the defendant's identity and appearance on that date of the charged crime, and was not rendered inadmissible merely because the testimony incidentally placed the defendant's character in issue. Moreover, the defendant's trial counsel conceded that the witness's testimony regarding the description was admissible. *Buice v. State*, 289 Ga. App. 415, 657 S.E.2d 326 (2008).

Limiting instruction proper. — Limiting instruction on similar transaction evidence was properly given as the instruction was substantially the same as an approved pattern and did not direct the jury that the jury could consider similar transaction evidence to show any element of the offense charged in the indictment. *Miller v. State*, 281 Ga. App. 354, 636 S.E.2d 60 (2006), cert. denied, 2007 Ga. LEXIS 106 (Ga. 2007).

Claim waived. — Appeals court rejected the defendant's contention that the trial court erroneously admitted character evidence consisting of the defendant's statement made to a special agent regarding past cocaine use and distribution, when at trial, counsel raised a delayed objection arguing that such was inculpatory, and the objection was not only untimely but also failed to state the specific grounds raised on appeal; moreover, because the defendant later admitted to making the statement, any error in admitting the special agent's testimony was harmless. *Henley v. State*, 281 Ga. App. 242, 635 S.E.2d 856 (2006).

Despite the defendant's claim that the trial court erred by denying a mistrial based on an improper character reference in violation of O.C.G.A. § 24-2-2, because counsel failed to do anything more than move for a mistrial following the challenged statement and specifically request a curative instruction, no error resulted from the denial of the motion. *Johnson v. State*, 285 Ga. App. 590, 646 S.E.2d 760 (2007).

Counsel was not ineffective in failing to object to statements that might have impugned defendant's character, and hence the defendant was properly denied a new trial on those grounds. *Page v. State*, 287 Ga. App. 182, 651 S.E.2d 131 (2007).

2. Other Conduct or Crimes

Proper admission of similar transaction evidence requires the state to make three affirmative showings: (1) that the evidence is sought for a proper purpose; (2) that sufficient evidence exists to establish that the accused committed the similar transaction; and (3) that sufficient connection exists between the similar transaction and the crime charged so that proof of the former tends to prove the latter. *Rice v. State*, 217 Ga. App. 456, 458 S.E.2d 368 (1995).

Test of admissibility of evidence of other criminal acts by the defendant is not the number of similarities between the two incidents, rather, such evidence may be admitted if the evidence is substantially relevant for some purpose other than to show a probability that the defendant committed the crime on trial because the defendant is a man of criminal character; similarity is an important factor in determining the admissibility of the extrinsic crime, however, it is

not the only factor, nor is it necessarily the controlling factor. The ultimate issue for admissibility is whether the evidence of other crimes has relevance to the issues in the trial of the case at bar. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

When, as part of trial strategy, the first defendant elected to introduce evidence of the first defendant's non-involvement in a prior drug sale and attempted to elicit testimony from a codefendant that the first defendant did not participate in the prior drug deal, but when the codefendant testified that the first defendant and the second defendant were the suppliers of the ounce of cocaine sold in that prior transaction, the trial court did not err in admitting evidence of the prior drug deal as a similar transaction because the first defendant could not complain on appeal about the deleterious results stemming from that defendant's own trial strategy. *Lopez v. State*, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

In a prosecution for aggravated assault, under O.C.G.A. § 16-5-21, and possession of a knife during the commission of a crime, under O.C.G.A. § 16-11-106(b)(1), evidence that defendant stabbed another in an incident eight years previously was admissible to show whether defendant intended to threaten or harm the victim when defendant brandished a knife, and the evidence was not more prejudicial than probative, given the prior incident's relevance to a necessary element of the current crimes. *Ledford v. State*, 275 Ga. App. 107, 620 S.E.2d 187 (2005).

Admission of similar transaction evidence proper. see *Ryan v. State*, 277 Ga. App. 490, 627 S.E.2d 128 (2006) (drugs).

In a prosecution for the crimes of kidnapping, aggravated sexual battery, sexual battery, and attempted rape, admission of similar transaction evidence was upheld as: (1) the defendant had sufficient notice of the state's intent to present that evidence; (2) the prior bad acts were sufficiently similar to the charged acts; (3) such was properly admitted for the purposes of showing identity, intent, bent of mind, and course of conduct; (4) both prior victims positively identified the defendant as their assailant; and (5) the evidence showed that the defendant had a modus operandi of luring young women who were strangers to him into his

car, driving to isolated areas, making them expose their breasts and genital areas, masturbating, intimidating them with talk of even more violent sexual assault or death, and then returning them to the area of the first encounter. *Watley v. State*, 281 Ga. App. 244, 635 S.E.2d 857 (2006).

Because the state adequately showed the connection between the murder of one victim, and the murder charged in the instant proceeding, specifically embedded in the defendant's proffered motive that the killing of the victim in the instant proceeding was committed to prevent evidence from being introduced against the defendant in the first killing, the similar transaction evidence was properly allowed; hence, the similar transaction did not amount to improper character evidence. *Young v. State*, 281 Ga. 750, 642 S.E.2d 806 (2007).

In a trial for felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the trial court properly allowed the state to introduce as similar transaction evidence an aggravated assault the defendant committed four years earlier; both the old assault charge and crimes for which the defendant was on trial involved violent assaults committed by the defendant with the help of young, unarmed accomplices, involved the defendant's use of a firearm and demand for valuables, and targeted business people within the same five-mile area during morning work hours. *Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

In a prosecution involving a murder and robbery at a convenience store, the trial court properly admitted similar transaction evidence of an attempted robbery of a fast-food restaurant. In each case, the defendant recruited another person from the same house for assistance, wore a mask, carried a .9mm pistol, and committed the crimes early in the morning. *Judkins v. State*, 282 Ga. 580, 652 S.E.2d 537 (2007).

When the defendant was charged with possessing methamphetamine, the trial court properly admitted as a similar transaction a prior conviction for possessing methamphetamine because both involved the defendant's possession of methamphetamine while involved in disorderly conduct. The defendant claimed that the scales on which the drug was found were

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

in a car when the defendant bought it, and evidence of the similar transaction, when officers responding to a disorderly person call found methamphetamine in the defendant's pocket, was relevant to the defendant's intent and bent of mind to possess methamphetamine. *Martin v. State*, 291 Ga. App. 363, 662 S.E.2d 185 (2008).

In a forgery case, the trial court properly admitted similar transaction evidence of a prior forgery conviction. The trial court admitted the similar transaction evidence to show the defendant's identity and course of conduct, which were proper purposes; furthermore, in both cases, the defendant cashed or tried to cash bogus checks issued to the defendant and endorsed by the defendant at a check-cashing location other than at the bank where the checks were purportedly drawn. *Beck v. State*, 291 Ga. App. 702, 662 S.E.2d 798 (2008).

In an armed robbery case, the trial court properly admitted evidence of a prior armed robbery. The similar transaction was offered to prove course of conduct, state of mind, and the defendant's intent; a certified copy of the defendant's conviction was offered; and the prior robbery took place the day before the robbery at issue and like the present robbery involved a victim being robbed of money at gunpoint while at work. *Deloatch v. State*, 296 Ga. App. 65, 673 S.E.2d 576 (2009).

Defendant was charged of robbing a store clerk at knife-point. Evidence presented at a Ga. Unif. Super. Ct. R. 31.3(B) hearing that, on the day after this robbery, the defendant robbed a second clerk at knife-point, was properly admitted as similar transaction evidence; the fact that the trial on the second robbery was pending afforded no basis to exclude the evidence. *Hill v. State*, 298 Ga. App. 677, 680 S.E.2d 702 (2009).

Trial court did not abuse the court's discretion in admitting similar transaction evidence during the defendant's trial for possession of methamphetamine and possession of drug related objects because the subsequent incident involved possession of methamphetamine and possession of a glass pipe used to smoke methamphetamine. *McGhee v. State*, No. A10A0473, 2010 Ga.

App. LEXIS 346 (Mar. 31, 2010).

Degree of similarity that is required. —

When similar transaction evidence is being introduced to prove motive, intent, or bent of mind, it requires a lesser degree of similarity to meet the test of admissibility than when such evidence is being introduced to prove identity; all that is required is that the incidents are sufficiently similar such that proof of the earlier event helps prove an element of the later crime. *Cain v. State*, 268 Ga. App. 39, 601 S.E.2d 415 (2004).

Similar transaction notice was sufficient.

— Similar transaction evidence was properly admitted because: (1) defendant's claim that the similar transaction notice was insufficient because the notice did not include a copy of the prior indictment was waived; (2) while the notice did not state the county involved and did not include the indictment, the failure of the state to attach copies of the indictment and to fully comply with Ga. Unif. Super. Ct. R. 31.3(B) did not require automatic reversal or exclusion of the similar transaction evidence, but was subject to testing for harm; and (3) the state served the indictment, verdict, and police report from the earlier attack on trial counsel more than a year before the trial took place. Moreover, any error in failing to attach the indictment to the notice was harmless because the indictment was otherwise provided in discovery long before trial. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Evidence of prior difficulties between victim and defendant ought to be received carefully, and if there is no probative connection between the two, or the prejudice arising from the evidence far outweighs what probative value the evidence may have, the evidence ought not be admitted; but if there is any relevance, or in cases of doubt, the jury ought to hear the evidence and determine for itself the weight and credibility the evidence will be given. *Barnes v. State*, 157 Ga. App. 582, 277 S.E.2d 916 (1981).

Trial court did not err in admitting the testimony of a long-time friend of the deceased wife about prior difficulties the deceased wife and defendant had, as evidence of defendant's prior acts toward the victim, the deceased wife, was admissible. *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119 (2003).

Unlike similar transactions, prior difficul-

ties between the defendant and the victim are not independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected by such nexus; hence, evidence of motive, even though not an essential element of a crime, had such great probative value that it outweighed the inherent prejudice of such evidence, even if it incidentally placed the defendant's character in issue. *LeBlanc v. State*, 283 Ga. App. 434, 641 S.E.2d 646 (2007).

Trial court did not err in permitting a witness to testify about the decedent victim's statement concerning defendant's prior acts of abuse as testimony about prior difficulties between the defendant and a victim was admissible at trial to show the nature of their relationship and to demonstrate motive, intent, or bent of mind of the defendant in committing the act. *Banegas v. State*, 283 Ga. App. 346, 641 S.E.2d 593 (2007).

State of feeling between defendant and victim. — On a trial of an indictment for arson, it is not error to admit evidence showing that feelings of anger or dislike existed on the part of the defendant toward the owner of the property. *Wright v. State*, 113 Ga. App. 436, 148 S.E.2d 333 (1966).

Trial court does not err in admitting evidence of a previous difficulty between a defendant and victim which illustrates the state of feeling between them. *Wright v. State*, 113 Ga. App. 436, 148 S.E.2d 333 (1966); *Jones v. State*, 246 Ga. 109, 269 S.E.2d 6 (1980).

Evidence of drug use. — Evidence that defendant's urine sample taken after killing had tested positive for marijuana was relevant and admissible as part of *res gestae* to show the influence of drugs on defendant's state of mind at the time of the killing. *Giddens v. State*, 206 Ga. App. 409, 425 S.E.2d 299 (1992).

Trial court did not err in admitting into evidence defendant's unredacted taped statement to police in a case in which defendant was ultimately convicted of malice murder; even though the statement contained evidence that defendant was under the influence of drugs at the time the crime was committed, such evidence was deemed part of the *res gestae* and was admissible as such even though the statement incidentally

placed defendant's character in evidence. *Cunningham v. State*, 279 Ga. 694, 620 S.E.2d 374 (2005).

Evidence of alcohol use. — In a prosecution for driving under the influence, failure to stop at a stop sign, violating the open container law, and improper lane usage, evidence that defendant previously drove while under the influence of alcohol and with an open container in the car was admissible as circumstantial evidence of defendant's bent of mind and course of conduct on the night in question. *McCullough v. State*, 230 Ga. App. 98, 495 S.E.2d 338 (1998).

Trial court did not abuse the court's discretion by admitting evidence of a prior accident involving an incident of driving under the influence to show bent of mind and course of conduct; probative value of the prior incident was not outweighed by the prejudicial effect of the evidence. *Harris v. State*, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

Defendant's three prior driving under the influence (DUI) convictions were properly admitted in defendant's DUI trial as similar transaction evidence to show bent of mind and course of conduct as in each of the previous cases, defendant was arrested for DUI while driving late at night and consented to a breath test that showed that defendant was well over the legal limit; an almost 15-year lapse of time after one previous conviction went to the weight of the evidence. *Moody v. State*, 273 Ga. App. 670, 615 S.E.2d 803 (2005).

Prior use of a firearm. — Defendant's prior offense of the unprovoked use of a firearm to threaten a driver who disagreed with defendant's taking of a parking space was admissible because the offense showed defendant's propensity to settle disagreements with a gun, to act violently and impulsively to disappointment or misunderstanding, and to resort to the use of a gun with little provocation. *Davis v. State*, 244 Ga. App. 708, 536 S.E.2d 596 (2000).

Trial court did not err in admitting evidence of defendant's conviction several years earlier for voluntary manslaughter as evidence of the prior conviction was admissible as substantive evidence of defendant's guilt on the current charge against defendant of possession of a firearm by a con-

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

victed felon. *Laster v. State*, 276 Ga. 645, 581 S.E.2d 522 (2003).

Prior threat to kill another. — Witnesses testimony that defendant had recently come to the witnesses' residences in an intoxicated state and threatened the witnesses by pointing a loaded, cocked shotgun at the witnesses was admissible to show a common course of conduct and state of mind of the defendant in a time frame substantially close to the date on which the murder occurred. *Hooks v. State*, 253 Ga. 141, 317 S.E.2d 531 (1984).

Evidence of other crime not generally admissible. — Testimony as to a crime other than that for which the defendant is being tried is not ordinarily admissible. *Loughridge v. State*, 181 Ga. 261, 182 S.E. 12 (1935); *Chambers v. State*, 76 Ga. App. 269, 45 S.E.2d 724 (1947); *Wiggins v. State*, 80 Ga. App. 258, 55 S.E.2d 842 (1949); *Mims v. State*, 207 Ga. 118, 60 S.E.2d 373 (1950); *Kelley v. State*, 98 Ga. App. 324, 105 S.E.2d 798 (1958); *Brown v. State*, 118 Ga. App. 617, 165 S.E.2d 185 (1968); *Dawson v. State*, 120 Ga. App. 242, 170 S.E.2d 45 (1969); *Nooner v. State*, 131 Ga. App. 563, 206 S.E.2d 660 (1974); *Perry v. State*, 154 Ga. App. 559, 269 S.E.2d 63 (1980), overruled on other grounds, *Joiner v. State*, 231 Ga. App. 61, 497 S.E.2d 642 (1998); *State v. Johnson*, 246 Ga. 654, 272 S.E.2d 321 (1980).

Testimony that a defendant engaged in other criminal transactions is prejudicial to the defendant in the case for which the defendant is on trial, not because it has no probative value but because it has too much, as tending to indicate that defendant is of a criminal bent of mind and therefore more likely than the average citizen to have committed the act of which defendant is accused. *Cardell v. State*, 119 Ga. App. 848, 168 S.E.2d 889 (1969).

General rule is that in a criminal trial evidence which in any manner shows or tends to show that the accused has committed other criminal acts is irrelevant and inadmissible as that evidence tends to place the accused's character into evidence. *Perry v. State*, 158 Ga. App. 349, 280 S.E.2d 390 (1981); *Bankston v. State*, 159 Ga. App. 342, 283 S.E.2d 319 (1981), cert. denied, 454 U.S.

1154, 102 S. Ct. 1026, 71 L. Ed. 2d 311 (1982).

Proof of other crimes is never admissible (except in cases when the defendant has personally put the defendant's character in issue) where its chief or only probative value consists in showing that the defendant is, by reason of the defendant's bad character, more likely to have committed the crime than the defendant otherwise would have been. To admit such evidence, it must have relevancy and probative value from some other point of view. *Jones v. State*, 159 Ga. App. 634, 284 S.E.2d 651 (1981).

Similar transaction evidence was properly admitted under O.C.G.A. § 24-2-2 to show that the defendant had committed a prior armed robbery of a retail establishment when the defendant was unable to support oneself and needed money. *Johnson v. State*, 277 Ga. App. 41, 625 S.E.2d 411 (2005).

Evidence of defendant's drug use. — Witnesses' brief testimony that the defendant would sell cocaine to the witnesses because of a prior relationship, was necessary to explain why the witnesses were approached to make the purchase, and why neither an undercover officer nor a confidential informant could accompany one of the witnesses to the defendant's residence, and the trial court did not abuse the court's discretion in admitting the testimony. *Smith v. State*, 278 Ga. App. 315, 628 S.E.2d 722 (2006).

In a drug case when cocaine, marijuana, and a scale were found in the car the defendant was driving, and the defendant gave police a false name, the trial court did not err in admitting evidence of similar transactions; in all of the transactions, the defendant either possessed cocaine or was in direct proximity to cocaine, the defendant possessed scales in two of the other offenses, and in all but one of the offenses the defendant gave the police a false name. *Jackson v. State*, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, 2007 Ga. LEXIS 521 (Ga. 2007).

In a prosecution for two counts of possession of less than one ounce of marijuana, evidence of the defendant's three prior convictions for the same offense was properly admitted. Given that the defendant denied possessing marijuana in two of the prior cases and in the case at bar, the prior transactions were probative of the defendant's

bent of mind and course of conduct. *Neal v. State*, 297 Ga. App. 223, 676 S.E.2d 864 (2009).

Admission of similar transaction evidence in a case charging the defendant with possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and obstructing or hindering law enforcement officers, O.C.G.A. § 16-10-24, was proper because, in both the similar transaction and the incident leading to the charges being tried, the defendant was arrested in possession of cocaine and “sale-sized” baggies after seeking to avoid police; the trial court also gave an instruction that the similar transaction evidence was limited to the purpose of showing the defendant’s bent of mind in committing the charged offenses. *Cotton v. State*, 297 Ga. App. 664, 678 S.E.2d 128 (2009).

Trial court properly admitted similar transaction evidence to show a defendant’s course of conduct and intent in the defendant’s trial for public indecency and sexual battery as in each of the similar transactions, defendant approached a woman previously unknown to the defendant in a public place, attempted to talk to the woman, and then engaged in sexually inappropriate behavior; in the sexual battery incidents and one similar transaction, the defendant either bit or licked the victims on their buttocks while the victims were shopping and in the public indecency incident and two of the similar transactions, the defendant exposed oneself. *Harmon v. State*, 281 Ga. App. 35, 635 S.E.2d 348 (2006), cert. dismissed, 2007 Ga. LEXIS 137 (Ga. 2007).

In a marijuana possession case involving a stop of a car in which the defendant was a passenger, the trial court did not err under O.C.G.A. § 24-2-2 in permitting evidence that the defendant was previously stopped for speeding and a significant amount of marijuana was found in the car; since the defendant’s constructive possession was at issue, the state was permitted to use the prior offense to show the defendant’s intent, bent of mind, and course of conduct, the incidents occurred approximately a year apart and involved similar conduct, and the probative value of the evidence was not outweighed by any unfair prejudice that resulted. *Curtis v. State*, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, 2007 Ga. LEXIS 203 (Ga. 2007).

With regard to a defendant’s conviction for the malice murder of the defendant’s husband, the trial court did not err in admitting evidence of a similar transaction as to the defendant poisoning a boyfriend with antifreeze via being fed green Jell-O because the defendant was intimate with both victims; both men went to the hospital complaining of flu-like symptoms soon before each man died; both men died from the unique cause of antifreeze poisoning; the defendant was the last person to see either man alive; both men died soon after the defendant served them Jell-O; and the defendant, who had financial problems before the deaths of both men, collected substantial money in connection with each man’s death. *Turner v. State*, 281 Ga. 647, 641 S.E.2d 527 (2007).

When a defendant was charged with violating O.C.G.A. § 16-8-60(b), the admission of similar crimes evidence did not violate due process; evidence that following the defendant’s arrest on the Georgia charge, the defendant had been arrested in Florida for possession of illegally reproduced recordings was appropriate for showing scheme and course of conduct, and the Florida act was sufficiently similar to the Georgia charges. *Hayward-El v. State*, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

Guilty plea to earlier offense properly admitted. — In the malice murder and armed robbery case, the trial court did not err under O.C.G.A. § 24-2-2 in admitting into evidence the defendant’s guilty plea to an earlier robbery; the crimes were close in time, two years apart, each involved the morning robbery of a lone male at a convenience store, and in both robberies, the robbery was accomplished with a weapon other than a firearm, a borrowed vehicle was used, money was taken from the register, and the employee was forcibly moved around the store. *Daniels v. State*, 281 Ga. 226, 637 S.E.2d 403 (2006).

Conviction of sex offense admissible in failure to register as offender trial. — Defendant’s motion to sever the failure to register as a sex offender counts under former O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the defendant was not entitled to severance as a matter of right since the charges involved a

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

series of acts which were connected together; (2) the case was not so complex as to impair the jury's ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to sever the failure to register as a sex offender counts was proper as the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt and evidence of the conduct underlying the defendant's conviction of a sex offense that was admissible as a similar transaction. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Trial court did not err in admitting into evidence a no contest plea and in "making reference" to the plea with regard to the similar transaction evidence because the defendant's failure to object to the introduction of the evidence precluded review of the issue on appeal; further, the plea was admissible to show a conviction for purposes of the defendant's alleged failure to register as a sex offender under former O.C.G.A. § 42-1-12 and the jury was permitted to consider the plea as similar transaction evidence. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Prior difficulty with witness properly admitted. — In the defendant's criminal case, the trial court did not err in admitting into evidence pursuant to O.C.G.A. § 24-2-2 a prior difficulty the defendant previously had with one of the witnesses in the case; the evidence at issue was the defendant's performance of sexual acts on a juvenile victim prior to the acts that were alleged in the indictment, and this was relevant to show the defendant's motive, intent, and bent of mind in committing the acts against the victim for which the defendant was indicted. *Clark v. State*, 282 Ga. App. 248, 638 S.E.2d 397 (2006).

Admission of prior conviction for indecent exposure. — In a sexual battery case, it was proper to admit similar transaction evidence of a prior conviction for indecent exposure. Although the present incident involved the defendant groping the victim's breast, during both incidents, the defendant commented on the victim's appearance,

asked the victim to look at the defendant, and began masturbating in the victim's presence; the proof of the prior incident tended to establish the charged offense and was also relevant to rebut the defendant's claim that it was the victim who had exposed the victim's breasts to the defendant by showing the defendant's course of conduct, bent of mind, and scheme. *Romo v. State*, 288 Ga. App. 237, 653 S.E.2d 832 (2007).

Trial court properly admitted similar transaction evidence: in both incidents, which occurred seven months apart, the defendant had a verbal disagreement with young unarmed males, demanded that they leave the premises, and when they refused to comply, retrieved a particular make of weapon and fired it at or near the victims, then calmly walked inside. *Johnson v. State*, 289 Ga. App. 435, 657 S.E.2d 333 (2008).

When defendant was accused of robbing an auto parts store, similar transaction evidence was properly admitted; the evidence showed defendant's participation in nine other armed robberies of retail establishments in the same metropolitan area over a seven-month period, including six robberies at five other auto parts stores. *Wyche v. State*, 291 Ga. App. 165, 661 S.E.2d 226 (2008), cert. denied, 2008 Ga. LEXIS 914 (Ga. 2008).

Defendant was charged with raping a mentally retarded 27-year-old. Evidence that two years earlier the defendant was convicted of taking indecent liberties with an eight- and an 11-year-old child was properly admitted as the evidence was probative to show the defendant's lustful disposition toward persons of limited mental capacity, and the evidence's relevance outweighed any prejudice. *Kent v. State*, 294 Ga. App. 134, 668 S.E.2d 442 (2008).

In a prosecution for felony murder, armed robbery, and burglary, it was not error to admit evidence of an armed robbery that the defendant and the codefendant committed two weeks before the charged crimes as the trial court's conclusion that the two crimes were sufficiently similar was not clearly erroneous. *Jackson v. State*, 284 Ga. 484, 668 S.E.2d 700 (2008).

In a malice murder prosecution when the victim was violently stabbed and severely beaten, evidence that an officer saw the defendant violently attack an acquaintance

as the result of a minor disagreement was properly submitted as a similar transaction to show the defendant's bent of mind and course of conduct. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009).

Incident occurring eight years ago admitted. — Similar transaction evidence of an eight-year-old incident in which the defendant robbed two victims at gunpoint was not too remote in time or dissimilar to the armed robbery and aggravated assault charges the defendant was on trial for, and was thus properly admitted to show course of conduct, bent of mind, motive, and identity. *Wallace v. State*, 295 Ga. App. 452, 671 S.E.2d 911 (2009).

Trial court properly allowed similar transaction evidence in the defendant's trial for malice murder, O.C.G.A. § 16-5-1(b), to show course of conduct; the defendant, who was working as a security officer at a government building was charged with attacking a coworker without provocation. The state was permitted to present evidence of a similar transaction from eight years earlier in which the defendant, wearing the uniform of a security guard, ran down the stairs of a train station to the platform, grabbed a man awaiting the arrival of a train, beat and kicked the victim, threw the victim on the train tracks, and when the victim climbed back on the platform, the defendant resumed beating and kicking the victim until transit police arrived. *Hicks v. State*, 285 Ga. 386, 677 S.E.2d 111 (2009).

Eleven-year lapse does not render prior similar offense inadmissible. — Eleven-year lapse of time between defendant's similar prior sex offense and the one on trial did not itself render evidence of the prior offense inadmissible. It was one of the more important factors in considering admissibility; once it crossed that threshold, it thereafter affected the weight and credibility of the testimony. *Hill v. State*, 183 Ga. App. 404, 359 S.E.2d 190 (1987).

Trial court did not abuse the court's discretion in admitting defendant's conviction for criminal attempt, second-degree sexual assault, in which the victim was over 25 years old, but was developmentally disabled and mildly retarded; this evidence was admissible in defendant's trial for child molestation, attempted child molestation, enticing a child for indecent purposes, and statutory

rape to show course of conduct, bent of mind, lustful disposition, and modus operandi and as tending to corroborate the child victims' testimony; the conviction, which occurred almost 11 years earlier, was not too remote to be admissible. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Testimony from other rape victims. — In a rape prosecution, similar transaction testimony from the defendant's prior rape victims was properly admitted, as the testimony was probative of the defendant's course of conduct, intent, modus operandi, and lustful disposition, and corroborated the victim's testimony that the defendant claimed to have previously raped persons that "nobody would believe." *Sanders v. State*, 297 Ga. App. 897, 678 S.E.2d 579 (2009).

When the defendant was accused of touching the "private part" of a 12-year-old girl, it was proper to admit evidence of a 22-year-old woman's rape. Both victims were females with whom the defendant had a previous good relationship and over whom he had authority, and both incidents occurred in the middle of the night when the victims were not fully alert or fully capable of resisting; a mere difference in the victims' ages would not render a prior transaction inadmissible. *Walley v. State*, 298 Ga. App. 483, 680 S.E.2d 550 (2009).

Exceptions to prohibition of evidence of other crimes. — When the extraneous crime forms part of the *res gestae*, or is one of a system of mutually dependent crimes, or is evidence of guilty knowledge, or may bear upon the question of the identity of the accused or articles connected with the offense, or is evidence of prior attempts by the accused to commit the same offense upon the victim as that for which the defendant stands charged, or when the proof of the extraneous crime tends to prove malice, intent, motive, or the like, then its admission as evidence may be proper. *Cawthon v. State*, 119 Ga. 395, 46 S.E. 897 (1904); *Wilson v. State*, 173 Ga. 275, 160 S.E. 319 (1931); *Williams v. State*, 51 Ga. App. 319, 180 S.E. 369 (1935).

When evidence of other criminal transactions is a part of the *res gestae* or tends to show motive, or to show a course of conduct pointing toward and leading to the crime or to the concealment of the crime or the

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

identity of the perpetrator thereof, such evidence is admissible as an exception to the general rule which makes evidence of other criminal transactions inadmissible under most circumstances. *Richards v. State*, 157 Ga. App. 601, 278 S.E.2d 63 (1981).

Evidence of another crime is admissible when it is part of a course of criminal conduct if it is a part of the *res gestae*. *Whitfield v. State*, 159 Ga. App. 398, 283 S.E.2d 627 (1981).

Independent crimes are admissible to show motive, intent, plan, identity, bent of mind, or course of conduct. In order for these independent acts to be admissible it must be shown that the defendant was the perpetrator of the independent crime and that there is sufficient similarity of the former independent crime that it tends to prove the latter crime. *Weathersby v. State*, 262 Ga. 126, 414 S.E.2d 200 (1992).

Explanation of why officer investigated defendant. — Because evidence of defendant's prior crimes was relevant to explain why a police officer investigated defendant, the trial court did not err in admitting the evidence. *Smith v. State*, 274 Ga. App. 852, 619 S.E.2d 358 (2005).

Prior crimes committed by defendant, including the murder of a store owner and an armed robbery, were properly admitted, not as similar transactions, but as evidence to show the motive, course of conduct, and bent of mind; moreover, evidence of the robbery was sufficiently similar to the current armed robbery charges. *Grimes v. State*, 280 Ga. 363, 628 S.E.2d 580 (2006).

Admission of evidence of defendant's prior misdemeanor convictions was harmless error. — Trial court did not commit reversible error when the court: (1) granted the state's motion in limine prohibiting admission of evidence that another person confessed to the crime; (2) permitted a police officer to explain the officer's conduct under O.C.G.A. § 24-3-2; and (3) allowed the state to introduce evidence of defendant's prior misdemeanor convictions under O.C.G.A. §§ 24-2-2 and 24-9-20(b); thus, defendant failed to show that counsel's trial strategies on these issues constituted ineffective assistance of counsel. *Harris v.*

State, 279 Ga. 522, 615 S.E.2d 532 (2005).

Admission of irrelevant evidence of affair did not require mistrial. — During a trial for felony murder while in the commission of cruelty to a child, evidence that a defendant's romantic partner did not know that the defendant was married was irrelevant; although the defendant's objection to the admission of the evidence was improperly overruled, the defendant's motion for a mistrial was properly denied because a mistrial was not mandated. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

Testimony as to circumstances connected with the accused's arrest is admissible even though the testimony incidentally shows the commission of another crime. *Humphries v. State*, 154 Ga. App. 596, 269 S.E.2d 90 (1980); *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980); *Woodard v. State*, 155 Ga. App. 533, 271 S.E.2d 671 (1980).

When evidence is relevant for the purpose of showing the circumstances of the arrest, the evidence will not be excluded because the evidence incidentally shows the commission of another crime. *Bryan v. State*, 157 Ga. App. 635, 278 S.E.2d 177 (1981).

Testimony that an officer had gone to defendant's home to execute an arrest warrant for a probation violation explained the officer's presence at defendant's home and the officer's observation of defendant's use of marijuana; the testimony did not put defendant's character in issue and was, therefore, admissible. *Jones v. State*, 268 Ga. App. 246, 601 S.E.2d 763 (2004).

Because the police found weapons in defendant's car, after obtaining consent to search, when the police arrested defendant for stalking, the evidence was properly admitted in defendant's subsequent trial for burglary and aggravated assault to show the circumstances connected with the stalking arrest. *Blackwell v. State*, 274 Ga. App. 579, 618 S.E.2d 190 (2005).

When extreme prejudice results. — Statement volunteered by police officer, witness for the state, on cross-examination, that the defendant was apprehended after being shot while attempting to break into another house, was so prejudicial that the mere statement by the court that the jury was not to consider it did not cure the error, and a reversal was demanded on this ground. *Felton v. State*, 93 Ga. App. 48, 90 S.E.2d 607 (1955).

Trial for escape. — General rule which prohibits reference to other crimes by the accused is not fully applicable to a trial for escape, which by its nature alludes to a prior act resulting in incarceration or conviction; evidence of the escapee's original crime is often an unavoidable aspect of the state's proof with regard to the lawfulness of confinement. *Johnson v. State*, 188 Ga. 771, 4 S.E.2d 639 (1939); *Carter v. State*, 155 Ga. App. 840, 273 S.E.2d 417 (1980).

In trial for escape and other offenses, it was not error to introduce record of prior conviction to show lawfulness of confinement without a limiting instruction. *Greene v. State*, 155 Ga. App. 222, 270 S.E.2d 386 (1980).

Conviction relied upon must have occurred prior to the escape. — When a conviction does not occur prior to the escape and thus is not relied upon to establish the felony grade of offense, reference to the conviction is unnecessary and is error. *Carter v. State*, 155 Ga. App. 840, 273 S.E.2d 417 (1980).

Proof of other crime required. — In order to justify the admission of evidence relating to an independent crime committed by the accused, it is absolutely essential that there should be evidence establishing the fact that the independent crime was committed by the accused, and satisfactorily connecting that crime with the offense for which the accused is indicted. *Robinson v. State*, 62 Ga. App. 355, 7 S.E.2d 758 (1940); *Johnson v. State*, 152 Ga. App. 624, 263 S.E.2d 509 (1979); *Albert v. State*, 152 Ga. App. 708, 263 S.E.2d 685 (1979); *Sweeny v. State*, 152 Ga. App. 765, 264 S.E.2d 260 (1979); *Rhodes v. State*, 153 Ga. App. 306, 265 S.E.2d 110 (1980); *Smith v. State*, 154 Ga. App. 497, 268 S.E.2d 714 (1980); *Haygood v. State*, 154 Ga. App. 633, 269 S.E.2d 480 (1980); *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980); *Rakestraw v. State*, 155 Ga. App. 563, 271 S.E.2d 696 (1980); *State v. Johnson*, 246 Ga. 654, 272 S.E.2d 321 (1980).

Evidence of the commission of independent crimes by the accused may be admitted even when the defendant is acquitted of the other offense. *Albert v. State*, 152 Ga. App. 708, 263 S.E.2d 685 (1979), conviction reversed, *Albert v. Montgomery*, 732 F.2d 865 (11th Cir. 1984) (holding that the principle of collateral estoppel prevents the introduc-

tion for any purpose of evidence of crime of which a defendant has been acquitted).

Jury is to receive evidence of the commission of previous crimes only for the purposes specified, and not for the purpose of determining by this alone the guilt of the accused. *Fitzgerald v. State*, 52 Ga. App. 33, 182 S.E. 77 (1935).

In a prosecution for vehicular homicide and driving under the influence (DUI), the trial court properly allowed evidence regarding the defendant's prior DUI, as the defendant had pled guilty to that offense, the blood test results appeared on the uniform traffic citation, a certified copy of the accusation and plea was entered into evidence, and an officer testified that the defendant was the person arrested on that charge. *Hurston v. State*, 278 Ga. App. 472, 629 S.E.2d 18 (2006).

Although the modification of a defendant's first offender status by the Georgia Crime Information Center was authorized by O.C.G.A. § 42-8-65, it was not a conviction because only the trial court that imposed first offender probation was authorized to revoke that status. Thus, as the defendant was not shown to have been adjudicated guilty of the prior crimes, the state improperly impeached the defendant with evidence of the defendant's first offender record. *Lee v. State*, 294 Ga. App. 796, 670 S.E.2d 488 (2008).

Criminal confession is not rendered inadmissible because the language used therein indicates that the accused had committed another and separate offense. *Dampier v. State*, 245 Ga. 882, 268 S.E.2d 349, cert. denied, 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161 (1980).

Mere accusation or indictment insufficient. — Mere introduction of an accusation with pleas of guilty thereon, embracing the same crime for which defendant is on trial, without proof of details as to the manner in which previous acts were committed, does not constitute similarity of transactions so connected as to reveal knowledge, plan, or system, and therefore the court erred in admitting, over objections, the former accusation and plea of guilty of defendant, charged with possession of non-taxpaid whiskey, to a previous charge of the same offense. *Chambers v. State*, 76 Ga. App. 269, 45 S.E.2d 724 (1947); *Waters v. State*, 82 Ga.

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

App. 608, 61 S.E.2d 794 (1950).

Use of form to pose prohibited question.

— It is error requiring the grant of a new trial for the state to put the plaintiff's character in issue by using a form completed by the plaintiff to ask a question which would otherwise be prohibited, and then introducing into the evidence the defendant's entire past criminal record to impeach the answer to that question. *Mikle v. State*, 236 Ga. 748, 225 S.E.2d 275 (1976).

Res gestae. — Generally, on a prosecution for a particular crime, evidence of another and distinct crime wholly independent from that for which one is on trial is inadmissible; but there are exceptions to this rule: one is, if the separate crime was committed as a part of the same transaction as that for which the accused is being tried, and forms a part of the *res gestae*. *Bailey v. State*, 214 Ga. 409, 105 S.E.2d 320 (1958) (abandonment); *Williams v. State*, 223 Ga. 773, 158 S.E.2d 373 (1967) (rape); *Blanton v. State*, 150 Ga. App. 559, 258 S.E.2d 174 (1979) (prostitution); *Mosley v. State*, 150 Ga. App. 802, 258 S.E.2d 608 (1979) (armed robbery); *Bradley v. State*, 154 Ga. App. 333, 268 S.E.2d 388 (1980) (burglary); *Hayes v. State*, 199 Ga. 251, 34 S.E.2d 97 (1945) (robbery); *Durham v. State*, 243 Ga. 408, 254 S.E.2d 359 (1979) (rape and murder); *Deshazier v. State*, 155 Ga. App. 526, 271 S.E.2d 664 (1980) (vehicular homicide).

When transactions involving other crimes and the alleged bad character of the defendant are so connected in time and event as to be part of the same transaction as that for which defendant is being tried, those transactions are admissible as a clear exception to the general rule of inadmissibility of other transactions. *Kennedy v. State*, 193 Ga. App. 784, 389 S.E.2d 350 (1989).

Three robberies of drive-through restaurants located within a short distance of each other occurred in less than a 24-hour period and the suspect walked up to the drive-through window wearing a green army jacket and using a blue car, were sufficiently similar and constituted part of the *res gestae*; therefore, the trial court did not err in admitting the evidence. *Houston v. State*, 270 Ga. App. 456, 606 S.E.2d 883 (2004).

Since the defendant produced a prison identification card voluntarily, and volunteered information about a prior conviction when a police officer asked if the defendant had a driver's license, the evidence was admissible as part of the *res gestae* despite its prejudicial nature. *Bertholf v. State*, 298 Ga. App. 612, 680 S.E.2d 652 (2009).

Connection between crimes in mind of actor. — To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose the actor intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that the actor who committed the one must have done the other. *Loughridge v. State*, 181 Ga. 261, 182 S.E. 12 (1935); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955); *Kelley v. State*, 98 Ga. App. 324, 105 S.E.2d 798 (1958).

Logical connection between crimes. — When one is on trial charged with the commission of a crime, proof of a distinct and independent offense is never admissible, unless there is some logical connection between the two, from which it can be said that proof of the one tends to establish the other. *Wilson v. State*, 173 Ga. 275, 160 S.E. 319 (1931); *Scott v. State*, 46 Ga. App. 213, 167 S.E. 210 (1932); *McMichen v. State*, 62 Ga. App. 50, 7 S.E.2d 749 (1940); *Robinson v. State*, 62 Ga. App. 355, 7 S.E.2d 758 (1940); *Chambers v. State*, 76 Ga. App. 269, 45 S.E.2d 724 (1947); *Fowler v. State*, 82 Ga. App. 197, 60 S.E.2d 473 (1950); *Gilstrap v. State*, 90 Ga. App. 12, 81 S.E.2d 872 (1954); *Spinks v. State*, 92 Ga. App. 878, 90 S.E.2d 590 (1955); *Bailey v. State*, 214 Ga. 409, 105 S.E.2d 320 (1958); *Cardell v. State*, 119 Ga. App. 848, 168 S.E.2d 889 (1969); *Nicholson v. State*, 125 Ga. App. 24, 186 S.E.2d 287 (1971); *Wooten v. State*, 125 Ga. App. 635, 188 S.E.2d 409 (1972); *Lee v. State*, 154 Ga. App. 562, 269 S.E.2d 65 (1980); *Haygood v. State*, 154 Ga. App. 633, 269 S.E.2d 480 (1980); *Carroll v. State*, 155 Ga. App. 514, 271 S.E.2d 650 (1980); *Rakestraw v. State*, 155 Ga. App. 563, 271 S.E.2d 696 (1980); *State v. Johnson*, 246 Ga. 654, 272 S.E.2d 321 (1980); *Paxton v. State*, 160 Ga. App. 19, 285 S.E.2d 741 (1981).

Mere fact that the defendant has recently committed a crime of the same sort as that for which defendant is on trial establishes no probative connection between the two crimes. *Cardell v. State*, 119 Ga. App. 848, 168 S.E.2d 889 (1969).

If the evidence be so dubious that the judge does not clearly perceive the connection between the crime with which the defendant is charged and another offense, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt. *Robinson v. State*, 62 Ga. App. 355, 7 S.E.2d 758 (1940).

Evidence of the commission of one crime is not admissible upon the trial of the defendant for another crime, when the sole purpose is to show that the defendant is guilty of such other crime. *Honea v. State*, 181 Ga. 40, 181 S.E. 416 (1935); *Loughridge v. State*, 181 Ga. 261, 182 S.E. 12 (1935); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936); *Harrison v. State*, 60 Ga. App. 610, 4 S.E.2d 602 (1939).

Only separate crimes which are admissible are those that are either similar or logically connected to the crime for which defendant is being tried, and crimes which are not similar or which are not logically connected to the crime for which defendant is being tried should be excluded from evidence; proof of crimes which are similar or are closely connected to the crime charged does tend to establish the crime charged. *Bissell v. State*, 157 Ga. App. 711, 278 S.E.2d 415 (1981).

There are exceptions to the "other crimes" rule when there is sufficient logical connection between the independent crime and the offense charged so that it can be said that proof of the former tends to prove the latter. *Perry v. State*, 158 Ga. App. 349, 280 S.E.2d 390 (1981); *Kilgore v. State*, 176 Ga. App. 121, 335 S.E.2d 465 (1985).

When there is no question that the modus operandi of a past burglary for which defendant had been convicted is similar to that of the burglary for which the defendant is on trial, a logical connection exists between the two offenses sufficient to render the prior offense relevant and admissible for the purpose of establishing the defendant's criminal intent in the case for which defendant is on trial. *Scott v. State*, 162 Ga. App. 541, 292 S.E.2d 125 (1982).

In defendant's trial for forgery and racketeering for selling fake badges for a golf tournament to a ticket agency, the trial court did not abuse the court's discretion in admitting similar transaction evidence because all of the similar transactions were used, not to show identity, but to show bent of mind and course of conduct as: (1) four of the five transactions involved forgeries through which defendant appropriated the checks of other people and attempted to profit from those checks and at issue was whether defendant attempted to profit from badges that were constructed to resemble those created by a golf course; and (2) the final transaction even involved a scheme wherein defendant represented to potential buyers that defendant had golf tournament badges to sell to them, which defendant never delivered. With respect to the similarity requirement for admitting evidence of prior crimes, there can be substantial variation of circumstances when there exists a logical connection between crimes which are essentially dissimilar, and the issue is whether the extrinsic transactions are relevant to the issues in the trial of the case. When similar transaction evidence is being introduced to prove motive, intent, or bent of mind, it requires a lesser degree of similarity to meet the test of admissibility than when such evidence is being introduced to prove identity. *Davis v. State*, 264 Ga. App. 128, 589 S.E.2d 700 (2003).

Trial court did not err in ruling that similar transaction evidence was admissible because the ex-wife's testimony closely paralleled that of the victim, defendant's ex-girlfriend; in both cases defendant violated a restraining order, called the victim names, picked on bodily faults, and threatened both the victim and the victim's children. *Maskivish v. State*, 276 Ga. App. 701, 624 S.E.2d 160 (2005).

In a prosecution for child molestation, aggravated child molestation, and statutory rape allegedly committed by the defendant against three of the defendant's children, testimony from one of the defendant's other sons concerning similar transactions committed against that son was properly admitted in order to show the defendant's bent of mind and lustful disposition towards the defendant's own children. *McCoy v. State*, 278 Ga. App. 492, 629 S.E.2d 493 (2006).

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

Admission of evidence of a defendant's theft of another vehicle as similar transaction evidence to show course of conduct, intent, and identity was not an abuse of discretion since, as in the present case, the defendant stole the other car from a salesman during a test drive with the use of a weapon and then forced the salesman from the car next to a freeway exit ramp. *Mullins v. State*, 280 Ga. App. 689, 634 S.E.2d 850 (2006).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — While it is the general rule that upon the trial of a person for a criminal offense, other and distinct criminal transactions cannot be given in evidence against the defendant, yet, according to the weight of authority, evidence of other transaction may be received as tending to show motive or intent, when the transactions are so connected in time and similar in their other relations that the same motive may reasonably be imputed to all. *Bates v. State*, 18 Ga. App. 718, 90 S.E. 481 (1916); *Hales v. State*, 250 Ga. 112, 296 S.E.2d 577 (1982).

Proof of another offense is admissible on the trial of a defendant charged with the commission of a crime even though such evidence incidentally places the defendant's character in issue, when evidence of such other crime tends to show identity, motive, malice, intent, plan, scheme, bent of mind, or course of conduct. *Wilson v. State*, 173 Ga. 275, 160 S.E. 319 (1931); *Scott v. State*, 46 Ga. App. 213, 167 S.E. 210 (1932); *Phillips v. State*, 51 Ga. App. 675, 181 S.E. 233 (1935); *Honea v. State*, 181 Ga. 40, 181 S.E. 416 (1935); *Loughridge v. State*, 181 Ga. 261, 182 S.E. 12 (1935); *Fitzgerald v. State*, 52 Ga. App. 33, 182 S.E. 77 (1935); *Gray v. State*, 52 Ga. App. 209, 182 S.E. 862 (1935); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936); *Bennings v. State*, 53 Ga. App. 218, 185 S.E. 370 (1936); *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1937); *Hunter v. State*, 188 Ga. 215, 3 S.E.2d 729 (1939); *Heller v. State*, 60 Ga. App. 552, 4 S.E.2d 413 (1939); *McMichen v. State*, 62 Ga. App. 50, 7 S.E.2d 749 (1940); *Robinson v. State*, 62 Ga. App. 355, 7 S.E.2d 758 (1940); *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct.

76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976); *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944); *Bell v. State*, 71 Ga. App. 430, 31 S.E.2d 109 (1944); *Chambers v. State*, 76 Ga. App. 269, 45 S.E.2d 724 (1947); *Gossett v. State*, 203 Ga. 692, 48 S.E.2d 71 (1948), appeal dismissed, 214 Ga. 840, 108 S.E.2d 272 (1959); *Anderson v. State*, 206 Ga. 527, 57 S.E.2d 563 (1950); *Mims v. State*, 207 Ga. 118, 60 S.E.2d 373 (1950); *Fowler v. State*, 82 Ga. App. 197, 60 S.E.2d 473 (1950); *Crawford v. State*, 211 Ga. 166, 84 S.E.2d 354 (1954); *Lyles v. State*, 215 Ga. 229, 109 S.E.2d 785 (1959); *Hargett v. State*, 121 Ga. App. 157, 173 S.E.2d 266 (1970); *Nicholson v. State*, 125 Ga. App. 24, 186 S.E.2d 287 (1971); *McNeal v. State*, 228 Ga. 633, 187 S.E.2d 271 (1972); *Overton v. State*, 230 Ga. 830, 199 S.E.2d 205 (1973); *Bloodworth v. State*, 233 Ga. 589, 212 S.E.2d 774 (1975); *Davis v. State*, 233 Ga. 638, 212 S.E.2d 814 (1975); *Lofton v. State*, 137 Ga. App. 323, 223 S.E.2d 727, aff'd, 237 Ga. 275, 227 S.E.2d 327 (1976); *Lloyd v. State*, 139 Ga. App. 625, 229 S.E.2d 106 (1976); *Moss v. State*, 144 Ga. App. 226, 240 S.E.2d 773 (1977); *Bunge v. State*, 149 Ga. App. 712, 256 S.E.2d 23 (1979); *Simmons v. State*, 152 Ga. App. 643, 263 S.E.2d 522 (1979); *Castleberry v. State*, 152 Ga. App. 769, 264 S.E.2d 239 (1979); *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980), cert. denied, 449 U.S. 891, 101 S. Ct. 253, 66 L. Ed. 2d 119 (1980); *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916 (1980), overruled on other grounds, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993); *Buffington v. State*, 153 Ga. App. 54, 264 S.E.2d 543 (1980); *Laws v. State*, 153 Ga. App. 166, 264 S.E.2d 700 (1980); *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980); *Pittman v. State*, 245 Ga. 453, 265 S.E.2d 592 (1980); *Smith v. State*, 154 Ga. App. 497, 268 S.E.2d 714 (1980); *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980); *Lee v. State*, 154 Ga. App. 562, 269 S.E.2d 65 (1980); *Felts v. State*, 154 Ga. App. 571, 269 S.E.2d 73 (1980); *Humphries v. State*, 154 Ga. App. 596, 269 S.E.2d 90 (1980); *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980); *Plemons v. State*, 155 Ga. App. 447, 270 S.E.2d 836 (1980); *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980); *Rakestraw v. State*, 155 Ga. App. 563, 271 S.E.2d 696 (1980); *State v. Johnson*, 246 Ga.

654, 272 S.E.2d 321 (1980); *Wallace v. State*, 246 Ga. 738, 273 S.E.2d 143 (1980); *Kendrick v. State*, 156 Ga. App. 27, 274 S.E.2d 78 (1980); *Bissell v. State*, 157 Ga. App. 711, 278 S.E.2d 415 (1981); *Ballweg v. State*, 158 Ga. App. 576, 281 S.E.2d 319 (1981); *Neal v. State*, 159 Ga. App. 450, 283 S.E.2d 671 (1981); *Hale v. State*, 159 Ga. App. 563, 284 S.E.2d 68 (1981).

Evidence of other crimes to prove malice, intent, and motive is admissible only when the act of which the accused stands charged would be legal in the absence of those elements. *Thomas v. State*, 239 Ga. 734, 238 S.E.2d 888 (1977).

Evidence of independent crimes will not be admitted unless its relevance to the issues at trial outweighs its prejudicial impact. *Tuzman v. State*, 145 Ga. App. 761, 244 S.E.2d 882 (1978).

Fact that defendant was not arrested and charged with the commission of the independent crimes does not render evidence of the commission of such crimes inadmissible for showing common motive, plan, or scheme. *Woodard v. State*, 155 Ga. App. 533, 271 S.E.2d 671 (1980).

When evidence of other crimes is admitted for the limited purpose of showing identity, plan, motive, scheme, bent of mind, or course of conduct, the other crimes need not be listed in the indictment as defendant is not on trial for those crimes. *State v. Johnson*, 246 Ga. 654, 272 S.E.2d 321 (1980).

Trial court did not err in admitting similar transaction testimony concerning defendant's use of keys to gain entry into the apartments of women, ostensibly for maintenance purposes, as the trial court's finding that the evidence was admissible to establish motive, intent, and course of conduct was not clearly erroneous. *Oliver v. State*, 276 Ga. 665, 581 S.E.2d 538 (2003).

Trial court did not err in admitting similar transaction evidence regarding a previous incident when defendant, while intoxicated, drove through a chain link fence and overturned a car as the evidence was relevant to defendant's bent of mind to get behind the wheel of a vehicle when it was less safe for defendant to do so, especially since defendant claimed in the present case that defendant had not been driving when the van defendant was in struck a guardrail, and the

evidence showed that defendant smelled of alcohol. *Lanning v. State*, 261 Ga. App. 480, 583 S.E.2d 160 (2003).

Trial court did not err in admitting evidence of other crimes defendant committed on the same day defendant robbed a convenience store as both of the similar crimes involved robberies of a female victim working alone at a convenience store on the same day, just as occurred with the indicted offense, and the clerks' descriptions of defendant's clothing and physical appearance in the similar crimes resembled those of defendant in the indicted offense; accordingly, sufficient circumstantial evidence connected defendant to the offenses and allowed for admission of the evidence of similar crimes. *Ferguson v. State*, 262 Ga. App. 28, 584 S.E.2d 618 (2003).

Admission of evidence that defendant committed a prior crime was proper pursuant to O.C.G.A. § 24-2-2 when the defendant was on trial for having pursued defendant's former girlfriend in defendant's car, threatening to kill her because they broke up, and shooting at her, and there was evidence from a prior crime that the defendant had taken the same type of action against another former girlfriend; the court found that such evidence was properly admitted in order to prove identity, course of conduct, intent, and motive because there was obvious similarity between the crimes and the methods in which the crimes were carried out. *Morris v. State*, 263 Ga. App. 115, 587 S.E.2d 272 (2003).

Admission of evidence of a prior attempted rape of a neighbor in defendant's rape trial involving a different victim was not an abuse of discretion since the evidence was admitted to show defendant's lustful disposition, to evince defendant's propensity to sexually assault women defendant knew, and to corroborate the victim's testimony of no consent; a finding that the probative value of the evidence outweighed the prejudicial effect of the evidence was implicit in the trial court's decision to admit the evidence. *Rowe v. State*, 263 Ga. App. 367, 587 S.E.2d 781 (2003).

When a prior victim testified as to the similarities between the prior victim's encounter with defendant and the victim's, the prior victim's evidence was properly admitted pursuant to Ga. Unif. Super. Ct. R.

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

31.3(B) to show defendant's bent of mind, intent, and course of conduct; any inconsistencies in the prior victim's testimony affected only the weight and credibility. *Williams v. State*, 264 Ga. App. 115, 589 S.E.2d 676 (2003).

Trial court did not abuse the court's discretion in admitting similar transaction evidence of a first car-jacking to show bent of mind, course of conduct, and identity since: (1) both incidents constituted car-jackings committed with a gun pointed at the victim; (2) the incidents occurred within six days of each other; (3) the first car-jacking involved a car of the same make and color as one used in the car-jacking that was being tried; (4) the victim of the first car-jacking positively identified defendant as the perpetrator of the first car-jacking; and (5) the testimony of the victim of the first car-jacking was sufficient to meet the elements of O.C.G.A. § 16-5-44.1(b). *Mullins v. State*, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Trial court did not err in admitting evidence of three similar transaction offenses in defendant's trial for robbery, hijacking a motor vehicle, and possession of a firearm by a convicted felon since the earlier incidents were sufficiently similar to show that defendant had a course of conduct and bent of mind to steal cars, particularly in a certain area, because: (1) on two prior occasions defendant was discovered driving stolen cars and was convicted of theft by receiving; and (2) as to the third similar transaction, a witness testified that a man showed the witness a gun and demanded that the witness give him the keys to a car, defendant was subsequently arrested and identified by the witness, and defendant was indicted for armed robbery and entered a guilty plea to the offense of robbery. *Cain v. State*, 268 Ga. App. 39, 601 S.E.2d 415 (2004).

Trial court did not err when the court admitted evidence of defendant's prior conviction for possession of cocaine with intent to distribute in defendant's current case in which defendant was charged with, *inter alia*, trafficking in cocaine as the evidence was admitted for the permissible purpose of showing defendant's bent of mind and course of conduct. *Kates v. State*, 271 Ga. App. 326, 609 S.E.2d 710 (2005).

Prejudicial impact of prior crimes evidence did not outweigh the probative value in defendant's fleeing or attempting to elude a police officer trial as the prior crimes evidence showed a pattern of running from police and of resisting arrest and was properly admitted to show course of conduct, bent of mind, and intent. *Mills v. State*, 273 Ga. App. 699, 615 S.E.2d 824 (2005).

Trial court did not err in admitting evidence of independent crimes to show identity, bent of mind, and course of conduct because the independent crimes and the charged crimes showed that defendant committed the burglaries with accomplices, that the defendant committed the burglaries during daylight hours, that defendant and the accomplices would choose a home to burglarize by driving around semi-rural areas until they found a home that looked empty and that "sat back" some distance from the street on which it was located, and that defendant used the brother's white van to commit the charged crimes and one of the independent crimes. *Denny v. State*, 280 Ga. 81, 623 S.E.2d 483 (2005).

Trial court did not abuse the court's discretion in finding an earlier transaction sufficiently similar to the one for which a defendant was on trial and in admitting the evidence as to the prior transaction to show course of conduct, intent, and *modus operandi*, as, while some aspects of the earlier crime differed from the one for which the defendant was on trial: (1) the victims in both instances were young women who were strangers to the defendant; (2) both incidents occurred at night, at or near a bar; (3) the defendant approached the women from behind, brandished a weapon, threatened to kill the victims, and caused the victims physical harm; (4) both times the defendant was dressed in camouflage pants and a dark shirt; and (5) while the prior incident occurred more than 15 years earlier, the defendant had been out of jail for just over a year after serving the defendant's sentence for the similar transaction and, thus, the lapse of time was not a significant factor. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

When the defendant was accused of the malice murder of the mother of defendant's child, the trial court did not err in admitting testimony about an earlier statement where

the defendant said that the defendant would have shot the victim and the victim's male companion had the defendant's gun not jammed; such evidence was proper to show motive, intent, and bent of mind. *Lowery v. State*, 282 Ga. 68, 646 S.E.2d 67 (2007), cert. denied, U.S. , 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007).

Introduction of certified copy of indictment proper. — In proving a prior offense for the purpose of proving identity, bent of mind, course of conduct, etc., it is proper to introduce a certified copy of the indictment and the plea or verdict of guilty. *Scott v. State*, 162 Ga. App. 541, 292 S.E.2d 125 (1982).

Standard for admitting evidence of prior crimes is well-settled: the state must show that: (1) it is introducing evidence of an independent offense or act for an appropriate purpose; (2) there is sufficient evidence to establish that an accused committed the independent offense or act; and (3) there is sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. *Cain v. State*, 268 Ga. App. 39, 601 S.E.2d 415 (2004).

Similar transaction evidence admissible. — Similar transaction evidence was properly admitted to show defendant's state of mind, knowledge, or intent because, in both crimes, defendant worked with an accomplice to force the victims to cooperate by threatening to shoot the victims, and both crimes were committed in a brazen manner during the daytime without any attempt to hide defendant's identity. *Pace v. State*, 272 Ga. App. 16, 611 S.E.2d 694 (2005).

Trial court did not abuse the court's discretion in admitting similar transaction evidence of defendants' actions with another teen-age girl, which did not result in a conviction, to show defendant's lustful disposition, course of conduct, bent of mind, and modus operandi in dealing with teenage girls and to corroborate the testimony of the child victims regarding defendant's behavior toward the victims. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Evidence of defendant's three prior convictions was properly admitted in defendant's entering an automobile trial as: (1) certified copies of the convictions were introduced and defendant was placed at the

scene of the prior crimes; (2) the prior offenses and the charged offenses all involved acts of entering an automobile during the early morning hours in downtown Savannah; (3) the crimes could be admitted to show bent of mind and course of conduct; and (4) the prejudicial impact of the similar transaction evidence did not outweigh the probative value. *Williams v. State*, 273 Ga. App. 213, 614 S.E.2d 834 (2005).

Similar transaction evidence of crimes against a rape victim was properly admitted for identification purposes in the defendant's trial for assault because the witness testimony, DNA evidence, and the discovery of the rape victim's possessions in the defendant's car tied the defendant to the sexual assaults and because the assailant in both cases hid the assailant's face with a dark-colored raincoat and used the same gun. *Lampkin v. State*, 277 Ga. App. 237, 626 S.E.2d 199 (2006).

Trial court did not err in admitting similar transaction evidence to show a modus operandi as a modus operandi was similar to "course of conduct" and the state sought to admit the similar transaction for the purpose of showing course of conduct, intent, motive, and bent of mind; while the earlier crime included a sexual assault and the crimes for which the defendant was being tried did not, the addition of a sexual component to the earlier crime did not subtract from the notable similarities. The trial court's statement that "the only reason that there (was) not a sexual content to this crime (was), well, we don't know what would have happened, and certainly the event was abruptly halted, so the ruling (stood)" was made out of the presence of the jury and could not have affected the verdict. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Differences between the state's proffer of similar transaction evidence and a witness's testimony at trial were insignificant and affected neither the admissibility of the similar transaction evidence, nor the outcome of the trial, in that: (1) the state proffered that the victims were walking behind a bar, but the witness testified that the victims had passed a bar and were near a restaurant; (2) the state proffered that the defendant showed the victims a gun, but the witness

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

testified that the witness saw the gun but not that the defendant showed the gun to the witness; and (3) the state proffered that the defendant forced both victims to remove all of their clothes, but the witness testified that the witness had to remove some of the witness's clothes. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

There was a sufficient connection between an earlier drug crime and the one at issue to support the admission of similar transaction evidence. In both instances defendant's vehicle was stopped on or near a certain interstate highway for driving in an unlawful manner, and upon each stop defendant consented to a search of defendant's vehicle and the search yielded cocaine; there was no doubt that defendant committed the prior act, as defendant confessed to it. *Buckholts v. State*, 283 Ga. App. 254, 641 S.E.2d 246 (2007).

When the defendant was charged with malice murder, felony murder, and cruelty to children, it was proper to admit similar transaction evidence about the defendant's violent acts toward the defendant's elementary-school-aged siblings and about the defendant's wife-beating; the evidence at issue dealt with the defendant's violent behavior toward family members residing in the same home, even those significantly younger than the defendant. *Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

In a trial for driving with a suspended license, the trial court did not improperly admit evidence of seven similar transactions; the similar transactions occurred in the same area and most at about the same time of day as the charged crime, two involved the same car, and all showed the defendant's bent of mind to drive with a suspended license. *Williams v. State*, 285 Ga. App. 190, 645 S.E.2d 676 (2007).

When there was evidence that the defendant performed an oral act on the vagina of the ten-year-old victim while she was sleeping in a camper, it was proper to admit evidence of an incident 14 years before when the defendant had taken a four-year-old into a bedroom and performed a similar oral act on her vagina; the lapse of 14 years did not

make the evidence inadmissible, and the incidents were sufficiently similar. *Boileau v. State*, 285 Ga. App. 221, 645 S.E.2d 577 (2007).

When the defendant pointed a gun at the victim twice after the victim flicked a cigarette that landed on the defendant's car seat, the trial court properly admitted similar transaction evidence that two days before the incident, the defendant pointed a gun at the chest of a teenager who was wearing a T-shirt with a message that the defendant did not like. *Moore v. State*, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

In a trial for arson, burglary, and malice murder, the trial court properly admitted similar transaction evidence of a fire at the defendant's former home to show motive and course of conduct; before each incident, the defendant acted in a suspicious manner with regard to the fire, both fires occurred at homes to which the defendant had access, and the defendant had incurred substantial debt before each fire and reaped a financial benefit as a result of each fire. *Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

In a sexual battery case involving a 13-year-old victim, the trial court properly admitted evidence of a similar transaction regarding a 12-year-old girl. The trial court found that both incidents involved girls of a similar age who developed some sort of romantic relationship with the defendant and that the incidents occurred at the same residence and at about the same time. *Engle v. State*, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

In a malice murder case, a voluntary manslaughter conviction was properly admitted as similar transaction evidence since in both cases defendant knew the victim and obtained the weapon from the victim, both incidents arose from arguments with the victim and resulted in the victim being struck or shot in the head, neither victim was able to defend against the attack, and in both cases the defendant attempted to conceal evidence. *Harvey v. State*, 284 Ga. 8, 660 S.E.2d 528 (2008).

In a murder and aggravated assault prosecution, the trial court properly admitted similar transaction evidence for the limited purposes of showing motive, state of mind, bent of mind, course of conduct, and plan or scheme, as the similar transaction and the

crimes for which the defendant was on trial occurred in very close proximity, in time and location, and each involved the defendant using a handgun to shoot an unsuspecting victim without provocation. *Abdullah v. State*, 284 Ga. 399, 667 S.E.2d 584 (2008).

In defendant's prosecution for, *inter alia*, aggravated child molestation, evidence that the defendant previously engaged in a similar pattern of grooming a nine-year-old victim by, *inter alia*, giving the victim expensive presents before eventually molesting the victim was properly admitted to show bent of mind, common scheme or plan, and *modus operandi*; any objection to that victim's recantation of the accusation at the time because of fear for the victim's mother only went to the weight and credibility of the victim's testimony rather than the testimony's admissibility. *Cannon v. State*, 296 Ga. App. 687, 675 S.E.2d 560 (2009).

Testimony of victim's sibling about unprosecuted offense in child molestation case permitted. — Trial court did not err in allowing similar acts testimony by the victim's half-sister in an aggravated sexual battery and child molestation trial. Although the half-sister did not allege penetration by the defendant, she explained that she awoke after he pulled at her shorts, and she described how the defendant fled across the room in much the same way that the victim testified that the defendant fled from her room when she stirred; furthermore, the fact that the half-sister did not speak out about the abuse prior to the victim's outcry did not warrant a determination that the trial court abused the court's discretion by allowing the half-sister's testimony. *Hilliard v. State*, 298 Ga. App. 473, 680 S.E.2d 541 (2009).

Evidence that defendant had previously transported marijuana. — Evidence that marijuana was found in the trunk of defendant's automobile supported the inference that the defendant had previously transported marijuana and was relevant to prove that defendant was predisposed to commit the crime for which the defendant was indicted and to which the defendant raised the defense of entrapment, so that the evidence was sufficient to withstand a relevancy objection. *Fancher v. State*, 190 Ga. App. 438, 378 S.E.2d 923 (1989).

Scheme defined. — Plan, scheme, device, design, etc., means a peculiar or distinctive

method of committing a crime which, if employed at another time by an accused, would tend to show the accused was the one who employed it this time. *Nicholson v. State*, 125 Ga. App. 24, 186 S.E.2d 287 (1971); *Hammitt v. State*, 183 Ga. App. 382, 359 S.E.2d 4, cert. denied, 183 Ga. App. 906, 359 S.E.2d 4 (1987).

Prior attempts by accused concerning same victim. — Testimony concerning a prior effort by an accused to commit the same crime upon the victim for which the accused is now charged is a long recognized exception to the general rule that evidence of prior crimes is inadmissible. *Baker v. State*, 245 Ga. 657, 266 S.E.2d 477 (1980); *Haygood v. State*, 154 Ga. App. 633, 269 S.E.2d 480 (1980).

Evidence of a subsequent successful conspiracy by defendant to murder her husband had a logical connection to the crime for which she was being tried, a separate conspiracy to murder him. Such evidence tends to show intent and state of mind, and certainly tends to establish conspiracy to murder the same victim. *Buffington v. State*, 171 Ga. App. 919, 321 S.E.2d 418 (1984).

Impeachment of defendant's specific testimony by contradictory evidence. — While the impeachment of a defendant's general credibility by proof of general bad character and of prior convictions is prohibited, impeachment of the specific testimony of a criminal defendant (e.g., "I never hurt nobody") may be accomplished by testimony that defendant did, in fact, hurt another, or by a certified copy of a conviction for a crime of physical violence. *Williams v. State*, 257 Ga. 761, 363 S.E.2d 535 (1988).

District attorney's reference to an indictment was an inappropriate means of impeaching, by contradictory evidence, defendant's statement that defendant had never hurt anyone. *Williams v. State*, 257 Ga. 761, 363 S.E.2d 535 (1988).

Exceptions to the general rule have been liberally extended in cases of sexual crimes. *Perry v. State*, 158 Ga. App. 349, 280 S.E.2d 390 (1981); *Neal v. State*, 159 Ga. App. 450, 283 S.E.2d 671 (1981).

Proof of crimes involving moral turpitude is admissible to impeach a witness who places the witness's character in issue through testimony given by the witness on direct examination. *Emmett v. State*, 199 Ga.

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

App. 650, 405 S.E.2d 707, cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991).

In order for evidence of independent crime to be admissible as a circumstance of an arrest, it must be relevant to the circumstances of the arrest, which circumstances must, in turn, be relevant to the crime for which the defendant is on trial. *Bryan v. State*, 157 Ga. App. 635, 278 S.E.2d 177 (1981).

Conduct of defendant before, during the time of, and after commission of a crime may be considered by the jury in establishing defendant's intention and defendant's participation in order to determine whether or not such intention and conduct were sufficient corroboration of the testimony of an accomplice to sustain a conviction. This may be done by circumstantial as well as by direct evidence. *Zuber v. State*, 248 Ga. 314, 282 S.E.2d 900 (1981).

Defense counsel's failure to object to evidence that a burglar alarm went off at the house where defendant was arrested shortly before the defendant was arrested was not ineffective assistance of counsel because even if this evidence improperly placed defendant's character into evidence, contrary to O.C.G.A. § 24-2-2, there was no reasonable probability that defendant would have been acquitted, given the strength of other evidence against the defendant. *Patterson v. State*, 274 Ga. App. 341, 618 S.E.2d 81 (2005).

Conduct by family members. — Trial court erred in allowing the state's attorney to cross-examine the defendant, who was accused of possession of marijuana, as to whether other members of defendant's family had "been in trouble for marijuana." *Hill v. State*, 176 Ga. App. 509, 336 S.E.2d 276 (1985).

Trial court did not abuse the court's discretion in curtailing defendant's cross-examination of the victim as to the victim's spouse's criminal activities since defendant argued that the victim might have been a participant in the criminal conduct and that, therefore, the victim's credibility would have to be tested against the victim's criminal conduct. *Bell v. State*, 265 Ga. App. 407, 593 S.E.2d 935 (2004).

Continuous course of conduct. — In a criminal prosecution, evidence of another crime is admissible when both crimes are part of a continuous course of conduct, closely connected in time, place, and manner of commission. *Putman v. State*, 251 Ga. 605, 308 S.E.2d 145 (1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984).

Two conditions imposed on admission of evidence of independent crimes. — Before evidence of independent crimes is admissible two conditions must be satisfied: first, there must be evidence that the defendant was in fact the perpetrator of the independent crime; second, there must be sufficient similarity or connection between the independent crime and the offense charged that proof of the former tends to prove the latter. *Bissell v. State*, 157 Ga. App. 711, 278 S.E.2d 415 (1981); *Paxton v. State*, 160 Ga. App. 19, 285 S.E.2d 741 (1981); *Milner v. State*, 180 Ga. App. 97, 348 S.E.2d 509 (1986).

Two conditions precedent to the admission of evidence relating to defendant's prior act of exposing oneself are met when first, the witness positively identified defendant as the perpetrator of the crime; second, there was sufficient similarity between the former incident and the latter incident that proof of the former tends to prove the latter. *Huckeba v. State*, 157 Ga. App. 795, 278 S.E.2d 703 (1981).

Length of time intervening between prior difficulty and present offense is only material as affecting the credibility and weight to be given such evidence. *Barnes v. State*, 157 Ga. App. 582, 277 S.E.2d 916 (1981).

Objection to admission of similar transaction evidence must be at trial. — Trial court properly denied defendant's motion for a new trial as defendant waived defendant's contentions that one of the similar transactions offered to show bent of mind and course of conduct was too remote in time, and that the similar transaction evidence was unduly prejudicial, as defendant failed to object on these grounds at trial. *Murphy v. State*, 263 Ga. App. 62, 587 S.E.2d 223 (2003).

Evidence of similar or connected sexual offenses against children is admissible in child molestation cases to corroborate the testimony of the victim as well as to show the lustful disposition of the defendant. *Sullivan*

v. State, 162 Ga. App. 297, 291 S.E.2d 127 (1982).

In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim's testimony, but the state must still make three affirmative showings: a proper purpose for the use of the evidence; sufficient proof that the defendant did, in fact, commit the independent act; and sufficient similarity or connection between the two incidents so that proof of the former tends to prove the latter. *Hostetler v. State*, 261 Ga. App. 237, 582 S.E.2d 197 (2003).

Since three prior incidents and the current child molestation charges against defendant all involved defendant going to locations frequented by children and exposing defendant's genitals to the children, the prior incidents were sufficiently similar to be admitted as similar transaction evidence in defendant's trial for child molestation; the fact that the prior incidents, unlike the current ones, did not involve touching the child victims did not mean that the prior incidents were not sufficiently similar to the current ones to be admitted, as there was no requirement that the prior crime or transaction had to be absolutely identical in every respect, and, in any event, the sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts perpetrated upon the children, was of sufficient similarity to make the evidence admissible. *Hostetler v. State*, 261 Ga. App. 237, 582 S.E.2d 197 (2003).

Evidence that defendant had perpetrated similar sexual offenses against children of the same age and gender using a similar method of operation was properly admitted because the requisite similarity between the independent offenses and the crimes charged was clearly established; a time lapse of about eight years went to the weight and credibility of the evidence. *Hogan v. State*, 272 Ga. App. 19, 611 S.E.2d 689 (2005).

Evidence of a prior sexual assault was properly admitted in defendant's child molestation trial as similar transaction evidence even though the trial court failed to make a determination as to the proper purposes for which the evidence was offered or as to defendant's identity as perpetrator of the independent act; the error was harmless as

the evidence was sufficient for the trial court to have concluded that the Williams (*Williams v. State*, 261 Ga. 640, 409 S.E.2d 649 (1991)) requirements were satisfied. *Howse v. State*, 273 Ga. App. 252, 614 S.E.2d 869 (2005).

Similar transaction evidence was properly admitted in a prosecution for enticing a minor for indecent purposes and statutory rape because, in each case, the defendant obtained permission from the mothers of girls he knew well to take the girls for a specific purpose, diverted to an apartment, carried the girls to his bedroom, partially disrobed them, attempted to or did perform various sex acts, gave them a food treat, then returned them to their mothers with a fictitious explanation; the similar transaction evidence was not tainted, even though the victims' mothers knew one another. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

Testimony that an older granddaughter was molested 25 years ago was not so remote as to be inadmissible in the defendant's trial for the child molestation of a 15-year-old granddaughter; similar transaction evidence, including the older granddaughter's testimony and evidence involving the molestation of the defendant's five-year-old great-granddaughter, was admissible to show the defendant's bent of mind or lustful disposition. *Delk v. State*, 274 Ga. App. 261, 619 S.E.2d 310 (2005).

Evidence of defendant's prior sexual battery of a juvenile was properly admitted in defendant's trial for child molestation and attempted child molestation of a nine-year-old girl to show defendant's lustful disposition toward molesting young girls because several years earlier defendant had pled nolo contendere to charges arising out of defendant touching the breast of a 16-year-old girl and placing her hand on his genitals. *Cook v. State*, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Evidence of the defendant's prior conviction for solicitation of sodomy was properly admitted as a similar transaction in the defendant's trial for child molestation and sexual battery against a child since the victims of the current child molestation and the defendant's prior offense were both young girls whom the defendant knew, and in both instances, while the defendant was

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

alone with the girls, the defendant placed the defendant's hands on their vaginal areas. *Attaway v. State*, 279 Ga. App. 781, 632 S.E.2d 397 (2006).

In choosing to have a witness testify as to a defendant's good character, the defendant opened the door for the state to introduce all evidence bearing on the defendant's character, including a juvenile adjudication; the defendant's claim that the trial court erred in permitting the prosecution to cross-examine the defendant's character witness regarding the defendant's prior juvenile adjudication for child molestation because a certified copy of the juvenile adjudication was not tendered was without merit. *Redman v. State*, 281 Ga. App. 605, 636 S.E.2d 680 (2006).

During the defendant's trial for child molestation and statutory rape, the trial court did not err in admitting similar transaction testimony regarding the defendant's unwanted sexual advances toward his girlfriend's younger sister because the difference in the victims' ages did not make the similar transaction inadmissible; it is the totality of the similar facts surrounding the crimes that are properly considered in a similar transaction analysis. *Gresham v. State*, No. A10A0995, 2010 Ga. App. LEXIS 391 (Apr. 13, 2010).

Defendant's sexual acts at age 12 not admitted. — During a defendant's trial for aggravated child molestation and related charges, evidence of the defendant's sexual misconduct against two younger children at the age of 12 was improperly admitted and was more prejudicial than probative because: (1) there was no logical connection between the charged offenses and the prior misconduct as no pattern of continuous conduct or periods of incarceration between the incidents were shown; (2) the defendant was a child when the previous events occurred and an adult at the time of the charged events; and (3) no sexual misconduct was alleged to have occurred in the intervening years. *Maynard v. State*, 282 Ga. App. 598, 639 S.E.2d 389 (2006).

In a trial for rape, aggravated sodomy, and aggravated assault with attempt to commit rape, the trial court properly admitted as

similar transaction evidence the defendant's prior guilty plea to a charge of child molestation; as both crimes involved forcing sexual acts upon teenage girls, a certified copy of the prior conviction sufficed to show similarity. *Washington v. State*, 286 Ga. App. 268, 648 S.E.2d 761 (2007).

In a child molestation case involving relations of the defendant, the trial court did not err in introducing evidence of similar transactions involving other child relations that happened 16 to 29 years before the trial on the present charges; the lapse of time between these offenses went to the weight and credibility of the testimony, not to the admissibility of the offenses. *Boynton v. State*, 287 Ga. App. 778, 653 S.E.2d 110 (2007).

In a prosecution for aggravated sexual battery and aggravated child molestation involving a 12-year-old child, evidence that the defendant had sexual intercourse with a 15-year-old child shortly before committing the charged crimes was properly admitted as the evidence was relevant to show bent of mind, course of conduct, and to corroborate the victim's testimony; the prejudicial effect of the evidence did not outweigh the probative value. *Martin v. State*, 294 Ga. App. 117, 668 S.E.2d 549 (2008).

Three prior acts of child molestation were admissible in defendant's trial for child molestation and sexual battery of an 11-year-old female victim, although one victim was a male, one was four years younger, and the acts committed were different. The sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts or other conduct perpetrated upon the children, was of sufficient similarity to make the evidence admissible because sex crimes against children require a unique bent of mind. *Gunn v. State*, 300 Ga. App. 229, 684 S.E.2d 380 (2009).

Evidence of similar sexual offenses against young adult in child molestation trial.

— Evidence of a prior sexual assault was sufficiently similar for purposes of the admission of similar transaction evidence in defendant's child molestation trial, despite a difference in the victim's ages, because in the prior assault the victim was 23 years old and in the charged assault the victim was 14 years old as there was sufficient similarity between the two acts; in both cases: (1) the events

occurred in defendant's trailer home; (2) defendant initiated unwanted sexual attacks; (3) defendant put defendant's hands down the panties of the victim; (4) defendant masturbated and ejaculated on the victims; and (5) defendant unsuccessfully attempted penetration. *Howse v. State*, 273 Ga. App. 252, 614 S.E.2d 869 (2005).

Evidence of prior obstruction of police officers admissible. — After defendant struck and pushed an officer, and fought with another officer who attempted to arrest defendant the trial court did not abuse the court's discretion in admitting evidence of a similar transaction because, in both incidents, defendant refused to comply with law enforcement officers' instructions, cursed at the officers, and physically resisted by struggling with the officers; the similar transaction evidence showed a course of conduct in resisting law enforcement officers in the performance of their duties and was relevant to rebut defendant's claim of justification. *Harris v. State*, 276 Ga. App. 234, 622 S.E.2d 905 (2005).

Internet chat room transcript admissible. — Transcript of an Internet chat room conversation between defendant and a police officer, posing as a 14-year-old girl, was properly admitted as similar transaction evidence in defendant's trial for pimping, contributing to the delinquency of a minor, and sexual exploitation of a minor; the officer was present to testify, personally witnessed the real-time chat recorded in the transcript as it was taking place, and testified that the transcript accurately represented the on-line conversation; the officer's testimony was tantamount to that of a witness to an event and was sufficient to authenticate the transcript. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Admission of similar transaction evidence against adult in child molestation case. — In a child molestation case, evidence that before assaulting certain women, defendant grabbed the victim by the back of the victim's hair or held the victim's neck, was properly admitted as "other transactions" evidence, since defendant used a similar method to control the child victim before sexually assaulting the victim; this evidence was relevant to show defendant's course of conduct and rebut defendant's defense of fabrication. That the prior acts involved

adults did not preclude their admission as similar transactions. *Helton v. State*, 268 Ga. App. 430, 602 S.E.2d 198 (2004).

Evidence admissible on assault and battery claim. — With regard to a former employee's assault and battery claim, a trial court erred in excluding evidence of a dentist's prior threats to kill the dentist's spouse and children and of the dentist pushing a 13-year-old patient after the patient had allegedly been rude to the dentist; the evidence was admissible given that the dentist was alleged to have assaulted the employee and threatened to kill the employee. *Ferman v. Bailey*, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Evidence of defendant's prior assault on victim. — In a prosecution against a defendant for aggravated assault upon defendant's spouse, evidence that defendant had earlier committed an assault upon the spouse was admissible to demonstrate defendant's intent or bent of mind. *Roberson v. State*, 180 Ga. App. 406, 349 S.E.2d 39 (1986).

In a prosecution against a defendant for aggravated assault on defendant's girlfriend, evidence that the defendant had previously attacked her with a machete was admissible. *Smith v. State*, 232 Ga. App. 290, 501 S.E.2d 523 (1998).

In a child molestation prosecution, since evidence of the defendant's uncharged molestation of the victim was admissible without notice or a hearing, defense counsel was not ineffective for not objecting to such evidence. *Stillwell v. State*, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009).

Nonconvicted prior drug transactions admissible. — Evidence of prior drug transactions for which defendant was not arrested but in which defendant used a beeper to contact the arrestee and defendant's car to transport the arrestee was relevant to show defendant's participation for distribution of cocaine. *Howard v. State*, 206 Ga. App. 610, 426 S.E.2d 181 (1992).

Testimony of victim describing the telephone calls the victim received from defendant over a period of time and defendant's aborted visit the same month as the crime on trial was evidence of defendant's bent of mind and tended to show that as well as motive, intent, plan, identity, and/or course

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

of conduct. *Watson v. State*, 180 Ga. App. 82, 348 S.E.2d 557 (1986).

Use of alias. — District attorney's opening statement to jury referring to defendant by defendant's alias "The Grass Man" was relevant since testimony of the witnesses established that defendant often used the alias. *Campbell v. State*, 160 Ga. App. 561, 287 S.E.2d 591 (1981).

Evidence that defendant was on parole at the time of the crime was not inadmissible since the evidence showed defendant's motive for committing robbery and was material. *Cook v. State*, 221 Ga. App. 831, 472 S.E.2d 686 (1996).

Defendant's denial of alleged admission of other acts. — Testimony in rebuttal to testimony by defendant that defendant had never told anyone that defendant had robbed and raped some people and thrown guns out of a car window is admissible to impeach defendant's testimony in defendant's own behalf. *Baker v. State*, 161 Ga. App. 670, 288 S.E.2d 280 (1982).

Prior peace warrant of victim against defendant. — Under O.C.G.A. § 24-2-2, evidence of prior difficulties between the accused and the victim is admissible to illustrate the accused's motive, intent, or bent of mind toward the victim; therefore, a peace warrant that victim had taken out against defendant nine months before the victim's death was clearly relevant to show defendant's motive and "bent of mind" towards the victim, and the admission of the warrant into evidence did not violate defendant's due process rights. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931 (1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 108 L. Ed. 2d 965 (1990).

Trial court did not err in denying defendant's motion to suppress certain testimony about prior difficulties that had occurred between defendant and the murder victim as such evidence was relevant to the relationship between the victim and defendant, and was admissible to show defendant's motive, intent, and bent of mind in murdering the victim. *Moody v. State*, 277 Ga. 676, 594 S.E.2d 350 (2004).

Evidence not related to issues excluded.

— In a voluntary manslaughter case, a photograph portraying the victim's use of obscene hand gestures, a photograph portraying the victim's display of what appeared to be two partially consumed bottles of beer, and photographs portraying the victim's obscene consumption of a cake baked in the likeness of a nude woman were properly excluded because the photographs were not relevant to the issues being tried and not relevant to defendant's claim of self-defense. *Guy v. State*, 204 Ga. App. 228, 418 S.E.2d 778, cert. denied, 204 Ga. App. 921, 418 S.E.2d 778 (1992).

When the trial court refused to allow evidence as to whether defendant consented to intercourse with defendant in the sexual molestation case under O.C.G.A. § 16-6-4(a) and evidence that defendant bragged about it to others after the fact, the trial court did not err; evidence as to the victim's nonchastity was inadmissible as irrelevant under O.C.G.A. § 24-2-2 as was evidence of the victim's preoccupation with sex. *Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

Questions and responses alluding to prior arrests impermissibly placed defendant's character in issue, and when the trial court failed to take any corrective action in fulfillment of the court's duty, the defendant was denied a fair trial. *Richardson v. State*, 199 Ga. App. 10, 403 S.E.2d 877 (1991).

No mistrial when defendant declines cautionary instructions. — Acts of cruelty to children by the defendant have no relevance whatsoever to the issues in a trial for arson. However, when the defendant expressly declined the trial court's offer to give cautionary instructions to the jury and stated that defendant would stand on defendant's motion for mistrial, it cannot be said that, as a matter of law, the giving of cautionary instructions would have been inadequate so that a mistrial was demanded. *Kuchenmeister v. State*, 199 Ga. App. 64, 403 S.E.2d 847, cert. denied, 199 Ga. App. 906, 403 S.E.2d 847 (1991).

Mistrial was not necessary to preserve defendant's right to a fair trial after trial court immediately ruled out improperly admitted evidence and instructed the jury to disregard the evidence and, thus, the trial court did not abuse the court's discretion in

denying defendant's motion for a mistrial after defendant claimed that the state improperly placed defendant's character into evidence when the state attempted to introduce evidence of a third similar shoplifting incident in which defendant was involved but the state's evidence failed to establish the third similar incident. *Bradford v. State*, 261 Ga. App. 621, 583 S.E.2d 484 (2003).

Similarity between former transactions and charged crime not found. — When, in presenting similar crimes evidence to the jury, the state merely introduced certified copies of the guilty pleas, that procedure was reversible error because the jury was not presented with any evidence to establish the similarity or connection between the former transactions and the charged crime. *Little v. State*, 202 Ga. App. 7, 413 S.E.2d 496 (1991).

Evidence of a prior violent act. — Trial court did not err in admitting evidence of defendant's conviction for manslaughter since the plaintiff contended that the defendant made a violent, malicious, and unwarranted attack on the plaintiff, as it went to the issue of defendant's bent of mind, habit, and course of conduct. *Dimarco's, Inc. v. Neidlinger*, 207 Ga. App. 526, 428 S.E.2d 431 (1993).

In a prosecution for battery, evidence of the victim's prior acts of violence and convictions for battery was properly excluded as the defendant failed to make a prima facie showing of justification. There was no evidence that the victim attacked the defendant, and the testimony of the victim's former romantic companion indicated that the defendant could not have seen the victim's alleged attack on the companion. *Frasier v. State*, 295 Ga. App. 596, 672 S.E.2d 668 (2009).

Evidence of other conduct or crimes was admissible in the following cases. — See *Fitzgerald v. State*, 51 Ga. App. 636, 181 S.E. 186 (1935) (possession of whiskey); *Honea v. State*, 181 Ga. 40, 181 S.E. 416 (1935) (conspiracy to commit robbery); *Loughridge v. State*, 181 Ga. 261, 182 S.E. 12 (1935) (conspiracy to commit robbery and murder); *Crow v. State*, 52 Ga. App. 192, 182 S.E. 685 (1935) (transporting liquor); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936) (robbery); *Sisk v. State*, 182 Ga. 448, 185 S.E. 777 (1936) (murder); *Ballenger v. State*, 60 Ga. App. 344, 4 S.E.2d 58 (1939) (maintaining a

disorderly house); *Heller v. State*, 60 Ga. App. 552, 4 S.E.2d 413 (1939) (possession of burglary tools); *Springer v. State*, 60 Ga. App. 641, 4 S.E.2d 679 (1939) (illegal sale of whiskey); *Guiffrida v. State*, 61 Ga. App. 595, 7 S.E.2d 34 (1940) (abortion); *McMichen v. State*, 62 Ga. App. 50, 7 S.E.2d 749 (1940) (sexual offenses); *Hale v. State*, 62 Ga. App. 315, 7 S.E.2d 787 (1940) (illegal sale of whiskey); *Williams v. State*, 62 Ga. App. 679, 9 S.E.2d 697 (1940) (operating a lottery); *Thompson v. State*, 191 Ga. 222, 11 S.E.2d 795 (1940) (homicide); *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (murder); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955) (rape); *Simmons v. State*, 196 Ga. 395, 26 S.E.2d 785 (1943) (robbery); *Fuller v. State*, 197 Ga. 714, 30 S.E.2d 608 (1944) (murder); *Christian v. State*, 71 Ga. App. 350, 30 S.E.2d 832 (1944) (violation of lottery laws); *Bell v. State*, 71 Ga. App. 430, 31 S.E.2d 109 (1944) (homicide); *Loughridge v. State*, 201 Ga. 513, 40 S.E.2d 544 (1946) (homicide); *Diggs v. State*, 90 Ga. App. 853, 84 S.E.2d 611 (1954) (larceny); 91 Ga. App. 52, 85 S.E.2d 66 (1954) (seduction and fornication); *Pierce v. State*, 212 Ga. 88, 90 S.E.2d 417 (1955) (murder); *Warren v. State*, 95 Ga. App. 79, 97 S.E.2d 194 (1957) (prior rape of same victim in assault with intent to rape case); *Lyles v. State*, 215 Ga. 229, 109 S.E.2d 785 (1959) (homicide); *Huckaby v. State*, 127 Ga. App. 439, 194 S.E.2d 119 (1972) (obscene telephone calls); *Garrett v. State*, 147 Ga. App. 666, 250 S.E.2d 1 (1978) (theft by conversion); *Echols v. State*, 149 Ga. App. 620, 255 S.E.2d 92 (1979) (sexual offenses); *Allen v. State*, 152 Ga. App. 481, 263 S.E.2d 259 (1979) (prior rape of victim by same defendant in rape case); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980) (murder); *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980) (drug violation); *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980) (vehicular homicide); *Carroll v. State*, 155 Ga. App. 514, 271 S.E.2d 650 (1980) (bank robbery); *Wilson v. State*, 155 Ga. App. 560, 271 S.E.2d 694 (1980) (theft by deception); *Rakestraw v. State*, 155 Ga. App. 563, 271

Criminal Cases (Cont'd)**2. Other Conduct or Crimes (Cont'd)**

S.E.2d 696 (1980) (burglary); Kendrick v. State, 156 Ga. App. 27, 274 S.E.2d 78 (1980) (theft by receiving stolen property); Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755 (1980) (embezzlement); Sherrod v. State, 157 Ga. App. 351, 277 S.E.2d 335 (1981) (battery); Huckeba v. State, 157 Ga. App. 795, 278 S.E.2d 703 (1981) (indecent exposure); Millwood v. State, 164 Ga. App. 699, 296 S.E.2d 239 (1982) (homicide with a knife over misconduct of a woman); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982) (multiple murders, kidnappings, armed robbery and burglary in three counties); Hendrix v. State, 164 Ga. App. 831, 298 S.E.2d 317 (1982) (evidence of same facts already properly before jury); Hunter v. State, 177 Ga. App. 326, 339 S.E.2d 381 (1985) (aggravated battery); Nelson v. State, 181 Ga. App. 481, 352 S.E.2d 804 (1987) (theft of disadvantaged victim, eleven years earlier under similar circumstances); Haywood v. State, 256 Ga. 694, 353 S.E.2d 184 (1987) (evidence showing propensity to use gun when intoxicated); Bernyk v. State, 182 Ga. App. 329, 355 S.E.2d 753 (1987) (armed robbery); Methvin v. State, 189 Ga. App. 906, 377 S.E.2d 735 (1989) (burglary); Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992) (child abuse and child molestation); Burney v. State, 201 Ga. App. 64, 410 S.E.2d 172 (1991) (burglary); Farley v. State, 265 Ga. 622, 458 S.E.2d 643 (1995) (felony murder); Herring v. State, 224 Ga. App. 809, 481 S.E.2d 842 (1997) (prior domestic violence); Standfill v. State, 267 Ga. App. 612, 600 S.E.2d 695 (2004) (burglary and possession of tools).

Evidence of other transactions was admissible when, as in the charged crime, in the other transactions defendant misrepresented to homeowners how quickly defendant could begin work and how many laborers defendant would commit to the project, in each transaction, defendant barely started work before abandoning the project, and in each case, defendant avoided customers' inquiries and failed to refund the unearned down payments. Smith v. State, 265 Ga. App. 57, 592 S.E.2d 871 (2004).

Trial court did not abuse the court's discretion in admitting evidence in defendant's

trial for child molestation, attempted child molestation, enticing a child for indecent purposes, and statutory rape that defendant pleaded guilty to possession of marijuana and multiple counts of contributing to the deprivation of a minor after defendant was discovered smoking marijuana with a 13-year-old girl. Leaptrout v. State, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Defendant's prior burglary conviction was properly admitted in defendant's burglary trial as: (1) defendant waived any claim that a prior conviction was insufficiently similar to the burglary as defendant did not raise the claim at the pretrial hearing and at trial; (2) defendant failed to preserve any objection to the introduction of the Alabama "Case Action Summary" based on a best evidence theory; and (3) defendant failed to show that the prior conviction was more prejudicial than probative. Brooks v. State, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

Trial court did not abuse the court's discretion in admitting the evidence as the state offered the evidence to show defendant's bent of mind or course of conduct, specifically, to show defendant's conduct in possessing small amounts of cocaine and when caught, denying that the cocaine belonged to defendant; the facts in the two instances were sufficiently similar to allow the introduction of the prior conviction into evidence and that the probative value of the evidence outweighed any prejudicial value. Kidd v. State, 277 Ga. App. 29, 625 S.E.2d 440 (2005).

Defendant's aggravated assault conviction was upheld on appeal, as the victim's identification of the defendant as the perpetrator was sufficient evidence to uphold the conviction, and evidence of a subsequent altercation between the two, like evidence of a prior difficulty, was probative evidence that the victim immediately identified the defendant to police on the day of the incident. Bond v. State, 283 Ga. App. 620, 642 S.E.2d 223 (2007).

In an aggravated assault case, since there was evidence that the victim's injuries were consistent with the use of a sharp instrument, similar transaction evidence of attacks with a box cutter and with a knife during altercations was not admitted for an im-

proper purpose. The evidence was admissible to show the defendant's bent of mind and course of conduct. *Miller v. State*, 292 Ga. App. 641, 666 S.E.2d 35 (2008), cert. denied, 2008 Ga. LEXIS 903 (Ga. 2008).

In a malice murder prosecution, the trial court did not abuse the court's discretion in admitting testimony concerning the violent relationship between the defendant and the victim (the defendant's paramour), and the marks and scratches witnesses saw on the victim's body as the testimony qualified as prior difficulties or similar transaction evidence. *Smith v. State*, 284 Ga. 304, 667 S.E.2d 65 (2008).

Defendant was convicted of voluntary manslaughter for fatally stabbing the defendant's spouse. A witness's testimony at a Ga. Unif. Super. Ct. R. 31.3(B) hearing that the defendant had threatened the witness with a knife was sufficient to establish the commission of the prior act, and as the prior act was sufficiently connected to the charged crime, the testimony was properly admitted at trial. *McKenzie v. State*, 294 Ga. App. 376, 670 S.E.2d 158 (2008).

Evidence of prior conviction of bribery. — Admission of an owner's conviction for bribery was harmless error because, although the conviction was irrelevant to claims against a contractor, there was no prejudice demonstrated. *Greene v. Bryant*, 277 Ga. App. 201, 626 S.E.2d 185 (2006).

Evidence of previous arrest for burglary admissible. — In a trial for burglary, the trial court properly admitted evidence of a prior burglary as evidence of intent and state of mind, even though the trial court failed to expressly balance the probative value of the evidence against the prejudicial impact; the evidence was not overly prejudicial as detailed limiting instructions were given when the evidence was admitted and at the close of the case. *Clark v. State*, 272 Ga. App. 89, 611 S.E.2d 741 (2005).

Error in admitting similar transaction evidence required reversal. — While state presented sufficient evidence of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove the issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions

were reversed. *Usher v. State*, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

Evidence of other conduct or crimes was inadmissible in the following cases. — See *Cawthon v. State*, 119 Ga. 395, 46 S.E. 897 (1904) (adultery as background for murder); *Alsobrook v. State*, 126 Ga. 100, 54 S.E. 805 (1906) (adultery as background for murder); *Moose v. State*, 145 Ga. 361, 89 S.E. 335 (1916) (threats to another in assault case); *Young v. State*, 149 Ga. 17, 98 S.E. 603 (1919) (adultery as background for murder); *Scott v. State*, 46 Ga. App. 213, 167 S.E. 210 (1932) (rape); *Williams v. State*, 51 Ga. App. 319, 180 S.E. 369 (1935) (killing a hog); *Hillery v. State*, 51 Ga. App. 373, 180 S.E. 499 (1935) (possession of stolen goods in burglary case); *Ballenger v. State*, 60 Ga. App. 344, 4 S.E.2d 58 (1939) (maintaining a disorderly house); *Robinson v. State*, 62 Ga. App. 355, 7 S.E.2d 758 (1940) (murder); *Waters v. State*, 80 Ga. App. 559, 56 S.E.2d 924 (1949) (murder by automobile); *Anderson v. State*, 206 Ga. 527, 57 S.E.2d 563 (1950) (operating a disorderly house in a murder case); *Walker v. State*, 86 Ga. App. 875, 72 S.E.2d 774 (1952) (theft); *Howard v. State*, 211 Ga. 186, 84 S.E.2d 455 (1954) (embezzlement); *Spinks v. State*, 92 Ga. App. 878, 90 S.E.2d 590 (1955) (sodomy in child molesting case); *Kelley v. State*, 98 Ga. App. 324, 105 S.E.2d 798 (1958) (assault in attempted murder case); *Abner v. State*, 139 Ga. App. 600, 229 S.E.2d 83 (1976) (victim as homosexual in sodomy case); *Watkins v. State*, 151 Ga. App. 510, 260 S.E.2d 547 (1979) (forgery); *Johnson v. State*, 154 Ga. App. 793, 270 S.E.2d 214 (1980) (sale of contraband).

3. Victim's Character

In a trial for homicide, general bad character of the deceased for violence cannot be established by proof of specific acts. *Ivey v. State*, 42 Ga. App. 357, 156 S.E. 290 (1930); *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945); *Wilcher v. State*, 87 Ga. App. 93, 73 S.E.2d 57 (1952); *Henderson v. State*, 234 Ga. 827, 218 S.E.2d 612 (1975); *Barrett v. State*, 140 Ga. App. 309, 231 S.E.2d 116 (1976); *Guevara v. State*, 151 Ga. App. 444, 260 S.E.2d 491 (1979); *P.D. v. State*, 151 Ga. App. 662, 261 S.E.2d 413 (1979); *Wilson v. State*, 153 Ga. App. 215, 265 S.E.2d 79 (1980); *Horne v. State*, 155 Ga. App. 851, 273 S.E.2d 193 (1980); *Smith v. State*, 247

Criminal Cases (Cont'd)**3. Victim's Character (Cont'd)**

Ga. 453, 276 S.E.2d 633 (1981).

Evidence of victim's violent character may be admitted when defendant acted in self-defense. — Charge that proof of the violent and turbulent character of the deceased is admissible only when it is shown prima facie that the deceased was the assailant, and that the accused had been assaulted and was honestly seeking to defend oneself, was not error. *Tatum v. State*, 57 Ga. App. 849, 197 S.E. 51 (1938); *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945); *Beam v. State*, 208 Ga. 497, 67 S.E.2d 573 (1951); *Henderson v. State*, 234 Ga. 827, 218 S.E.2d 612 (1975); *Maynor v. State*, 241 Ga. 315, 245 S.E.2d 268 (1978); *Smith v. State*, 247 Ga. 453, 276 S.E.2d 633 (1981); *Hanlon v. State*, 162 Ga. App. 46, 290 S.E.2d 285 (1982).

Proof of a victim's violent character becomes admissible when it is shown prima facie that the deceased was the assailant, that the accused had been assaulted, and that the accused was honestly seeking to defend oneself. *Williams v. State*, 249 Ga. 6, 287 S.E.2d 31 (1982); *Cooper v. State*, 249 Ga. 58, 287 S.E.2d 212 (1982).

Victim's violent character and general reputation for violence were admissible when the codefendant arguably made a showing that defendant was honestly seeking to defend oneself rather than to act as the aggressor. *Smith v. State*, 267 Ga. 372, 477 S.E.2d 827 (1996).

Because a murder defendant did not assert a justification defense, there was no basis for defendant to seek to introduce evidence of victims' characters. *Lance v. State*, 275 Ga. 11, 560 S.E.2d 663 (2002), cert. denied, 537 U.S. 1050, 123 S. Ct. 620, 154 L. Ed. 2d 525 (2002).

Victim's general character for violence cannot be established by proof of prior specific acts of violence, but a defendant should be allowed to offer evidence that the victim had a reputation for a particular type of violence. *Williams v. State*, 249 Ga. 6, 287 S.E.2d 31 (1982).

Evidence of victim's character irrelevant. — With regard to a defendant's conviction for child molestation as well as the trial court's denial of the defendant's motion for a new trial, the trial court did not err by

limiting the defendant's cross-examination of the victim by refusing to allow the defendant to cross-examine the 11-year-old victim regarding an alleged Internet profile page that listed the victim's age as 17 years old and having an occupation as a cheerleader for a professional sports team. The victim's age was not at issue in the case nor was the fact that the victim had previously stated that the victim was a cheerleader for a professional sports team, thus, the trial court properly ruled that the defendant was merely attempting to run around the prohibition on the admission of prior bad acts and impeach the victim about an immaterial issue. *Daniel v. State*, 296 Ga. App. 513, 675 S.E.2d 472 (2009), cert. denied, No. S09C1192, 2009 Ga. LEXIS 326 (Ga. 2009).

Evidence of victim's drug use. — Trial court did not err by refusing to allow the defendant to show that crack cocaine was found inside the ambulance that transported the victim to the hospital as a police officer testified that crack cocaine was found in the ambulance; moreover, defendant was permitted to impeach the victim with certified copies of the victim's prior felony convictions, including two for drug possession. *Haggins v. State*, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Evidence of victim's relationships. — In a murder prosecution in which the victim's body was never found, evidence of the victim's relationships at the time of the victim's disappearance was relevant because it rendered the inference that the victim did not run away but was killed more probable than it would be without the evidence. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

Evidence of nonchastity of victim inadmissible in trial of child molestation charge. — To the extent that the alleged evidence, sought to be introduced by the defendant, concerning the general reputation and character of the victim, dealt with the victim's reputation for nonchastity, it was inadmissible at trial in a prosecution for child molestation. *Lively v. State*, 157 Ga. App. 419, 278 S.E.2d 67 (1981).

Whether or not the victim was a prostitute was not relevant to the determination of who killed the victim. *Bryant v. State*, 249 Ga. 242, 290 S.E.2d 75 (1982).

School disciplinary record of victim inadmissible. — Trial court did not err in grant-

ing the state's motion in limine, which sought to prevent the defendant from introducing the victim's school records in an attempt to show that the victim had disciplinary problems, since such evidence was absolutely irrelevant to any issue in the prosecution for child molestation. *Lively v. State*, 157 Ga. App. 419, 278 S.E.2d 67 (1981).

Victim's bomb threat irrelevant. — Because making a bomb threat did not unambiguously reflect on a child victim's credibility, honesty, or imagination, was not related to the victim's testimony, and was not material to the issues on trial, the trial court did not abuse the court's discretion in refusing to allow the defense to introduce the evidence under O.C.G.A. § 24-2-2. *Bentley v. State*, 277 Ga. App. 483, 627 S.E.2d 61 (2006).

Evidence of assault victim's character not relevant. — In a prosecution for aggravated assault, to the extent that the defendant sought to attack the victim's character through testimony about the victim's use of alcohol during pregnancy, whether the victim hid the defendant from the police, and the victim's alleged jealousy over the defendant's new relationship, the trial court did not abuse the court's discretion in limiting the scope of cross-examination to the issues directly related to the incidents. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

Victim's involvement in charitable civic organization inadmissible. — In a rape prosecution, while the prosecutor should not have been allowed to question the victim about the victim's involvement with a civic organization that helped mentally ill children, the admission of such irrelevant material did not warrant a mistrial. *Brown v. State*, 260 Ga. App. 77, 579 S.E.2d 87 (2003).

Testimony as to the general reputation of the deceased, when admissible in a murder case, may come from two sources: the accused or a witness. *Henderson v. State*, 234 Ga. 827, 218 S.E.2d 612 (1975).

Evidence of victim's violent acts. — Defendant was not improperly prohibited from introducing evidence of a victim's violent acts against third persons during the state's case, despite evidence that: (1) the victim pinned defendant against a wall; (2) defendant ran into defendant's house screaming that the defendant had been robbed and

reported the robbery to the police; (3) defendant had fresh cuts or bruises on defendant's neck; and (4) defendant reported to police that defendant had shot at someone as defendant tried to fend off a robber; it did not necessarily follow that defendant honestly sought to defend oneself when defendant fired a gun at the victim, given evidence that the victim turned away or ran from defendant before the shooting and that the victim was shot in the back from at least two and one-half feet away. *Nelloms v. State*, 273 Ga. App. 448, 615 S.E.2d 153 (2005).

Evidence of victim's prior child molestation against defendant not admitted. — In a defendant's trial for aggravated battery against a victim more than 65 years of age in violation of O.C.G.A. § 16-5-24(a) and (d), evidence that the victim had fondled the defendant's genitals when the defendant was 15 was not admissible under O.C.G.A. § 24-2-2 to support the defendant's claim of justification under O.C.G.A. § 16-3-21. *Strozier v. State*, 300 Ga. App. 199, 685 S.E.2d 743 (2009).

Evidence that victim used cocaine. — Whether the victim of an aggravated assault and false imprisonment was addicted to cocaine was irrelevant to the issue of whether defendant assaulted the victim and held the victim against the victim's will, and the trial court did not err in ruling that defendant could not present evidence of the victim's prior cocaine use other than certified copies of convictions. *Harris v. State*, 196 Ga. App. 304, 396 S.E.2d 288 (1990).

In a prosecution for murder, the victim's prior conviction for possession of cocaine did not tend to prove a reputation for violence nor the reasonableness of defendant's belief that deadly force was necessary, and the court properly refused to admit such evidence. *Russell v. State*, 264 Ga. 121, 441 S.E.2d 750 (1994).

Toxicology report showing the presence of cocaine metabolites in a homicide victim's blood was properly excluded because the evidence was too attenuated to warrant speculation about the effects of cocaine on the victim at the time of the shooting. *Bell v. State*, 280 Ga. 562, 629 S.E.2d 213 (2006).

Exchanging sex for drugs. — Although the victim's past cocaine use was irrelevant, the defendant was allowed to discuss any

Criminal Cases (Cont'd)**3. Victim's Character (Cont'd)**

arrangement that the victim had made with the defendant in exchange for sex and question the victim as to the victim's use of drugs on the night in question. *Goodwin v. State*, 208 Ga. App. 707, 431 S.E.2d 473 (1993).

In a prosecution of defendant for possession of methamphetamine in defendant's body, evidence of prior convictions for the sale of that drug were not admissible. *King v. State*, 230 Ga. App. 301, 496 S.E.2d 312 (1998).

Reckless behavior of victim. — In a prosecution for involuntary manslaughter, the trial court did not abuse the court's discretion in disallowing evidence of the victim's past reckless conduct, which consisted of the testimony of a police officer that the victim had, on several occasions in the past, been found in the early morning hours intoxicated and sitting in the victim's wheelchair in the road, creating a dangerous condition. *Casillas v. State*, 233 Ga. App. 752, 505 S.E.2d 251 (1998).

Trial court did not err in denying defendant's motion for mistrial after a witness testified to other drug transactions defendant was involved in even though defendant's general character and especially defendant's conduct in other drug transactions were irrelevant matter as such statements were unsolicited, the trial court immediately instructed the jury to disregard the testimony, and the witness did not tell the jury anything the jury did not already know about defendant. *McCollum v. State*, 258 Ga. App. 574, 574 S.E.2d 561 (2002).

Trial court's refusal to allow defendant to introduce a certified copy of the victim's prior conviction for simple assault, even though the testimony of the investigating officer was also offered, was harmless error in light of the fact that the trial court permitted the defense to present testimony from five witnesses concerning other incidents. *Jones v. State*, 265 Ga. App. 97, 592 S.E.2d 888 (2004).

In the defendant's trial for homicide by vehicle in the first degree, serious injury by vehicle, driving under the influence of alcohol, and reckless driving, the trial court did not abuse its discretion in excluding as irrelevant evidence of a victim's two prior traffic

citations because a trooper testified unequivocally that the impact occurred in the lane in which the victim and the victim's family were traveling, and there was no evidence introduced to the contrary; moreover, there was no evidence that the victim was speeding at the time of the fatal collision. *Potter v. State*, 301 Ga. App. 411, 687 S.E.2d 653 (2009).

Evidence of victim's criminal activity. — Evidence that the victim was driving an allegedly stolen vehicle at the time the victim was shot by defendant was not relevant to the defense of justification. *Wilson v. State*, 262 Ga. 588, 422 S.E.2d 536 (1992), overruled on other grounds by *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006).

Trial court did not err in denying the defendant's motion to admit evidence of the victim's robbery conviction because the defendant failed to meet the requirements for admission of evidence of violent acts by the victim against third parties by relying on the language of the indictment associated with the victim's conviction and offering no witnesses or other evidence to establish the facts underlying the crime; the trial transcript did include defense counsel's unchallenged recitation of the allegation set forth in the indictment, and although that language set forth certain elements of the crime of robbery, O.C.G.A. § 16-8-40(a)(1) and (2), it did not provide a factual basis for determining whether an act of violence was involved in the robbery at issue. *Arnold v. State*, 286 Ga. 418, 687 S.E.2d 836 (2010).

4. Jury Instructions

Jury charge as to good character. — Good character affords no license for committing a crime, and it is entirely proper to charge the jury that the jury would be authorized to convict, notwithstanding proof of good character, if upon consideration of all the evidence the jury believes the defendant guilty beyond a reasonable doubt. *Mote v. State*, 184 Ga. App. 333, 361 S.E.2d 523 (1987).

Instruction on defense of good character must generally be requested. — Except in "exceptional cases," such as one in which the good character defense is the sole defense against the uncorroborated allegations of the prosecuting witness and the state's case, apart from those allegations, is based solely on highly tenuous circumstances and

is extremely weak, the court's failure to give an instruction on good character, absent a timely request, does not warrant a new trial. *Riceman v. State*, 166 Ga. App. 825, 305 S.E.2d 595 (1983).

Mistrial not warranted when curative instruction given. — After a witness stated in an answer not responsive to the question asked of the witness that the defendant and the victim had smoked crack cocaine together, the trial court properly denied the defendant's motion for a mistrial on the ground that the defendant's character had been improperly put in issue; a curative instruction was sufficiently prompt and clear. *Rhines v. State*, 288 Ga. App. 128, 653 S.E.2d 500 (2007).

Trial court properly denied a mistrial based on allegedly improper character evidence after an officer did not specifically indicate that defendant had a criminal record when asked if the officer knew defendant, and after the trial court gave an adequate curative instruction, the officer clarified that the officer knew defendant to be a nice person and outstanding football player; moreover, even if there was error, it was

harmless in light of the overwhelming evidence of guilt. *Gartrell v. State*, 291 Ga. App. 21, 660 S.E.2d 886 (2008).

As the trial court instructed the jury to disregard the information contained in a witness's non-responsive answer to a question from the prosecutor, which impugned the defendant's character, the defendant was not entitled to a mistrial. *Patterson v. State*, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, U.S. , 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

New trial denied when defendant failed to object to curative instruction given. — Defendant's motion for a new trial was properly denied because the state presented sufficient identification and circumstantial evidence linking the defendant to a burglary, including similar transaction evidence of a prior burglary, and in response to trial counsel's objection to the state's comment that the defendant was under the influence of drugs or alcohol at the time of the offense, the defendant did not object to the curative instruction given. *Bryant v. State*, 285 Ga. App. 508, 646 S.E.2d 717 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 368 et seq.

Am. Jur. Proof of Facts. — Alleged Victim's Commission of Prior Acts of and Reputation for Violence, 15 POF2d 167.

C.J.S. — 32 C.J.S., Evidence, §§ 568 et seq., 776 et seq.

ALR. — Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 ALR 8; 68 ALR 1068.

Habit, custom, or reputation of one injured or killed as evidence of his own negligence or freedom from negligence, 15 ALR 125; 18 ALR 1109.

Admissibility of evidence of good reputation for truth and veracity of witness who has not been impeached, 15 ALR 1065; 33 ALR 1220.

Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant, 22 ALR 1016; 27 ALR 357; 63 ALR 602.

Evidence of other forgeries or alterations

on issue as to forgery or alteration in civil cases, 33 ALR 427.

Admissibility in action for malpractice, of evidence as to reputation of physician or surgeon for skill and care, 48 ALR 249.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide, 64 ALR 1029; 1 ALR3d 571.

Admissibility on question of justification for dismissal or discharge of officer or employee for incompetency, of evidence as to his experience in other similar office or employment, 65 ALR 1096.

Admissibility on question as to quality, condition, or capacity of articles, machines, or apparatus, of evidence in regard to similar things manufactured or sold by the same person, 66 ALR 81.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 66 ALR 1328; 48 ALR2d 1259.

Negative proof of good character or rep-

utation of defendant in criminal case, 67 ALR 1210.

Admissions of partner as to past transactions or events as evidence against firm or other partner, 73 ALR 447.

Admissibility of evidence of good character of party for truth and honesty on issue of fraud in civil action, 78 ALR 643.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions, 80 ALR 1306; 78 ALR2d 1359.

Admissibility of evidence of other accidents on issue of negligence in respect of maintenance of electric wires, rails, etc., 81 ALR 685.

Admissibility, in prosecution for violation of intoxicating liquor law, of general reputation of person with whom defendant had dealings, as tending to show such violation, 83 ALR 1401.

Admissibility, in prosecution for receiving stolen property, of evidence of transactions other than, but similar to, that upon which the prosecution is based, for purpose of showing guilty knowledge or intent, 105 ALR 1288.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 ALR 1443.

Admissibility of evidence in a bastardy proceeding of defendant's reputation or character as to chastity and morality, 110 ALR 335.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 ALR 380.

Admissibility in criminal prosecution of evidence of notice of one other than defendant to commit the crime, 121 ALR 1362.

Admissibility against defendant in criminal case of evidence, otherwise competent, as to other offense as affected by fact that a charge for such offense is pending against him, 125 ALR 1036.

Admissibility, in action against manufacturer, packer, or bottler for personal injury due to defective or injurious condition of article, of evidence that like products were

free from, or were subject to, defective or injurious conditions, 127 ALR 1194.

Admissibility, on cross-examination or otherwise, of evidence that witness in a civil action had been under arrest, indictment, or other criminal accusation on a charge growing out of the accident, transaction, or occurrence involved in the civil action, 149 ALR 935.

Admissibility of evidence of character or reputation of party in civil action for assault (other than for purpose of impeaching him as a witness), 154 ALR 121.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 ALR 604.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 167 ALR 565; 77 ALR2d 841.

Admissibility and probative force, on issue of competency to execute an instrument, of evidence of incompetency at other times, 168 ALR 969.

Admissibility in criminal case of evidence relevant to the crime charged, as affected by incidental disclosure of another crime by defendant, 170 ALR 306.

Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved, 8 ALR2d 446.

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt, 9 ALR2d 205.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 ALR2d 606; 24 ALR6th 747.

Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused, 15 ALR2d 1080.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 ALR2d 304.

Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents, 20 ALR2d 1210.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses, 20 ALR2d 1217; 88 ALR3d 74.

Impeachment of witness by evidence or

inquiry as to arrest, accusation, or prosecution, 20 ALR2d 1421.

Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Prejudicial effect of admission of evidence as to Communist or other subversive affiliation or association of accused, 30 ALR2d 589.

Pardon as affecting impeachment by proof of conviction of crime, 30 ALR2d 893.

Admissibility, in forgery prosecution, of other acts of forgery, 34 ALR2d 777.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 ALR2d 817.

Admissibility, in robbery prosecution, of evidence of other robberies, 42 ALR2d 854.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 ALR2d 1055.

Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident, 46 ALR2d 9.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 ALR2d 103.

Admissibility of parole evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259.

Admissibility of evidence of precautions taken, or safety measures used, on earlier occasions at place of accident or injury, 59 ALR2d 1379.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 ALR2d 823.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 ALR2d 806.

Admissibility, in prosecution for maintaining liquor nuisance, or evidence of general reputation of premises, 68 ALR2d 1300.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 77 ALR2d 841; 2 ALR4th 330.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire

hazard, of evidence of other fires, 87 ALR2d 891.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 926.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 ALR2d 968.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 ALR2d 903.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales, 93 ALR2d 1097.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 ALR2d 6.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide, 1 ALR3d 571.

Effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial, 3 ALR3d 965.

Impeachment of witness with respect to intoxication, 8 ALR3d 749.

Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility of evidence of habit, customary behavior, or reputation as to care of motor vehicle driver or occupant, on question of his care at time of occurrence giving rise to his injury or death, 29 ALR3d 791.

Malpractice: admissibility of evidence that defendant physician has previously performed unnecessary operations, 33 ALR3d 1056.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged, 54 ALR3d 897.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 ALR3d 659.

Admissibility, in action against notary public, of evidence as to usual business practice of notary public of identifying person seeking certificate of acknowledgment, 59 ALR3d 1327.

Admissibility of evidence of other offenses in rebuttal of defense of entrapment, 61 ALR3d 293.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 ALR3d 1001; 38 ALR4th 583.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 ALR3d 1156.

Admissibility of testimony as to general reputation at place of employment, 82 ALR3d 525.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 ALR3d 1170.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 ALR3d 8.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 ALR3d 926.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than the accused, 97 ALR3d 967.

Use of unrelated misdemeanor conviction (other than for traffic offense) to impeach general credibility of witness in state civil case, 97 ALR3d 1150.

Admissibility of evidence of character or reputation of party in civil action for sexual

assault on issues other than impeachment, 100 ALR3d 569.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 ALR4th 330.

Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 ALR4th 1298.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Admissibility of evidence of accused's membership in gang, 39 ALR4th 775.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

Products liability: admissibility of evidence of absence of other accidents, 51 ALR4th 1186.

Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Admissibility of evidence in homicide case that victim was threatened by other than defendant, 11 ALR5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 ALR5th 871.

Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like, 18 ALR5th 804.

Admissibility of evidence of commission of similar crime by one other than accused, 22 ALR5th 1.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 ALR5th 749.

Admissibility of evidence relating to accused's attempt to commit suicide, 73 ALR5th 615.

24-2-3. Complainant's past sexual behavior not admissible in prosecutions for certain sex offenses; exception; in camera hearing; court order.

(a) In any prosecution for a violation of Code Section 16-6-1, relating to rape; Code Section 16-6-2, relating to aggravated sodomy; Code Section 16-6-4, relating to aggravated child molestation; or Code Section 16-6-22.2, relating to aggravated sexual battery, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

(b) In any prosecution for a violation of Code Section 16-6-1, relating to rape; Code Section 16-6-2, relating to aggravated sodomy; Code Section 16-6-4, relating to aggravated child molestation; or Code Section 16-6-22.2, relating to aggravated sexual battery, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.

(c) The procedure for introducing evidence as described in subsection (b) of this Code section shall be as follows:

(1) At the time the defense shall seek to introduce evidence which would be covered by subsection (b) of this Code section, the defense shall notify the court of such intent, whereupon the court shall conduct an in camera hearing to examine into the defendant's offer of proof;

(2) At the conclusion of the hearing, if the court finds that any of the evidence introduced at the hearing is admissible under subsection (b) of this Code section or is so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence, the court shall by order state what evidence may be introduced by the defense at the trial of the case and in what manner the evidence may be introduced; and

(3) The defense may then introduce evidence pursuant to the order of the court. (Code 1933, § 38-202.1, enacted by Ga. L. 1976, p. 741, § 1; Ga. L. 1989, p. 272, § 1; Ga. L. 2005, p. 20, § 13.1/HB 170.)

Cross references. — Rape generally, § 16-6-1.

Editor's notes. — Ga. L. 2005, p. 20, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all trials which commence on or after July 1, 2005.

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's evidence laws, see 31 Mercer L. Rev. 107 (1979). For annual survey on law of evidence, see 42 Mercer L. Rev. 223 (1990). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992). For article, "The Georgia Roundtable Discussion Model: Another Way to Approach Reform-

ing Rape Laws," see 20 Ga. St. U.L. Rev. 565 (2004). For annual survey article discussing developments in the law of evidence, see 51 Mercer L. Rev. 279 (1999). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For annual survey of evidence law, see 56 Mercer L. Rev. 235 (2004); 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006). For annual 11th Cir. survey of evidence law, see 56 Mercer L. Rev. 1273 (2005); and 57 Mercer L. Rev. 1083 (2006).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 245 (1989).

For comment on *Teague v. State*, 208 Ga. 459, 67 S.E.2d 467 (1951), see 14 Ga. B.J. 363 (1952). For comment on *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955), holding that a defendant has the right to cross-examine all witnesses called against him in all material matters, including the past conduct of the prosecutrix in an action for rape, see 19 Ga. B.J. 95 (1956). For comment, "Can Georgia's Rape Shield Statute Withstand a Constitutional Challenge?," see 36 Mercer L. Rev. 991 (1985).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CHILD MOLESTATION

INCEST

RAPE

SEXUAL BATTERY

SODOMY

PROCEDURE

RETRIAL

DECISIONS UNDER PRE-1976 LAW

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under Ga. L. 1976, p. 20, § 1 are included under this Code section.

Constitutionality. — O.C.G.A. § 24-2-3 does not violate a defendant's sixth amendment right of confrontation; it serves a variety of state interests which outweigh that right. *Harris v. State*, 257 Ga. 666, 362 S.E.2d 211 (1987).

Statute is a strong legislative attempt to protect the victim-prosecutor in rape cases by the exclusion of evidence which might reflect on the character of the witness with-

out contributing materially to the issue of the guilt or innocence of the accused. *Parks v. State*, 147 Ga. App. 617, 249 S.E.2d 672 (1978) (see O.C.G.A. § 24-2-3).

O.C.G.A. § 24-2-3 seeks to eliminate the philosophy that women of promiscuous sexual reputation are entitled to less protection under the rape laws than women of chaste reputation. *Singleton v. State*, 157 Ga. App. 192, 276 S.E.2d 685 (1981); *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981); *Snyder v. State*, 201 Ga. App. 66, 410 S.E.2d 173 (1991).

O.C.G.A. § 24-2-3 is a legislative attempt to exclude evidence which might reflect on

the character of the witness without contributing materially to the issue of the guilt or innocence of the accused. *Martin v. State*, 196 Ga. App. 145, 395 S.E.2d 391 (1990).

Discretion of court to apply “rape shield” principle. — Trial court did not err in applying the “rape shield” principle to exclude evidence that the victim had allegedly engaged in sexual activity with her ex-boyfriend immediately prior to the alleged act of sexual battery; the court had discretion to apply such principle even when the exclusion was not mandated under O.C.G.A. § 24-2-3. *Bates v. State*, 216 Ga. App. 597, 454 S.E.2d 811 (1995).

Trial court did not abuse the court’s discretion in excluding the defendant’s claim that his victim had prior consensual sex with him and that he reasonably believed she consented on the night of the offense, since the victim testified to the events of that night, there was a trail of clothing left near the crime scene, and evidence of her injuries was offered. *Davis v. State*, 235 Ga. App. 362, 509 S.E.2d 655 (1998).

Construction with O.C.G.A. § 24-3-38. — Despite O.C.G.A. § 24-3-38, giving a party the right to have a whole conversation heard, O.C.G.A. § 24-2-3 prohibited the admission of a portion of defendant’s statement in which he said that the victim had sexual intercourse with her cousin. *Snow v. State*, 228 Ga. App. 649, 492 S.E.2d 564 (1997).

Rape shield law was not implicated since the testimony of the victim concerned prior physical abuse, not sexual abuse. *Demetrios v. State*, 246 Ga. App. 506, 541 S.E.2d 83 (2000).

Evidence of relationship with boyfriend. — Given that the defendant was not charged with rape, evidence of the victim’s sexual activity, and the fact that she had a boyfriend, with whom she allegedly had sexual intercourse during the time of the alleged sexual abuse, should not have been excluded under either the 2004 or 2005 version of the Rape Shield statute as: (1) that evidence acted as a possible explanation for the victim’s physical trauma, placing her credibility and the defendant’s guilt into question; (2) the jury’s split verdict supported the defendant’s argument that even without the excluded testimony, the state’s case was far less than overwhelming; and, (3)

the appeals court could not determine what role the excluded evidence would have played in the jury’s deliberations; hence, a new trial as to the charges of child molestation and incest was ordered. *Gresham v. State*, 281 Ga. App. 116, 635 S.E.2d 316 (2006).

Victim’s prior accusations of sexual misconduct. — Rape-shield law does not necessarily prohibit testimony as to the falsity of a victim’s prior accusations of sexual misconduct directed against persons other than defendant. *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

Defendant was not required to make a threshold showing that the victim’s previous molestation allegations were false before defendant was entitled to a hearing on the reasonable probability of falsity. *Peters v. State*, 224 Ga. App. 837, 481 S.E.2d 898 (1997).

Testimony of previous false allegations by the victim was not prohibited; however, defendant failed to make the threshold showing of a reasonable probability that the victim’s three previous rape reports were false. *Banks v. State*, 250 Ga. App. 728, 552 S.E.2d 903 (2001).

Pregnancy of victim. — Evidence of a victim’s past sexual behavior for the purpose of showing that she may have been pregnant at the time the allegations were made and may have therefore made up the charge to justify or explain the pregnancy was barred by O.C.G.A. § 24-2-3. *Green v. State*, 221 Ga. App. 436, 472 S.E.2d 1 (1996).

Evidence that a child rape victim had sex with her boyfriend six months before the alleged rape was properly excluded since, while relevant to show that the victim’s pregnancy was not caused by defendant, it was insufficiently probative due to the time frames involved. *Williams v. State*, 263 Ga. App. 597, 588 S.E.2d 790 (2003).

“Quite possibly pregnant” evidence disallowed. — Cross-examination of the victim with regard to sexual acts with males other than defendant and the fact that she was “quite possibly pregnant” was properly disallowed since the only proffer made by defendant concerning the possible pregnancy as a motive for lying was counsel’s mere statement, and defendant denied ever having sexual relations with the victim. *Gibbs v. State*, 196 Ga. App. 140, 395 S.E.2d 387 (1990).

General Consideration (Cont'd)

Miscarriage by victim. — With regard to a defendant's convictions for aggravated sodomy and kidnapping, the trial court did not abuse the court's discretion by excluding as barred by the rape shield statute evidence of the victim's prior miscarriage since the rape shield statute bars evidence relating to the past sexual behavior of the complaining witness. *Smith v. State*, 294 Ga. App. 692, 670 S.E.2d 191 (2008).

Parent status of minor victim was irrelevant fact. — Trial court correctly excluded all reference to the fact that the 16-year-old victim had a child of approximately 21 months of age. *Johnson v. State*, 245 Ga. App. 690, 538 S.E.2d 766 (2000).

Rape shield statute provides the exclusive means for admitting evidence relating to the past sexual behavior of the complaining witness in prosecutions for rape. The res gestae rule, impeachment techniques, and other traditional means for introducing evidence which is otherwise inadmissible can have no effect in this situation. *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978).

Rape shield statute supersedes all evidentiary exceptions, including the res gestae rule. *Phillips v. State*, 196 Ga. App. 267, 396 S.E.2d 57 (1990).

O.C.G.A. § 24-2-3 does not prohibit testimony of previous false allegations by the victim; however, before such evidence can be admitted, the trial court must make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists. *Smith v. State*, 259 Ga. 135, 377 S.E.2d 158, cert. denied, 493 U.S. 825, 110 S. Ct. 88, 107 L. Ed. 2d 53 (1989).

Once the court determined that a child-victim's previous allegation of abuse was unreliable, testimony of the previous allegation was no longer subject to the rape shield statute protection and should have been admitted. *Hines v. State*, 221 Ga. App. 193, 470 S.E.2d 787 (1996).

On appeal from a conviction for two counts of aggravated child molestation, the trial court did not err in denying the defendant a new trial, as no abuse of discretion resulted in excluding evidence that one of the victims made prior false accusations of sexual abuse against an older cousin, be-

cause the evidence presented a credibility issue for the trial court to resolve in analyzing whether there was a reasonable probability of falsity. *Roberts v. State*, 286 Ga. App. 346, 648 S.E.2d 783 (2007).

Evidence of prior false claims improperly barred. — Evidence concerning allegedly false prior rape claims made by the prosecutor was not barred by O.C.G.A. § 24-2-3 as the subject testimony was admissible, not merely to impeach the witness credibility, but as substantive evidence tending to establish that there had been no rape, but mere consensual sexual intercourse; accordingly, the trial court abused the court's discretion in denying defendant's motion for a new trial. *Humphrey v. State*, 207 Ga. App. 472, 428 S.E.2d 362 (1993).

Rape shield statute prohibits all evidence relating to the past sexual behavior of the complaining witness, including marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards; in other words, her reputation concerning past sexual activity with persons other than the defendant. The exceptions are, if so found by the judge after an in camera hearing, that the past behavior involving participation by the accused, or that the evidence supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of. *Parks v. State*, 147 Ga. App. 617, 249 S.E.2d 672 (1978).

Evidence of prior sexual experience is not permitted by O.C.G.A. § 24-2-3. *Roberts v. State*, 158 Ga. App. 309, 279 S.E.2d 753 (1981); *Raines v. State*, 191 Ga. App. 743, 382 S.E.2d 738 (1989).

Trial court did not err in refusing to admit evidence of the victim's past marital problems when defendant admitted that the victim did not tell him which type of marital problem it was. Hence, his lack of knowledge that the victim's marital problem related to infidelity could have had no reasonable bearing on whether the victim would consent to the conduct complained of. *Burley v. State*, 190 Ga. App. 75, 378 S.E.2d 328 (1989).

Rape shield statute precludes the introduction of evidence of the victim's past sexual behavior. Obviously, a prior rape committed against the victim has nothing to do with her past sexual behavior. *Raines v. State*, 191 Ga. App. 743, 382 S.E.2d 738 (1989).

Trial court properly disallowed defendant's proffer that the victim might have said defendant raped her on occasions other than the two charged, since it was not clear how such evidence would have aided defendant and there was no indication that the victim was lying about the other incidents of rape. *Gibbs v. State*, 196 Ga. App. 140, 395 S.E.2d 387 (1990).

Evidence of portions of a conversation between defendant and the victim that involved her past sexual abuse by family members and others was properly excluded. *Hicks v. State*, 222 Ga. App. 828, 476 S.E.2d 101 (1996).

Inconsistent victim testimony and ability to question. — Victim's prior statement seemingly fell within the language of the Rape Shield Statute, O.C.G.A. § 24-2-3, as the statement related to the victim's "past sexual behavior." However, the record shows that the defense did not seek to use the victim's prior statement to pursue the inadmissible topic of her sexual history with individuals other than defendant. Rather, the defense sought to use the statement to show that the victim's "past sexual behavior" did not include defendant and that the victim's trial testimony concerning the victim's sexual experiences with defendant was a fabrication. As one of the purposes of the Rape Shield Statute is to assist the truth-seeking process, it should not provide "justification for letting the witness affirmatively resort to perjurious testimony in reliance on [a defendant's] disability to challenge her credibility." Thus, the trial court erred in restricting defendant from cross-examining the victim concerning the prior statement; however, such error was harmless as the victim explained why the testimony regarding contact with defendant was inconsistent. *Mooney v. State*, 266 Ga. App. 587, 597 S.E.2d 589 (2004).

Evidence of character or other crimes. — Proffered testimony of a defense witness that the witness had exchanged sex with the victim for money and that defendant knew of this at the time of the incident was not admissible under the "highly material category" of subsection (c)(2) of O.C.G.A. § 24-2-3. *Brown v. State*, 214 Ga. App. 676, 448 S.E.2d 723 (1994).

Victim's testimony that victim had not had intercourse in five months admissible. —

After the state attempted to prove the defendant's rape of the victim by showing that the defendant passed herpes to the victim, the trial court's permission for the victim to testify that the victim had not had sex for five months prior to the rape did not violate the rape shield law, O.C.G.A. § 24-2-3, as the victim's testimony was relevant to exclude the possibility that someone other than defendant had sexual contact with the victim and gave the victim herpes. *Warner v. State*, 277 Ga. App. 421, 626 S.E.2d 620 (2006).

Testimony of defendant concerning overheard conversations was properly disallowed. — Even though the trial court allowed defendant to testify that the defendant had had prior sexual intercourse with the complaining witness, the court properly disallowed testimony from defendant that the defendant had overheard conversations by the victim's family members that the victim "ran around." *Marks v. State*, 192 Ga. App. 64, 383 S.E.2d 626 (1989).

Exceptions to the general rule of inadmissibility listed in this statute are exclusive and those exceptions are provided solely for the benefit of the defendant who, by proper and timely objection, may prevent the state from introducing the evidence excluded by the statute. *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978) (see O.C.G.A. § 24-2-3).

Two exceptions contained in O.C.G.A. § 24-2-3 are exclusive. *Jones v. State*, 190 Ga. App. 416, 379 S.E.2d 189 (1989).

Virginity irrelevant. — Admitting testimony that an alleged victim was not a virgin to support an inference that an accused reasonably believed she consented to his advances is erroneous since it is against just such reasoning that rape shield laws have been enacted. *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978).

Admission of victim's testimony that during the attack she told defendant she was a virgin was harmless error since the defense was based upon a claim of mistaken identity, not alleged consent by the victim. *Veal v. State*, 191 Ga. App. 445, 382 S.E.2d 131 (1989).

Evidence inadmissible despite physician's testimony that victim was sexually active. — Inquiry into the victim's past sexual experiences was properly refused, even where a physician testified that in examining the

General Consideration (Cont'd)

victim it was obvious she had been sexually active. *Worth v. State*, 183 Ga. App. 68, 358 S.E.2d 251, cert. denied, 183 Ga. App. 907, 358 S.E.2d 251 (1987).

Applicability to noncomplaining witness.

— O.C.G.A. § 24-2-3 includes cross-examination of the other witnesses about the sexual conduct of the complaining witness so the argument that the statute applies only to cross-examination of the complaining witness is without merit. *Ellis v. State*, 181 Ga. App. 630, 353 S.E.2d 822 (1987).

Harmless to deny examination as to incident victim denies. — Any error in denying the defendant a thorough and sifting cross-examination of the victim concerning a past sexual experience with the defendant is harmless when the defendant subsequently testifies to such an experience and the victim then denies the experience. *Clarke v. State*, 169 Ga. App. 433, 313 S.E.2d 716 (1984).

Where the defendant had never seen or known the victim prior to her abduction, evidence of past sexual activity was not admissible on the question of consent. *Fuller v. State*, 169 Ga. App. 488, 313 S.E.2d 505 (1984).

Prohibition inapplicable to impeachment as to victim's attire. — Rape shield law is not applicable to evidence offered to impeach the victim as to her mode of dress at the time in question. *Villafranco v. State*, 252 Ga. 188, 313 S.E.2d 469 (1984).

Reversible error when defendant was not allowed to show wife's medical records. — When a physician had testified that the victim had a venereal disease and that she maintained she had not had sexual intercourse with anyone else, it was reversible error not to allow defendant to show by his wife's medical records, or otherwise, that his wife was then undergoing medical treatment and tests for pregnancy and showed no sign of the disease, and therefore, by logical extension, that defendant did not have the disease. *Reece v. State*, 192 Ga. App. 14, 383 S.E.2d 572 (1989).

Evidence of infectious discharge in victim's body. — Exclusion of medical testimony regarding an infectious discharge discovered in the victim's body within hours

after the alleged rape was reversible error, since the excluded testimony was relevant to defendant's claim that he did not penetrate the victim because of the victim's gross physical condition. *White v. State*, 201 Ga. App. 53, 410 S.E.2d 441 (1991).

Evidence victim dropped out of school and missed prior court date not barred. — Defense's question to the victim concerning her status as a high school dropout and her failure to keep a previous court appointment did not violate O.C.G.A. § 24-2-3, since the questions did not directly reflect on her past sexual behavior. *George v. State*, 257 Ga. 176, 356 S.E.2d 882 (1987).

Evidentiary exhibit properly excluded. — Exhibit, which was apparently a fictional work about someone's sexual experiences and was to be used in an attack upon the victim's reputation for prior sexual behavior, was properly excluded under O.C.G.A. § 24-2-3. *Kilgore v. State*, 195 Ga. App. 884, 395 S.E.2d 337 (1990).

Denial of hearing held error. — When defendant offered to prove that the complaining witness had prior sexual encounters with defendant and others and that defendant knew about the others and of her reputation at the time of the incident on trial, it was error to deny a hearing on the defendant's offer of proof relating to the witness's past sexual behavior. *Hamilton v. State*, 185 Ga. App. 536, 365 S.E.2d 120 (1987), cert. denied, 185 Ga. App. 910, 365 S.E.2d 120 (1988).

Appellate standard of review. — Appellate court reviews the trial court's exclusion of evidence under the rape shield statute, O.C.G.A. § 24-2-3, for abuse of discretion. *Jackson v. State*, 254 Ga. App. 562, 562 S.E.2d 847 (2002).

Cited in *Tenant v. State*, 243 Ga. 595, 256 S.E.2d 382 (1979); *Tenant v. State*, 151 Ga. App. 891, 262 S.E.2d 204 (1979); *Burke v. State*, 153 Ga. App. 769, 266 S.E.2d 549 (1980); *Myers v. State*, 160 Ga. App. 685, 288 S.E.2d 27 (1981); *Grant v. State*, 160 Ga. App. 837, 287 S.E.2d 681 (1982); *State v. Abdi*, 162 Ga. App. 20, 288 S.E.2d 772 (1982); *Johnson v. State*, 165 Ga. App. 132, 299 S.E.2d 416 (1983); *Moore v. State*, 167 Ga. App. 768, 307 S.E.2d 293 (1983); *Moore v. State*, 169 Ga. App. 24, 311 S.E.2d 226 (1983); *Spratley v. State*, 169 Ga. App. 922, 315 S.E.2d 474 (1984); *Brown v. State*, 170

Ga. App. 305, 317 S.E.2d 307 (1984); Whitlock v. State, 170 Ga. App. 679, 318 S.E.2d 63 (1984); Collins v. State, 171 Ga. App. 906, 321 S.E.2d 757 (1984); In re J.F.F., 177 Ga. App. 816, 341 S.E.2d 465 (1986); Kennard v. State, 180 Ga. App. 522, 349 S.E.2d 470 (1986); Banks v. State, 185 Ga. App. 851, 366 S.E.2d 228 (1988); Brown v. State, 190 Ga. App. 678, 379 S.E.2d 598 (1989); Calloway v. State, 199 Ga. App. 272, 404 S.E.2d 811 (1991); Crane v. State, 199 Ga. App. 548, 405 S.E.2d 550 (1991); Concepcion v. State, 200 Ga. App. 358, 408 S.E.2d 130 (1991); Hall v. State, 204 Ga. App. 469, 419 S.E.2d 503 (1992); Smith v. State, 206 Ga. App. 184, 424 S.E.2d 864 (1992); Wells v. State, 206 Ga. App. 513, 426 S.E.2d 231 (1992); Wiggins v. State, 208 Ga. App. 757, 432 S.E.2d 113 (1993); Howard Motor Co. v. Swint, 214 Ga. App. 682, 448 S.E.2d 713 (1994); State v. Collins, 270 Ga. 42, 508 S.E.2d 390 (1998); Davis v. State, 238 Ga. App. 84, 517 S.E.2d 808 (1999); Jenkins v. State, 246 Ga. App. 38, 539 S.E.2d 542 (2000); McIntosh v. State, 247 Ga. App. 640, 545 S.E.2d 61 (2001); Gresham v. State, 255 Ga. App. 625, 566 S.E.2d 380 (2002); Pollard v. State, 260 Ga. App. 540, 580 S.E.2d 337 (2003); Grier v. State, 276 Ga. App. 655, 624 S.E.2d 149 (2005); Mitchell v. State, 287 Ga. App. 517, 651 S.E.2d 821 (2007); McGill v. State, 302 Ga. App. 378, 690 S.E.2d 648 (2010).

Child Molestation

Rape shield law applicable in child molestation cases. — In a prosecution for child molestation, evidence of the victim's past sexual behavior and preoccupation with sex was properly excluded. McGarity v. State, 224 Ga. App. 302, 480 S.E.2d 319 (1997), overruled in part by Abdulkadir v. State, 279 Ga. 122, 610 S.E.2d 50 (2005).

Trial court properly refused to allow defense counsel to question an investigator about the victim's prior sexual activity in a child molestation case as the rape shield law, O.C.G.A. § 24-2-3 (prohibiting the introduction of evidence of the past sexual behavior of the complaining witness in rape cases), was also applicable in child molestation cases, and no exceptions to the rape shield law was implicated. Flowers v. State, 255 Ga. App. 660, 566 S.E.2d 339 (2002).

O.C.G.A. § 24-2-3(b) is applicable in child

molestation cases and excludes evidence relating to the past sexual behavior of the complaining witness with some limited exceptions which include: (1) to show that someone other than the defendant caused the injuries to the child; (2) to show lack of victim credibility if the victim's prior allegations of molestation were false; and (3) to show other possible causes for the symptoms exhibited. Since no exception applied, inquiry into a later rape of defendant's victim was properly foreclosed in defendant's rape and incest trial. Taylor v. State, 268 Ga. App. 333, 601 S.E.2d 815 (2004).

In 2005, O.C.G.A. § 24-2-3 was amended to provide expressly that the rape shield law applies to prosecutions for child molestations. Brown v. State, 275 Ga. App. 281, 620 S.E.2d 394 (2005).

Early masturbation of victim irrelevant evidence. — In a child molestation case, evidence of the victim's possibly engaging in masturbation at an early age would not have been admissible as the defendant made no allegation that the victim had any unusually early or sudden sexual knowledge; thus, the victim's sexual history was irrelevant under the circumstances. Hughes v. State, 297 Ga. App. 581, 677 S.E.2d 674 (2009).

Expert testimony on abuse accommodation syndrome. — Defendant's claim that the defendant should have been able to question witnesses about the victim's alleged molestation by her stepfather and step-uncle was rejected as a nurse's testimony that the victim's behavioral characteristics were consistent with those of a child who had been sexually molested fell far short of the expert testimony regarding abuse accommodation syndrome that warranted the admission of evidence of previous molestation by others. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

Rape shield law inapplicable in child molestation cases. — By its plain terms the rape shield statute, O.C.G.A. § 24-2-3(a), applied only in prosecutions for rape and not to child molestation cases; however, the trial court did not err by applying O.C.G.A. § 24-2-3(a) to defendant's case because defendant was prosecuted for, among other offenses, rape, and the fact that defendant was acquitted of the rape charge did not require a new trial on the other charges. Abdulkadir v. State, 279 Ga. 122, 610 S.E.2d

Child Molestation (Cont'd)

50 (2005) (decided prior to 2005 amendment).

Child abuse accommodation syndrome. — Contrary to the defendant's contention, the trial court properly excluded evidence consisting of any prior abuse committed against the victims by persons other than the defendant on relevancy grounds, given that the state's fact witness, a social worker, did not testify that the victims' demeanor exhibited symptoms consistent with child abuse accommodation syndrome. The court noted that the evidence was not excludable under the rape shield statute as contended by the state. *Segura v. State*, 280 Ga. App. 685, 634 S.E.2d 858 (2006).

Evidence of a child sexual abuse victim's previous sexual activity was properly excluded under O.C.G.A. § 24-2-3(b), because medical evidence indicated the child had been sexually violated within the last 48 hours. *Callahan v. State*, 256 Ga. App. 482, 568 S.E.2d 780 (2002).

Trial court did not abuse the court's discretion in excluding evidence of a victim's prior false accusation of sexual misconduct made against another person under the rape shield statute, O.C.G.A. § 24-2-3(b), based on the state's proffer that the victim told defendant she was sexually active with her boyfriend because defendant, who was molesting her at the time, kept telling her that he was preparing her for adulthood and kept badgering her as to whether she was having sex with anyone, and because the victim thought that defendant would finally leave her alone if she told him that she was involved in a relationship and was sexually active. After considering the context and circumstances of the allegation, the trial court determined that the victim's prior accusation was the result of coercion and duress from her alleged abuser. *Eley v. State*, 266 Ga. App. 45, 596 S.E.2d 660 (2004).

In a rape case, the trial court properly found that under O.C.G.A. § 24-2-3, the defendant failed to show that the child victim had made three prior false allegations of sexual misconduct. In the first case, the defendant asserted a vague claim unsupported by any evidence that when the child was two years old, the child might have made some unspecified allegation against a rela-

tive against whom no charges were brought; in the second case, the allegations led to a guilty plea; the third case, police found that a minor had touched the victim but that no crime had been committed. *Osborne v. State*, 291 Ga. App. 711, 662 S.E.2d 792 (2008), cert. denied, 2008 Ga. LEXIS 783 (Ga. 2008).

With regard to defendant's convictions for sexual battery and child molestation of a step-child, the trial court properly excluded defendant's attempt to introduce evidence of a purported false allegation by the victim that the victim was the victim of date rape in 2006 under the rape shield law as defendant did not seek to introduce the evidence to show that the victim had psychological problems, rather, defendant argued that the victim had made a previous false allegation. *Birkbeck v. State*, 292 Ga. App. 424, 665 S.E.2d 354 (2008), cert. denied, 2008 Ga. LEXIS 874, 2008 Ga. LEXIS 874 (Ga. 2008); overruled in part, *State v. Gardner*, 286 Ga. 633, 690 S.E.2d 164 (2010).

Evidence not admissible in child molestation case. — In a prosecution for child molestation, the trial court did not abuse the court's discretion by granting the state's motion to exclude evidence that the victim told her physician that she was sexually active with her boyfriend. *Cox v. State*, 241 Ga. App. 388, 526 S.E.2d 887 (1999).

Evidence not admissible. — At a trial in which defendant was accused of sexual offenses against the daughter, the trial court did not err under O.C.G.A. § 24-2-3(b) in refusing to admit evidence of the possibility that the daughter was previously sexually molested by the babysitter; such evidence was inadmissible in a molestation case to show the victim's reputation for nonchastity or the victim's preoccupation with sex, and an exception to this rule did not apply, as the state presented neither medical evidence showing that the victim had been molested nor evidence showing that the victim had indicated symptoms consistent with the child abuse accommodation syndrome. *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Trial court did not err by excluding letters the victim wrote to the defendant during the time period between the defendant's arrest

and the trial pursuant to the Rape Shield Statute, O.C.G.A. § 24-2-3, because the evidence was cumulative to the extent that a portion of a letter from the victim recounting the victim's prior sexual activity supported an inference that the victim consented to sexual conduct since the jury was aware that the victim was pregnant with the defendant's child; to the extent that the portion of a letter from the victim in which the victim described future sexual activities that the victim would like to engage in with the defendant was relevant and admissible to show that the victim still had feelings for the defendant, that evidence was cumulative to the victim's testimony that the victim still loved the defendant and remained in contact with the defendant. *Morgan v. State*, No. A09A1853, 2010 Ga. App. LEXIS 66 (Jan. 25, 2010).

Trial court did not err by excluding letters the victim wrote to the defendant during the time period between the defendant's arrest and the trial pursuant to the Rape Shield Statute, O.C.G.A. § 24-2-3, because although the trial court initially indicated that the Rape Shield Statute prohibited admission of the letters, it clearly indicated that it would consider any future proper attempt to admit the evidence, but the defendant declined to do so; assuming that the ruling was erroneous, the verdict was sustainable because the evidence in the letters that the victim had a previous sexual relationship with the defendant before the incident and wanted to have one with the defendant in the future was not relevant to the charges for which the defendant was convicted, namely kidnapping, kidnapping with bodily injury, family violence aggravated assault, and false imprisonment. *Morgan v. State*, No. A09A1853, 2010 Ga. App. LEXIS 66 (Jan. 25, 2010).

Sexual activity of household excluded. — Evidence that a child sexual abuse victim was raised in a household where sexual activity was open was properly excluded, under O.C.G.A. § 24-2-3(b), because nothing in the proffered evidence showed that this would cause the victim to have knowledge of the sexual acts performed on the victim by defendant. *Callahan v. State*, 256 Ga. App. 482, 568 S.E.2d 780 (2002).

Evidence of prior false claims properly barred. — Trial court properly excluded evidence offered to show that the victim's

prior allegations of molestation were false based on the fact that the officer investigating the matter had failed to seek an arrest warrant for the alleged molester for more than one year after the complaint was made because it was not sufficient to establish that the allegations were false. *Mann v. State*, 244 Ga. App. 756, 536 S.E.2d 608 (2000).

Evidence that victim had venereal disease not admissible. — Trial court did not err in granting the state's motion to suppress evidence that the victim had a venereal disease one year after the last act of molestation since there was no evidence or offer of proof that the defendant did not have the disease. *Ricks v. State*, 249 Ga. App. 80, 546 S.E.2d 919 (2001).

Exception did not apply. — When the state did not offer any medical evidence to prove the girl had been molested or any testimony to show that she had displayed symptoms consistent with the child abuse accommodation syndrome, the exception to the admissibility of past sexual activity did not apply and inquiry into the victim's sexual history was precluded by O.C.G.A. § 24-2-3 (b). *Rocha v. State*, 248 Ga. App. 53, 545 S.E.2d 173 (2001).

Evidence in child sexual abuse cases. — Trial court did not err in refusing to allow cross-examination of a child sex abuse victim concerning alleged prior false accusations of molestation made against the victim's half brother after the trial court conducted a hearing to determine if the allegations at issue had a "reasonable probability of falsity," and ruled that the defense had not carried the defense's burden of showing a reasonable probability that the victim's accusation against the victim's half-brother was false; it was apparent that the trial court was faced with the conflicting testimony of the victim and the victim's half-brother and found that of the victim more credible. *Williams v. State*, 266 Ga. App. 578, 597 S.E.2d 621 (2004).

A child molestation defendant's trial counsel was not ineffective for failing to investigate and introduce the child victim's prior accusations of molestation, because there was no evidence of any such false prior accusations other than the victim's testimony at the trial itself that the child's cousin touched the child inappropriately. *Purvis v. State*, 301 Ga. App. 648, 689 S.E.2d 53 (2009).

Child Molestation (Cont'd)

Reference to evidence prohibited by rape shield law did not create manifest necessity for mistrial. — At defendant's trial for various sexual offenses based on allegations by his stepdaughter, which were later recanted, there was no manifest necessity for a mistrial over defendant's objection where a child abuse investigator mentioned, in violation of the trial court's ruling on a motion in limine based on O.C.G.A. § 24-2-3, that the stepdaughter had viewed pornographic movies even though the trial court did not abuse the court's discretion in granting the state's motion in limine to exclude the evidence; defense counsel's question to the investigator did not call for the improper response, and, once the issue had been injected, the defense was entitled to clarify that defendant bore no responsibility for the victim's viewing of the pornographic movies. *Payne v. State*, 267 Ga. App. 498, 600 S.E.2d 422 (2004).

Although the trial court erred by excluding evidence of one child victim's alleged homosexual relationship in defendant's trial on 14 counts of child molestation and 11 counts of aggravated child molestation, it was highly probable that the error did not contribute to the jury's verdict; even if defendant was given the opportunity to cross-examine the victim about the victim's past sexual behavior, the judge would have been unlikely to have adjudged that evidence as credible, completely disregarding defendant's guilty plea and the other evidence that such a similar transaction did occur. *Brown v. State*, 275 Ga. App. 281, 620 S.E.2d 394 (2005).

Constitutional challenge of rape shield statute denied. — Evidence that the victim was molested by her stepfather would not have diminished evidence that defendant molested the victim; therefore, application of the rape shield statute did not deny him a fair trial. *Rouse v. State*, 204 Ga. App. 845, 420 S.E.2d 779, cert. denied, 204 Ga. App. 922, 420 S.E.2d 779 (1992).

Question regarding victim's previous accusation against defendant. — Defense counsel was properly prohibited from asking the 11-year-old victim on cross-examination whether she had previously accused the defendant, her stepfather, of molesting her.

Allen v. State, 210 Ga. App. 447, 436 S.E.2d 559 (1993).

Questioning about motive to fabricate allegations not barred. — Limitation on cross-examination of an alleged child molestation victim, precluding examination of whether she was dating an older man, did not preclude questioning whether she had a motive to fabricate the allegations due to conflicts with defendant over parental discipline. *Nixon v. State*, 234 Ga. App. 797, 507 S.E.2d 833 (1998).

Evidence of victim's sexually transmitted disease allowed. — Since the defendant was convicted of incest and child molestation, the trial court erred in disallowing the defendant to introduce medical evidence of a sexually transmitted disease for which the victim had tested positive for the purpose of corroborating defendant's defense, not for the purpose of exploring the victim's past or other sexual behavior. *Chambers v. State*, 205 Ga. App. 78, 421 S.E.2d 326 (1992).

Questioning about promiscuity precluded. — In a prosecution for child molestation and incest, the defendant was properly precluded from questioning the victim about her alleged promiscuity. *Walker v. State*, 234 Ga. App. 40, 506 S.E.2d 179 (1998).

Because evidence of the victim's disease was inadmissible under O.C.G.A. § 24-2-3(a), trial counsel's performance could not be considered deficient based on a failure to contest the receipt of the medical information; thus, an order granting defendant's petition for a writ of habeas corpus was reversed because even if counsel had requested a continuance for the purpose of testing the defendant, no reasonable likelihood existed that the outcome of the trial would have been different, and in fact, a negative result for defendant at the time of trial would not have established the medical condition at the time of the crimes, or rule out the possibility that the defendant had molested the victim. *Murrell v. Ricks*, 280 Ga. 427, 627 S.E.2d 546 (2006).

Inapplicable to victim's prior alleged molestations. — O.C.G.A. § 24-2-3 did not bar the introduction of victim's prior alleged molestations to show that someone other than defendant caused the injuries to the two victims. *Lemacks v. State*, 207 Ga. App. 160, 427 S.E.2d 536 (1993).

Evidence of child victim's alleged viewing of pornography. — Trial court did not err in

limiting inquiry into a child victim's alleged viewing of the victim's brother's pornographic materials because there was no showing of relevance when the victim denied seeing the movies and did not use words of a sexual nature that normally would not be in the victim's vocabulary. *Montgomery v. State*, 277 Ga. App. 142, 625 S.E.2d 529 (2006).

Evidence of sexually transmitted disease.

— Trial court did not err in refusing to allow the offered testimony regarding other sexual assaults upon the victim after defendant failed to offer proof that the victim's stepfather was also infected with gonorrhea. Any evidence of the victim's sexual activity with her stepfather would have shed no light on the origin of the victim's sexually transmitted disease. *Rouse v. State*, 204 Ga. App. 845, 420 S.E.2d 779, cert. denied, 204 Ga. App. 922, 420 S.E.2d 779 (1992).

Harmless error. — Although the defendant in a child molestation case should have been allowed to question one of the teenagers involved about her sexual relationship with the defendant's child because at the time of the trial, the rape shield statute applied only to rape cases, the error was harmless; such a relationship was placed into evidence by the teenager's own statements. *Krirat v. State*, 286 Ga. App. 650, 649 S.E.2d 786 (2007), cert. denied, 2007 Ga. LEXIS 745 (Ga. 2007).

Incest

Incest. — Rape shield statute was applicable in prosecution for incest. *Estes v. State*, 165 Ga. App. 453, 301 S.E.2d 504 (1983).

Flirtation between child and parent inadmissible. — Trial court did not err by excluding evidence concerning daughter's alleged flirtation with her stepfather because the rape shield statute bars such evidence. *Murphy v. State*, 195 Ga. App. 878, 395 S.E.2d 76 (1990).

Incest is a sexual crime included within O.C.G.A. § 24-2-3. *Haynes v. State*, 180 Ga. App. 202, 349 S.E.2d 208 (1986).

Rape

Evidence not admissible in rape case. — In a prosecution for rape and other offenses, the trial court properly precluded defendant from examining an officer regarding inti-

mate photographs and letters written by the victim to her husband while he was in prison. *Martin v. State*, 219 Ga. App. 277, 464 S.E.2d 872 (1995).

Victim impact statement in which the victim stated that defendant "took her virginity" was not admissible for impeachment purposes under the rape shield statute. *Fetterolf v. State*, 223 Ga. App. 744, 478 S.E.2d 889 (1996).

Evidence concerning a romantic relationship between the victim and a recused prosecuting attorney was inadmissible. *Griffin v. State*, 224 Ga. App. 225, 480 S.E.2d 608 (1997).

There was no error in the trial court's refusal to allow defendant to introduce evidence of the victim's past sexual behavior to explain how her hymen became perforated. *Snow v. State*, 228 Ga. App. 649, 492 S.E.2d 564 (1997).

Even though defendant had obtained a pretrial order allowing him to present testimony that he and the victim had previously had consensual intercourse, his asking a nurse about the victim's statement to her about a prior act of voluntary intercourse violated the rape shield statute since this evidence was not included in defendant's proffer. *Banks v. State*, 230 Ga. App. 258, 495 S.E.2d 877 (1998).

Evidence of victim's prior rape was not admissible as a prior false allegation or otherwise; defendant's argued inference that the victim must have consented because as a previous rape victim she would have exhibited more wariness of strange men was not permissible. *Williams v. State*, 251 Ga. App. 137, 553 S.E.2d 823 (2001).

Trial court properly excluded evidence as to the victims' past sexual behavior in defendant's rape and aggravated assault trial as defendant failed to satisfy either prong of O.C.G.A. § 24-2-3(b) since: (1) the victims were beaten; (2) one victim testified that she was pushed to the ground and hit in the face; (3) the other victim was dragged to an abandoned yard and told repeatedly to "shut up" while being punched in the face; and (4) the victims testified that they never had sex with defendant before the night in question. *Williams v. State*, 257 Ga. App. 54, 570 S.E.2d 362 (2002).

In a prosecution for rape and sodomy, the trial court properly refused to allow the

Rape (Cont'd)

defendant to present evidence as to the victim's past conduct in which she allegedly consented to sex in exchange for drugs, as defendant did not proffer any evidence to demonstrate the basis for his belief that the victim consented to his conduct. *Brown v. State*, 260 Ga. App. 77, 579 S.E.2d 87 (2003).

Since the victim never claimed that defendant was the father of her child, evidence of her sexual conduct was irrelevant pursuant to O.C.G.A. § 24-2-3(b). *Carson v. State*, 259 Ga. App. 21, 576 S.E.2d 12 (2002).

Rape shield statute was properly used to exclude testimony of the victim's mother and in limiting victim's cross-examination; the evidence excluded under the rape shield statute involved the victim's sexual act with a third party and was also excludable on relevancy grounds. *Abdulkadir v. State*, 264 Ga. App. 805, 592 S.E.2d 433 (2003).

Evidence of the sexual history of defendant's wife was properly excluded under the Georgia Rape Shield Statute, O.C.G.A. § 24-2-3, as defendant was charged with the aggravated assault of his wife in conjunction with a rape charge; trial counsel was not ineffective for failing to argue that evidence of the prior sexual history of defendant's wife was admissible. *Osterhout v. State*, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

Trial court properly refused to allow testimony that a victim of domestic violence had been seen working as a prostitute because that information had no relevance to the aggravated assault and false imprisonment charges for which a defendant was convicted, and further, the defendant failed to produce any evidence that could have provided a nexus between the alleged prostitution and a conclusion that someone else might have inflicted the victim's injuries. *Moorer v. State*, 290 Ga. App. 216, 659 S.E.2d 422 (2008).

Testimony about ongoing customer-prostitute relationship should be allowed. — Defendant's aggravated sodomy conviction was reversed after the trial court erroneously refused to allow testimony concerning defendant's five-year relationship with the victim, a prostitute, under Georgia's Rape Shield Statute, O.C.G.A. § 24-2-3; the ongoing customer-prostitute relationship between the two would support a reasonable

inference that defendant believed that the defendant's sexual relationship with the victim on the night in question was consensual; the evidence also had a direct bearing on the victim's motivation to fabricate the rape allegation, and therefore was admissible; defendant's proposed cross-examination of the victim was confined to the existence of an ongoing relationship between them. *Ivey v. State*, 264 Ga. App. 377, 590 S.E.2d 781 (Nov. 26, 2003).

Use of term "virgin" prohibited. — Any evidence of physical injuries a victim receives during the commission of a rape, including the condition of the hymen, is admissible, but the term "virgin" is a comment on prior sexual history and therefore not admissible. *Herndon v. State*, 232 Ga. App. 129, 499 S.E.2d 918 (1998).

Inquiry about dress prohibited. — The trial court properly refused to permit defendant to introduce evidence or to make inquiry about the mode of the victim's dress on the night of the rape. *Alford v. State*, 243 Ga. App. 212, 534 S.E.2d 81 (2000).

Victim's desire to keep knowledge of sexual activity from parents. — Despite defendant's contention that defendant should have been allowed to present evidence that the victim had the motive to fabricate her claim of rape in order to prevent her parents from knowing that she had become sexually active, the trial court did not abuse the court's discretion in restricting defendant's cross-examination of the victim regarding her past sexual history based on *Green v. State*, 221 Ga. App. 436 (1996). *Lloyd v. State*, 263 Ga. App. 234, 587 S.E.2d 372 (2003).

Effectiveness of counsel in questioning. — Failure of defense counsel to cross-examine rape victim regarding her prior sexual history was not ineffective assistance of counsel since such questioning was clearly prohibited under O.C.G.A. § 24-2-3. *Brown v. State*, 225 Ga. App. 49, 483 S.E.2d 318 (1997).

Inquiring about areas of victim fabrication. — When defendant was charged with raping a victim who accepted defendant's offer of a ride as the victim was on her way to return a jacket to a former boyfriend, the rape shield law, O.C.G.A. § 24-2-3(a), did not prohibit defendant from inquiring of the victim about a theory that the victim

fabricated the rape charge to explain semen stains on the boyfriend's jacket, resulting from the sexual encounter, because she wanted to reestablish a romantic relationship with the boyfriend, because defendant was not seeking to inquire about the victim's character for sexual behavior. *Richardson v. State*, 276 Ga. 639, 581 S.E.2d 528 (2003).

O.C.G.A. § 24-2-3 applies by its terms to any prosecution for rape, making no distinction between the different phases of the trial. *Singleton v. State*, 157 Ga. App. 192, 276 S.E.2d 685 (1981).

Statutory rape. — Although the rape shield statute is applicable by its terms to rape cases, logic and the intent of the Act show that it should be equally applicable in statutory rape cases, except that the exceptions in the Act relating to consent and the accused's prior participation would be inapplicable in statutory rape cases. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979); *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981); *Brown v. State*, 173 Ga. App. 640, 327 S.E.2d 515 (1985).

In a prosecution for statutory rape, evidence of sexual intercourse between the victim and other individuals was properly excluded under O.C.G.A. § 24-2-3; in the absence of any indication that the prior acts of sexual intercourse were forcibly accomplished, evidence of sexual intercourse with others would relate to past sexual behavior and reflect upon the character of the victim. *Berry v. State*, 210 Ga. App. 789, 437 S.E.2d 630 (1993).

Evidence of other sexual activity with defendant allowed. — O.C.G.A. § 24-2-3 permits introduction of evidence of other sexual activity of the complaining witness only if such behavior involved the defendant or if such evidence supports an inference that the defendant reasonably believed the complaining witness would have consented to his actions. *Rouse v. State*, 204 Ga. App. 845, 420 S.E.2d 779, cert. denied, 204 Ga. App. 922, 420 S.E.2d 779 (1992).

Evidence that victim had contracted gonorrhea three months before she was raped, that she wore sexually suggestive clothing and acted promiscuously when she frequented nightclubs, and that she demanded money from another man threatening to claim that he raped her was properly ruled inadmissible. *Ford v. State*, 189 Ga. App. 395,

376 S.E.2d 418 (1988).

Victim's statements to defendant about past relationships. — Rape shield statute applied to victim's statements to defendant about her having had sexual relations with black men and having had children by these men which defendant sought to introduce as evidence that defendant believed the victim consented to have sex with him. *Logan v. State*, 212 Ga. App. 734, 442 S.E.2d 883 (1994).

Reasonable belief that victim consented.

— Since the defendant had known the victim for only one hour before the alleged rape occurred, and since in that time, it was unlikely that the defendant discovered any past sexual activity on the part of his victim that could justify his claim that she consented to intercourse, the trial court's refusal to admit evidence as to the victim's prior sexual experience was not a denial of defendant's right to a thorough and sifting cross-examination. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

Proffered testimony of two young men regarding the victim's advances toward them was inadmissible in a rape case, since there was no evidence of consent by the victim, nor any evidence that defendant had knowledge of the alleged conduct between the victim and the two young men. *Moore v. State*, 195 Ga. App. 851, 395 S.E.2d 13 (1990).

Evidence that a victim of an attempted rape had recorded a phone-sex tape did not support an inference that the defendant could have reasonably believed that she consented to the attempted sexual intercourse. *Sweeney v. State*, 233 Ga. App. 862, 506 S.E.2d 150 (1998).

Refusal to allow cross-examination of rape victim on existence of pubic hairs found on victim inconsistent with those of appellant and victim was not error. *Tremble v. State*, 162 Ga. App. 761, 292 S.E.2d 442 (1982).

In rape cases, proof of prior consent without regard to identity of persons or similarity of circumstances may be admitted to allow the jury to weigh or calculate the probability of consent with respect to an entire class of "unchaste" women when the court finds that the evidence supports an inference that the accused could have rea-

Rape (Cont'd)

sonably believed that the complaining witness consented to the conduct complained of. *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

State's introduction of evidence that victims contracted gonorrhea after rape and that defendant had gonorrhea during time in question did not authorize defendant to question victims concerning their prior sexual conduct. *McNeese v. State*, 170 Ga. App. 118, 316 S.E.2d 564 (1984).

Sexual Battery

No application in sexual battery cases. — Trial court did not err in refusing to charge the jury that it could consider the victim's character in determining whether the sexual contact with defendant was consensual or against the victim's will since the rape shield statute, O.C.G.A. § 24-2-3, on which defendant relied in arguing for the instruction, did not apply directly to sexual offenses such as sexual battery or aggravated sexual battery, and also because there was no evidence of any past sexual behavior between defendant and the victim. *Stinson v. State*, 256 Ga. App. 902, 569 S.E.2d 858 (2002) (decided prior to 2005 amendment).

Evidence not admissible in sexual assault case. — Trial court correctly granted the state's motion in limine to exclude evidence concerning the sexual assault victim having had consensual sex with her boyfriend before defendant sexually assaulted her because the Georgia rape shield statute, O.C.G.A. § 24-2-3, barred the sexual assault victim's prior sexual history as having any relevance to defendant's intent at the time of his sexual assault on the victim. *Bing v. State*, 256 Ga. App. 88, 567 S.E.2d 731 (2002).

O.C.G.A. § 24-2-3 is applicable to prosecutions for aggravated assault with intent to rape, and trial court did not err in sustaining the state's objection to defense counsel's questions concerning the prosecutors' previous sexual conduct. *Blount v. State*, 172 Ga. App. 120, 322 S.E.2d 323 (1984).

Sodomy

Evidence not admissible in sodomy case. — Evidence of any previous consensual ho-

mosexual fantasies the victim may have had was not admissible because it would in no way support an inference that the accused could have reasonably believed that the victim consented to the conduct complained of in the prosecution, which included armed robbery and kidnapping, as well as non-consensual aggravated sodomy at knife point. *Rogers v. State*, 247 Ga. App. 219, 543 S.E.2d 81 (2000).

In a prosecution for aggravated sodomy, even though the rape shield statute did not apply, evidence of the victim's sexual behavior with persons other than the defendant was properly excluded as not relevant since the defendant's defense was that he was not there, rather than that the victim had consented. *Mobley v. State*, 212 Ga. App. 293, 441 S.E.2d 780 (1994).

Evidence of victim's prior relationships with defendant. — Trial court did not abuse the court's discretion in excluding evidence of a rape victim's alleged past sexual behavior with defendant as the evidence of alleged prior sexual encounters with the victim did not lead to an inference of consent since the evidence established that defendant could not have reasonably believed that the victim consented to the sodomy and intercourse at issue based on defendant brandishing a gun and threatening to shoot the victim's friend and the victim if the victim did not comply with defendant's demands for sex. *Jennings v. State*, 292 Ga. App. 149, 664 S.E.2d 248 (2008).

Procedure

Defense must notify court of need for in camera hearing. — Before a trial court can be faulted for refusing an in camera hearing as provided for by O.C.G.A. § 24-2-3, the court must be placed on notice as to the intent of the defense to seek to introduce such evidence, and the defense must specifically notify the court of the need for an in camera hearing for its offer of proof. *Tucker v. State*, 173 Ga. App. 742, 327 S.E.2d 852 (1985); *Evans v. State*, 180 Ga. App. 1, 348 S.E.2d 561 (1986).

Defendant was not entitled to an in camera hearing on defendant's offer of proof of the victim's past sexual behavior when the defendant later testified before the jury that the defendant had consensual sex with the victim and the defendant never made a

proffer of anticipated testimony of an independent witness who would testify that the witness saw the consensual sex. *Nelson v. State*, 210 Ga. App. 249, 435 S.E.2d 750 (1993).

Victim may not appeal finding of admissibility. — Since the victim is not the defendant, the court does not consider any prejudice to her that admission of sexual history evidence may allow as against its probative value; nor is she provided any right of appeal against a finding of admissibility. Once the pertinence of a woman's lack of chastity, and hence its admissibility, is determined at the in camera inspection, this character trait may be proved. *Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

Retrial

Reprosecution not barred when evidence inappropriately introduced. — Defendant's introduction of evidence that was prohibited by the rape shield statute gave the court grounds to find manifest necessity for a mistrial; therefore, state and federal double jeopardy provisions did not bar reprosecution. *Banks v. State*, 230 Ga. App. 258, 495 S.E.2d 877 (1998).

Trial court did not err in denying a defendant's plea in bar of former jeopardy with regard to kidnapping, rape, and other charges for alleged crimes committed against the defendant's estranged wife as defense counsel violated the Rape Shield Statute, O.C.G.A. § 24-2-3, in questioning the defendant's spouse as to how often the spouse had engaged in sexual intercourse after the alleged rape, which entitled the state to a mistrial. The defendant did not have the right to force the state either to endure a prejudiced trial or forego prosecution entirely. *Birdsong v. State*, 298 Ga. App. 322, 680 S.E.2d 159 (2009).

Retrial not barred by double jeopardy clause. — Trial judge did not abuse the judge's discretion in determining that declaration of a mistrial was required because prejudicial and inadmissible matter injected by the defense in violation of O.C.G.A. § 24-2-3 made it impossible for an impartial verdict to be reached, and retrial of defendant was not barred by the double jeopardy clause of the fifth amendment. *Abdi v. State*, 249 Ga. 827, 294 S.E.2d 506 (1982), cert.

denied, 471 U.S. 1006, 105 S. Ct. 1871, 85 L. Ed. 2d 164 (1985).

Declaration of a mistrial by the trial judge, on the judge's own motion, in a rape prosecution, following the cross-examination of the alleged victim, which culminated in a question by defense counsel concerning the past sexual behavior of the witness, a violation of O.C.G.A. § 24-2-3 that was "highly improper" and prejudicial, was proper and did not bar a second trial of the defendant for the alleged offense. *Abdi v. Georgia*, 744 F.2d 1500 (11th Cir. 1984), cert. denied, 471 U.S. 1006, 105 S. Ct. 1871, 85 L. Ed. 2d 164 (1985).

Decisions Under Pre-1976 Law

Editor's notes. — The cases noted below were decided under the law as it existed prior to the enactment, by Ga. L. 1976, p. 741, § 1, of former Code 1933, § 38-202.1.

Evidence of general reputation for lewdness is admitted for the purpose of illustrating the probability of consent, and to negative the nonconsent and force. *Teague v. State*, 208 Ga. 459, 67 S.E.2d 467 (1951). But see, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955), for comment, see 14 Ga. B.J. 363 (1952).

Evidence of specific acts not allowed. — In a prosecution for rape, only the showing of female's general character for lewdness is permitted, and evidence of specific acts of lewdness with other men or a cross-examination of the female as to such acts is not allowed; and the rule is not changed when the accused admits the intercourse and claims that intercourse was with consent. *Latimer v. State*, 188 Ga. 775, 4 S.E.2d 631 (1939); *Teague v. State*, 208 Ga. 459, 67 S.E.2d 467 (1951). But see, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955), for comment, see 14 Ga. B.J. 363 (1952).

Evidence of specific acts allowed. — When the alleged victim of the rape is sworn as a witness for the state, justice and the defendant's constitutional right to a fair trial require that his counsel be permitted to cross-examine her thoroughly as to any prior act of lewdness with the accused and with other men. *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955). But see *Lynn v. State*, 231 Ga. 559, 203 S.E.2d 221 (1974). For comment, see 19 Ga. B.J. 95 (1956).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Alleged Victim's Commission of Prior Acts of and Reputation for Violence, 15 POF2d 167.

ALR. — Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 ALR 8; 68 ALR 1068.

Cross-examination as to sexual morality for purpose of affecting credibility of witness, 65 ALR 410.

Admissibility in rape cases of evidence of previous unchastity, or reputation for unchastity, of prosecutrix, 140 ALR 364.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or an incompetent to testify because of age or other reason, 157 ALR 1359.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 ALR2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity, 35 ALR3d 1452.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not mate-

rial to his commission of offense charged, 54 ALR3d 897.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity, 90 ALR3d 1300.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 ALR3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 ALR3d 1181.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 ALR4th 283.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 ALR4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 ALR4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 ALR4th 685.

24-2-4. How much of document or record admissible.

Where either party introduces part of a document or record, the opposite party may read so much of the balance as is relevant. (Civil Code 1895, § 5241; Civil Code 1910, § 5830; Code 1933, § 38-703.)

History of Code section. — This Code section is derived from the decisions in *Monroe v. Phillips*, 64 Ga. 32 (1879); *Dowling v. Feeley*, 72 Ga. 557 (1884); and *Jones v. Grantham*, 80 Ga. 472, 5 S.E. 764 (1888).

Administrative rules and regulations. — Fire Safety Information to Be Furnished in Hotels, Motels, Dormitories, Apartments and Personal Care Homes, Official Compilation of the Rules and Regulations of the State of Georgia, Comptroller General,

Safety Fire Commissioner, State Minimum Fire Safety Standards, Rule 120-3-3-.06.

Law reviews. — For article, “An Analysis

of Georgia’s Proposed Rules of Evidence,” see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Brief of evidence. — In the preparation of the brief of evidence after trial, only such portions of documents should be embraced therein as were actually read or considered at the trial. *Crawford v. Roney*, 126 Ga. 763, 55 S.E. 499 (1906).

Entry on back of deed. — When the plaintiff relies on a deed coming from the plaintiff’s own possession, the opposite party may without proof of its execution, rely upon an endorsement, memorandum, or entry on the back of the deed. *McBrayer v. Walker*, 122 Ga. 245, 50 S.E. 95 (1905).

Foreign state code. — When one party offers a section of the code of another state as proof of the law of that state on a given subject, that party is not required to introduce all cognate sections. If there are other sections applicable the opposite party may offer those sections, but cannot complain that one’s adversary has not done so. *Southern Ry. v. Robertson*, 7 Ga. App. 154, 66 S.E. 535 (1909).

Real estate valuations. — It would be a misconception of the principle invoked by statute to allow the several valuations as stated by the real estate board in a document together with their arguments and reasons therefor, to be introduced in evidence by the plaintiff merely because the plaintiff’s witness on cross-examination had stated a single valuation from this paper, when the entire document was otherwise absolutely inadmissible as hearsay. *City of Atlanta v. Atlanta Title & Trust Co.*, 45 Ga. App. 265, 164 S.E. 224 (1932).

Victim’s testimony. — After the defense counsel was allowed to pursue the inconsistencies between a witness’s trial testimony and the witness’s statement to a detective, pursuant to O.C.G.A. § 24-2-4, the state was entitled to rebut the defense’s implication that a robber was not the defendant by reading the entire statement to the jury;

consequently, the trial court did not err in allowing the detective to read part of a victim’s statement to the jury. *Houston v. State*, 270 Ga. App. 456, 606 S.E.2d 883 (2004).

Photos of victim. — Trial court properly admitted one of three photographs of the victim’s body which showed an exterior mark of strangulation, as such was not overly gruesome and inflammatory; moreover, pre-incision photos of a victim which depicted the location and nature of the victim’s wounds were admissible as both relevant and material. *McWilliams v. State*, 280 Ga. 724, 632 S.E.2d 127 (2006).

Letters. — Trial court did not err by refusing the defendant’s request to admit only the portions of letters written by the codefendant that cast the codefendant in a bad light relative to the crimes and excluding other portions that described the defendant’s role in the crimes as being more significant than the defendant had described in a custodial interview because the defendant was not permitted to admit portions of the letters for the purportedly-limited purpose of showing the codefendant’s state of mind without waiving the defendant’s objections to the state’s introduction of the remainder of the letters. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010).

Cited in *Stokes v. Rutherford*, 192 Ga. 883, 17 S.E.2d 78 (1941); *Keebler v. Willard*, 91 Ga. App. 551, 86 S.E.2d 379 (1955); *State Hwy. Dep’t v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967); *Life Ins. Co. v. Dodgen*, 148 Ga. App. 725, 252 S.E.2d 629 (1979); *Strange v. Henderson*, 223 Ga. App. 218, 477 S.E.2d 330 (1996); *Boatman v. State*, 272 Ga. 139, 527 S.E.2d 560 (2000); *Kent v. State*, 245 Ga. App. 531, 538 S.E.2d 185 (2000); *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 365. 29A Am. Jur. 2d, Evidence, § 1042.

C.J.S. — 32A C.J.S., Evidence, §§ 1038, 1102 et seq.

CHAPTER 3

HEARSAY

Article 1

Sec.

General Provisions

- Sec.
24-3-1. Hearsay evidence defined; when admitted.
24-3-2. Original evidence distinguished.
24-3-3. When declarations part of res gestae.
24-3-4. Statements made for medical diagnosis or treatment.
24-3-5. Declarations of conspirators.
24-3-6. Dying declarations.
24-3-7. Declarations as to title by one in possession.
24-3-8. Declarations against interest by one since deceased.
24-3-9. Declarations of deceased persons as to ancient rights.
24-3-10. Testimony at former trial.
24-3-11. Ancient documents.
24-3-12. Proof of pedigree.
24-3-13. Ancient boundaries and landmarks.
24-3-14. Records made in regular course of business admissible; effect of circumstances of making; construction of Code section.
24-3-15. Admissions and confessions distinguished.
24-3-16. Testimony as to child's description of sexual contact or physical abuse.
24-3-17. Admissibility of certified copies of records of Department of Public Safety or Department of Driver Services or comparable agencies in other states; admissibility of computer transmitted records.
24-3-18. Admissibility of medical reports; qualifications of person signing

reports; right of adverse party to cross-examine person signing reports.

Article 2

Admissions

- 24-3-30. Admissions in pleadings.
24-3-31. Admissions of parties to record admissible generally; exceptions.
24-3-32. Admissions by privies.
24-3-33. Admissions by agents.
24-3-34. Admissions of real parties in interest.
24-3-35. What admissions by third parties received in evidence.
24-3-36. Acquiescence or silence as admission.
24-3-37. What admissions not proper evidence.
24-3-37.1. Offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apologies by a health care provider or the provider's employee or agent.
24-3-38. Right to have whole conversation heard.

Article 3

Confessions

- 24-3-50. Only voluntary confessions admissible.
24-3-51. Confessions under spiritual exhortation or promise of secrecy or collateral benefit admissible.
24-3-52. Against whom confession of conspirator admissible.
24-3-53. Admissions and confessions received with care; no conviction on uncorroborated confession.

Law reviews. — For article discussing developments in Georgia criminal law in 1976 to 1977, see 29 Mercer L. Rev. 55 (1977). For article surveying recent legislative and judicial developments in Georgia's evidence

laws, see 31 Mercer L. Rev. 107 (1979). For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For annual survey of the law of evidence, see 38

Mercer L. Rev. 215 (1986). For annual survey of the law of evidence, see 41 Mercer L. Rev. 175 (1989). For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998). For annual survey article discussing developments in the law of evidence, see 51 Mercer L. Rev. 279 (1999).

For note, "Hearsay in Georgia: Treatment of the Recalcitrant Witness," see 21 Ga. St. B.J. 82 (1984).

For comment on *Moore v. Atlanta Transit Sys.*, 105 Ga. App. 70, 123 S.E.2d 693 (1961), see 25 Ga. B.J. 202 (1962). For comment on *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975) upholding admission of advisory materials promulgated by the F.A.A. as an exception to the hearsay rule, see 27 Mercer L. Rev. 1219 (1976).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ILLUSTRATIONS

General Consideration

Not exhaustive. — Cases specified in the Code in which hearsay evidence is admitted as exceptions to the general rule excluding hearsay testimony are not exhaustive of the cases in which hearsay evidence is admissible. *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Ellis v. O'Neal*, 175 Ga. 652, 165 S.E. 751 (1932); *Moore v. Atlanta Transit Sys.*, 105 Ga. App. 70, 123 S.E.2d 693 (1961), for comment, see 25 Ga. B.J. 202 (1962).

Objections. — When evidence is objected to en bloc certain portions of which are admissible, and portions are not, a complaint of the admission of the evidence as a whole is without merit. *Brannan v. Mobley*, 169 Ga. 243, 150 S.E. 76 (1929).

A general objection, such as that the verdict is unsupported by the evidence, gives the appellate court ground to set aside the verdict, if it is founded on hearsay. *Eaton Oil & Auto Co. v. Greene County*, 53 Ga. App. 145, 185 S.E. 296 (1936).

Cited in *Owens v. Owens*, 218 Ga. 336, 127 S.E.2d 897 (1962).

Illustrations

Statements of the testator, either before the execution of a purported will, at the time

of execution, or after the execution of a paper, are admissible to aid in the determination of the fact whether the paper offered for probate is really the writing which was attested by witnesses as required by law. Greater latitude is given to the admission of parol evidence on the issue of probate than on the construction of the will after probate. *Ellis v. O'Neal*, 175 Ga. 652, 165 S.E. 751 (1932).

Testimony of an arresting officer as to statements made to the officer by a cab driver, in the presence of the accused, regarding the activities of the accused while a passenger during the night after the crime was committed, was hearsay, not being original evidence, under § 24-3-2, nor an exception to the hearsay rule. Nor was it admissible by acquiescence or silence, since the circumstances required neither an answer nor denial by the accused. *Rosborough v. State*, 209 Ga. 362, 72 S.E.2d 717 (1952).

Declarations of a deceased employee to an employer and to the investigating police officer as to the cause of the accident were hearsay, inadmissible under any exception to the hearsay rule. *Lockhart v. Liberty Mut. Ins. Co.*, 141 Ga. App. 476, 233 S.E.2d 810 (1977).

RESEARCH REFERENCES

ALR. — Admissibility of statements derogatory to title made after parting with title without monetary consideration, 1 ALR 1240.

Admissibility of statements or declarations of plaintiff's spouse concerning acts or conduct of defendant in action for alienation of affections, 4 ALR 497.

Admissibility in murder trial of acts or declarations of deceased indicating fear of person other than defendant, 4 ALR 1516.

Proof of entire conversation containing alleged confession, 26 ALR 541.

Admissibility of statements made by deceased with reference to purpose or destination of a journey or trip he was about to make, 113 ALR 268.

Evidence of specific acts or reputation as admissible to prove incompetency of motor vehicle driver, or defendant's knowledge thereof, in action against one permitting, alleged incompetent to drive, 120 ALR 1311.

Hearsay in proceeding for suspension or revocation of license to conduct business or profession, 142 ALR 1388.

Admissibility in divorce action for adultery of wife's statement that husband was not father of her child, 4 ALR2d 567; 9 ALR4th 428.

Written recitals or statements as within rule excluding hearsay, 10 ALR2d 1035.

Declarations or admissions of person in control of vehicle as admissible against or binding upon owner, lien claimants, or the like, of a vehicle subjected to forfeiture proceedings, 55 ALR2d 1280.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536.

Admissibility, against third person, of financial or credit report or rating of a mercantile or commercial agency, 85 ALR2d 436.

Admissibility, in contempt proceeding against witness, of evidence of incriminating nature of question as to which he invoked privilege against self-incrimination, 88 ALR2d 463.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Admissibility, as against hearsay objection, of report of tests or experiments carried out by independent third party, 19 ALR3d 1008.

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations, 47 ALR3d 822.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 ALR3d 598.

Products liability: admissibility, against manufacturer, of product recall letter, 84 ALR3d 1220.

Admissibility, as against interest, in criminal case of declaration of commission of criminal act, 92 ALR3d 1164.

Admissibility of hearsay evidence in probation revocation hearings, 11 ALR4th 999.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 ALR4th 1016.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Admissibility of hearsay evidence in student disciplinary proceedings, 30 ALR4th 935.

Uniform Evidence Rule 803(24): the residual hearsay exception, 51 ALR4th 999.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5), 75 ALR4th 199.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay—state cases, 89 ALR4th 456.

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 ALR5th 784.

Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of Evidence and similar formulations, 57 ALR5th 141.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article, "Evidence," see 53 Mercer L. Rev. 281 (2001).

24-3-1. Hearsay evidence defined; when admitted.

(a) Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.

(b) Hearsay evidence is admitted only in specified cases from necessity. (Orig. Code 1863, § 3693; Code 1868, § 3717; Code 1873, § 3770; Code 1882, § 3770; Civil Code 1895, § 5175; Civil Code 1910, § 5762; Code 1933, § 38-301.)

Law reviews. — For article, “Evidence from Computers,” see 8 Ga. L. Rev. 562 (1974). For article, “An Analysis of Georgia’s Proposed Rules of Evidence,” see 26 Ga. St. B.J. 173 (1990). For article, “The New ‘Necessity Exception’ to the Hearsay Rule in Georgia: A New Rule of Inclusion?,” see 16 Ga. St. U.L. Rev. 573 (2000). For annual survey article discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000). For annual survey article on evidence law, see 52 Mercer L. Rev. 263 (2000). For article, “Evidence,” see 53 Mercer L. Rev. 281 (2001). For survey article on evidence law for the period from June 1, 2002

through May 31, 2003, see 55 Mercer L. Rev. 249 (2003). For annual survey of evidence law, see 56 Mercer L. Rev. 235 (2004); 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009).

For comment on *Moore v. Atlanta Transit Sys.*, 105 Ga. App. 70, 123 S.E.2d 693 (1961), see 14 Mercer L. Rev. 445 (1963). For comment on *Argonaut Ins. Co. v. Allen*, 123 Ga. App. 741, 182 S.E.2d 508 (1971), upholding admission of psychiatric opinion based on subjective declarations of patient, see 8 Ga. St. B.J. 554 (1972).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICABILITY

ACTUAL KNOWLEDGE REQUIREMENT

CRIMINAL LAW

- 1. CONSTITUTIONAL RIGHTS
- 2. BASIS FOR CONVICTION

APPLICATION AND EXAMPLES

- 1. ADMISSIBLE HEARSAY
- 2. HEARSAY NOT FOUND
- 3. CONTENTS OF BOOKS AND RECORDS
- 4. CONVERSATIONS
- 5. CRIMINAL CASES
- 6. DECEASED PERSONS
- 7. EVIDENCE FROM OTHER TRIALS
- 8. LETTERS
- 9. REPUTATION
- 10. RUMORS
- 11. STATEMENTS BY PHYSICIANS
- 12. HEARSAY FOUND

OBJECTIONS

- 1. SPECIFICITY OF OBJECTIONS
- 2. ADMISSION OVER OBJECTION

General Consideration

When testimony considered hearsay. — Testimony is considered hearsay only if the witness is testifying to another party's statement in order to prove or demonstrate the truth of that statement. Otherwise it is a verbal act and thus original evidence rather than hearsay. *Hurston v. State*, 194 Ga. App. 226, 390 S.E.2d 119 (1990).

When defendant's statement that plans for dock construction were submitted was based on defendant's own personal knowledge, but defendant's statement regarding approval was hearsay, based on information from a source who told defendant about such approval, the trial court erred in considering this evidence. *Clauss v. Plantation Equity Group, Inc.*, 236 Ga. App. 522, 512 S.E.2d 10 (1999).

Underlying reasons for rule. — Chief reasons for the exclusion of hearsay evidence are the want of a sanction of an oath, and of any opportunity to cross-examine the witness. *Foster v. Brooks*, 6 Ga. 287 (1849); *Bennett v. State*, 49 Ga. App. 804, 176 S.E. 148 (1934); *Peacon v. Peacon*, 197 Ga. 748, 30 S.E.2d 640 (1944).

Necessity is not enough to justify hearsay. The two underlying reasons for any exception to the hearsay rule are a necessity for the exception and a circumstantial guaranty of the trustworthiness of the offered evidence which is that there must be something present which the law considers a substitute for the oath of the declarant and the declarant's cross-examination by the party against whom the hearsay is offered. *Gale v. State*, 138 Ga. App. 261, 226 S.E.2d 264 (1976); *Irby v. Brooks*, 246 Ga. 794, 273 S.E.2d 183 (1980), overruled on other grounds, *Swain v. Citizens & S. Bank*, 258 Ga. 547, 372 S.E.2d 423 (1988).

There is a distinction between illegal testimony and secondary evidence in that hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced, while the only objection to secondary evidence is that it is received without first laying the preliminary foundation; such evidence stands on a different footing, and if admitted without objection it is nevertheless competent, for by allowing such evidence without objecting at

the time it is sought to be introduced the party waives the party's right to have the best evidence of such fact sought to be proved, and cannot subsequently insist that the court should withdraw such secondary evidence from the consideration of the jury. *Rushin v. State*, 63 Ga. App. 646, 11 S.E.2d 844 (1940).

Hearsay testimony is wholly without probative value, and its introduction without objection does not give it any weight or force whatever in establishing a fact. *Higgins v. Trentham*, 186 Ga. 264, 197 S.E. 862 (1938); *Crawley v. Selby*, 208 Ga. 503, 67 S.E.2d 775 (1951); *Collins v. State*, 146 Ga. App. 857, 247 S.E.2d 602 (1978); *Finch v. Caldwell*, 155 Ga. App. 813, 273 S.E.2d 216 (1980).

Necessity. — Under O.C.G.A. § 24-3-1, hearsay evidence is admitted in specified cases from necessity. There are three prerequisites for admission of hearsay because of necessity: (1) necessity; (2) particularized guarantees of trustworthiness; and (3) the evidence must be relevant to a material fact and more probative on that material fact than other evidence that may be procured or offered. *Booth v. State*, 264 Ga. App. 393, 590 S.E.2d 789 (2003).

"Necessity" exception applies only when witness unavailable. — "Necessity" exception to the hearsay rule, set forth in subsection (b) of O.C.G.A. § 24-3-1, applies only when the witness is unavailable, usually because of death or in cases where the witness may not be compelled to testify, as in the case of a wife who cannot be compelled to testify against her husband. *Glisson v. State*, 188 Ga. App. 152, 372 S.E.2d 462 (1988).

Hearsay not admitted. — Statements to a police officer by the victim in a prosecution for battery which were made three-and-one-half hours after the incident and which bore no mark of spontaneity or other such state of mind undeniably free of conscious device or afterthought were not part of the *res gestae*; as pure hearsay, the statements were inadmissible since the state did not show "necessity," to wit, that the declarant was unavailable and that the state made reasonable efforts to secure the presence of the declarant. *Wilbourne v. State*, 214 Ga. App. 371, 448 S.E.2d 37 (1994).

Requirements for necessity exception. — To meet the necessity exception, the state must show that the declarant is unavailable to testify and that it made reasonable efforts

to locate the declarant and secure the declarant's presence. *Holmes v. State*, 271 Ga. 138, 516 S.E.2d 61 (1999).

Trial court did not abuse the court's discretion in deeming a witness to be unavailable when the evidence showed that investigators for both the state and a codefendant could not locate the witness after diligent and extensive efforts conducted over a month and a half before trial. *Holmes v. State*, 271 Ga. 138, 516 S.E.2d 61 (1999).

In a malice murder prosecution, statements made by the victim in the months before death were admissible under the necessity exception to hearsay as the statements were made to investigating police officers shortly after the events involving defendant and the victim. *Peterson v. State*, 274 Ga. 165, 549 S.E.2d 387 (2001).

Necessity exception inapplicable when declarant incompetent. — Necessity exception most commonly applies when the out-of-court declarant is unavailable to testify because of death or the exercise of a privilege not to testify, and the circumstances surrounding the statement provide a guaranty of trustworthiness, not when the declarant is unavailable because the declarant fails to qualify as a competent witness. *Shaver v. State*, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991).

Necessity requirement held satisfied. — See *Patterson v. State*, 202 Ga. App. 440, 414 S.E.2d 895 (1992); *Jones v. State*, 240 Ga. App. 723, 524 S.E.2d 773 (1999); *Battle v. State*, 244 Ga. App. 771, 536 S.E.2d 761 (2000).

Requirements of necessity and guaranty of trustworthiness satisfied. — In a murder prosecution, when defendant's common-law wife asserted the privilege not to testify against husband, statements wife made during the official investigation and confirmed at a subsequent pre-trial hearing were admissible as an exception to the hearsay rule without conducting an additional hearing on their reliability. *Drane v. State*, 265 Ga. 663, 461 S.E.2d 224 (1995). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Wife's out-of-court statement containing a reference to defendant's inculpatory admission was admissible pursuant to the "necessity" hearsay exception. *Quijano v. State*, 271 Ga. 181, 516 S.E.2d 81 (1999).

Sibling relationship satisfied guarantees of trustworthiness. — Trial court did not abuse the court's discretion in determining that sisters had the sort of relationship which held guarantees of trustworthiness, such that the victim's statements to the sister concerning her finances were admissible under the necessity exception to hearsay, O.C.G.A. § 24-3-1(b). *Todd v. State*, 274 Ga. 98, 549 S.E.2d 116 (2001).

Under the necessity exception to hearsay, O.C.G.A. § 24-3-1(b), the testimony of four individuals about the victim's statements regarding the subletting of the townhouse, the problems the victim was having about retrieving the mail, and the missing furniture and checks were admissible because the victim's statements were necessary and sufficiently trustworthy since they were made to the individuals in whom the victim placed a great deal of confidence. *Thomas v. State*, 274 Ga. 156, 549 S.E.2d 359 (2001).

Requirements of necessity and guaranty of trustworthiness not satisfied. — Victim's declarations to an army medic before the crimes in question that the defendant had injured the victim were inherently untrustworthy, and thus were improperly admitted under the necessity exception to the hearsay doctrine: (1) the victim was intoxicated when the victim made the statements; and (2) the victim also stated that the victim would lie to the victim's chain of command about the injury. The error was harmless, however, because the evidence could not have contributed to the verdict as two eye-witnesses implicated the defendant as a party to the crimes. *Navarrete v. State*, 283 Ga. 156, 656 S.E.2d 814 (2008), cert. denied, 129 S. Ct. 104, 172 L.Ed.2d 33 (2008).

Any error in admitting a hearsay statement was harmless by defendant's subsequently being called as witness. *Hufstetler v. State*, 171 Ga. App. 106, 319 S.E.2d 869 (1984).

Hearsay was inadmissible, but harmless error. — Testimony was inadmissible hearsay because the former police detective did not actually test the blood but was simply repeating information the detective read in the lab report, and while the court may have abused the court's discretion by allowing the detective to testify as to the results of the blood test, any error was harmless given the overwhelming evidence of defendant's guilt. *Green v. State*, 249 Ga. App. 546, 547 S.E.2d 569 (2001).

General Consideration (Cont'd)

Trial court erred in admitting testimony of a police officer about what the murder victim told the officer shortly after defendant shot into the bedroom in which the victim was sleeping, which was one of defendant's prior bad acts that the state tried to get admitted under the necessity exception to the hearsay rule. Such testimonial hearsay in a criminal prosecution was admissible when the declarant was unavailable only if the defendant had a prior opportunity to cross-examine the declarant about the hearsay statement, and defendant had no such opportunity, but because the statement did not contribute to defendant's conviction, admission of it was harmless error. *Moody v. State*, 277 Ga. 676, 594 S.E.2d 350 (2004).

Evidence properly excluded. — When the defendant did not tender the copies of the convictions which the defendant desired to have introduced to impeach witnesses, but only made a proffer of the testimony of the clerk's representative, the state's objection based on the failure to produce the best evidence was properly sustained. The testimony of the deputy clerk as to the content of the records was not only not the best evidence, it was also hearsay. *Lipscomb v. State*, 194 Ga. App. 657, 391 S.E.2d 773 (1990).

Even assuming that the trial court erred in refusing to admit an employee of a power company to testify that she saw on her computer screen a particular entry reflecting that a work order had issued for the defendant's address because there had been a disruption in electrical service to the defendant's home the night before the victims were killed and that it had been reported to the power company that the electric meter had been disconnected, it did not constitute reversible error since there was other evidence that the electric meter had been removed from the house the night before the victims were killed, and the power company's data did not identify the persons who had removed the meter. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

Summary of terminated caseworker's files was hearsay evidence and should not have been introduced into evidence; without the summary, the state lacked clear and convincing evidence to show that parental rights should be terminated. *In re A.A.*, 252 Ga. App. 167, 555 S.E.2d 827 (2001).

Cited in *Tiller v. State*, 96 Ga. 430, 23 S.E. 825 (1895); *Third Nat'l Bank v. Baker*, 19 Ga. App. 208, 91 S.E. 346 (1917); *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *City of Atlanta v. Atlanta Title & Trust Co.*, 45 Ga. App. 265, 164 S.E. 224 (1932); *Mutual Life Ins. Co. v. Davis*, 48 Ga. App. 742, 173 S.E. 471 (1934); *Hodge v. American Mut. Liab. Ins. Co.*, 57 Ga. App. 403, 195 S.E. 765 (1938); *Jenkins v. State*, 190 Ga. 556, 9 S.E.2d 909 (1940); *Kimball v. State*, 63 Ga. App. 183, 10 S.E.2d 240 (1940); *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942); *Fuller v. State*, 196 Ga. 237, 26 S.E.2d 281 (1943); *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943); *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51 (1946); *Hornbuckle v. State*, 76 Ga. App. 111, 45 S.E.2d 98 (1947); *Ehrlich v. Mills*, 203 Ga. 600, 48 S.E.2d 107 (1948); *Allgood v. Dalton Brick & Tile Corp.*, 81 Ga. App. 189, 58 S.E.2d 522 (1950); *Williams v. American Sur. Co.*, 83 Ga. App. 66, 62 S.E.2d 673 (1950); *Davidson v. State*, 208 Ga. 834, 69 S.E.2d 757 (1952); *Thomas v. State*, 85 Ga. App. 868, 70 S.E.2d 131 (1952); *Rosborough v. State*, 209 Ga. 362, 72 S.E.2d 717 (1952); *Banks v. Kilday*, 88 Ga. App. 307, 76 S.E.2d 642 (1953); *Eason v. Crews*, 88 Ga. App. 602, 77 S.E.2d 245 (1953); *Griffin v. Welch*, 210 Ga. 300, 79 S.E.2d 527 (1954); *Banks v. Lane*, 92 Ga. App. 155, 88 S.E.2d 312 (1955); *Haisten v. Tanner-Brice Co.*, 212 Ga. 468, 93 S.E.2d 756 (1956); *Heard v. Heard*, 99 Ga. App. 864, 110 S.E.2d 76 (1959); *Justice v. State Hwy. Dep't*, 100 Ga. App. 794, 112 S.E.2d 307 (1959); *Ferguson v. State*, 218 Ga. 173, 126 S.E.2d 798 (1962); *Fisher v. Temple*, 109 Ga. App. 859, 137 S.E.2d 545 (1964); *Kennemore v. State*, 223 Ga. 41, 153 S.E.2d 307 (1967); *Green v. State*, 115 Ga. App. 685, 155 S.E.2d 655 (1967); *Thruway Serv. City, Inc. v. Townsend*, 116 Ga. App. 379, 157 S.E.2d 564 (1967); *Maryfield Plantation, Inc. v. Harris Gin Co.*, 116 Ga. App. 744, 159 S.E.2d 125 (1967); *F & W Farm Serv., Inc. v. Citizens & S. Nat'l Bank*, 116 Ga. App. 757, 159 S.E.2d 190 (1967); *Tri-County Gas Co. v. Brooker*, 122 Ga. App. 522, 177 S.E.2d 806 (1970); *Rowe v. Rowe*, 228 Ga. 302, 185 S.E.2d 69 (1971); *Elam v. State*, 125 Ga. App. 427, 187 S.E.2d 920 (1972); *Reese v. Termplan, Inc.*, 125 Ga. App. 473, 188 S.E.2d 177 (1972); *Hewitt v. State*, 127 Ga. App. 180, 193 S.E.2d 47 (1972); *High v. Butler*,

230 Ga. 533, 198 S.E.2d 169 (1973); Weaver v. Georgia Power Co., 134 Ga. App. 696, 215 S.E.2d 503 (1975); Hall v. State, 138 Ga. App. 20, 225 S.E.2d 705 (1976); Sanders v. State, 138 Ga. App. 774, 227 S.E.2d 504 (1976); Hill v. State, 239 Ga. 278, 236 S.E.2d 626 (1977); Singleton v. State, 143 Ga. App. 387, 238 S.E.2d 743 (1977); Edgeworth v. Edgeworth, 239 Ga. 811, 239 S.E.2d 16 (1977); Dickey v. State, 240 Ga. 634, 242 S.E.2d 55 (1978); Burnett v. Doster, 144 Ga. App. 443, 241 S.E.2d 319 (1978); Roger Budd Chevrolet Co. v. First State Bank & Trust Co., 145 Ga. App. 167, 243 S.E.2d 332 (1978); Boyd v. State, 146 Ga. App. 359, 246 S.E.2d 396 (1978); Wilson v. State, 148 Ga. App. 368, 251 S.E.2d 387 (1978); Fountain v. Cabe, 242 Ga. 787, 251 S.E.2d 529 (1979); Hardison v. Chastain, 151 Ga. App. 678, 261 S.E.2d 425 (1979); Jaakkola v. Doren, 244 Ga. 530, 261 S.E.2d 701 (1979); Mulryan v. State, 155 Ga. App. 797, 272 S.E.2d 768 (1980); Jones v. State, 247 Ga. 268, 275 S.E.2d 67 (1981); Brown v. State, 159 Ga. App. 901, 285 S.E.2d 552 (1981); Reed v. State, 249 Ga. 52, 287 S.E.2d 205 (1982); Holcomb v. State, 249 Ga. 658, 292 S.E.2d 839 (1982); Momon v. State, 249 Ga. 865, 294 S.E.2d 482 (1982); Millwood v. State, 164 Ga. App. 699, 296 S.E.2d 239 (1982); Olson v. State, 166 Ga. App. 104, 303 S.E.2d 309 (1983); Padgett v. State, 251 Ga. 503, 307 S.E.2d 480 (1983); Faircloth v. State, 253 Ga. 67, 316 S.E.2d 457 (1984); Brantley v. State, 177 Ga. App. 13, 338 S.E.2d 694 (1985); Davis v. State, 255 Ga. 598, 340 S.E.2d 869 (1986); Whitehead v. State, 255 Ga. 526, 340 S.E.2d 885 (1986); Griffin v. Citizens Bank, 177 Ga. App. 771, 341 S.E.2d 298 (1986); Ingram v. State, 178 Ga. App. 292, 342 S.E.2d 765 (1986); Hooten v. State, 256 Ga. 31, 343 S.E.2d 481 (1986); Fugitt v. State, 256 Ga. 292, 348 S.E.2d 451 (1986); Eubanks v. State, 180 Ga. App. 355, 349 S.E.2d 244 (1986); Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1987); Citizens & S. Bank v. Swain, 185 Ga. App. 881, 366 S.E.2d 191 (1988); Walker v. State, 187 Ga. App. 631, 371 S.E.2d 199 (1988); Burroughs v. State, 190 Ga. App. 467, 379 S.E.2d 175 (1989); Sosebee v. State, 190 Ga. App. 746, 380 S.E.2d 464 (1989); Barrett v. State, 192 Ga. App. 705, 385 S.E.2d 785 (1989); McGraw v. State, 199 Ga. App. 389, 405 S.E.2d 53 (1991); Moxley v. Lariscy, 199 Ga. App. 522, 405 S.E.2d 339 (1991);

Moclaire v. State, 215 Ga. App. 360, 451 S.E.2d 68 (1994); Strickland v. State, 221 Ga. App. 120, 470 S.E.2d 508 (1996); McGaha v. State, 221 Ga. App. 440, 471 S.E.2d 533 (1996); Farmer v. State, 266 Ga. 869, 472 S.E.2d 70 (1996); Ivory v. State, 234 Ga. App. 858, 508 S.E.2d 421 (1998); Results Oriented, Inc. v. Crawford, 245 Ga. App. 432, 538 S.E.2d 73 (2000); Dodgen v. State, 247 Ga. App. 453, 543 S.E.2d 824 (2001); Ginn v. State, 251 Ga. App. 159, 553 S.E.2d 839 (2001); McPherson v. State, 274 Ga. 444, 553 S.E.2d 569 (2001); Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760 (2002); Miller v. State, 275 Ga. 32, 561 S.E.2d 810 (2002); Hudson v. State, 277 Ga. 581, 591 S.E.2d 807; Rowe v. State, 276 Ga. 800, 582 S.E.2d 119 (2003); Al-Amin v. State, 278 Ga. 74, 597 S.E.2d 332 (2004); Jenkins v. State, 278 Ga. 598, 604 S.E.2d 789 (2004); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006); Humphrey v. State, 281 Ga. 596, 642 S.E.2d 23 (2007); Boyt v. State, 286 Ga. App. 460, 649 S.E.2d 589 (2007); Cousins v. Maced. Baptist Church of Atlanta, 283 Ga. 570, 662 S.E.2d 533 (2008); Parker v. Melican, 286 Ga. 185, 684 S.E.2d 654 (2009).

Applicability

Anything heard by a witness while in the presence of the defendant is not hearsay and is admissible. Latimore v. State, 170 Ga. App. 848, 318 S.E.2d 722 (1984).

Anything seen or heard by a witness in the presence of a defendant is admissible and does not constitute inadmissible hearsay. Hurston v. State, 194 Ga. App. 226, 390 S.E.2d 119 (1990).

Cumulativeness is not an exception to the hearsay rule and affords no basis for an evidentiary ruling at trial. Parker v. State, 162 Ga. App. 271, 290 S.E.2d 518 (1982).

Res gestae rule is exception to rule against admission of hearsay testimony. Lively v. State, 157 Ga. App. 419, 278 S.E.2d 67 (1981).

No basis for res gestae exception when victim made statements to third parties three days after alleged offenses. Parker v. State, 162 Ga. App. 271, 290 S.E.2d 518 (1982).

Rule not applicable. — Hearsay rule prohibits the witness from testifying as to what another person said; it does not apply to what the witness personally said. Webb v.

Applicability (Cont'd)

State, 154 Ga. App. 395, 268 S.E.2d 438 (1980).

Hearsay rule did not apply to bar testimony of a witness as to the witness's own statements. *Bowers v. State*, 241 Ga. App. 122, 526 S.E.2d 163 (1999).

Defendant did not establish that trial counsel provided ineffective assistance of counsel; counsel acted reasonably in not objecting to unresponsive testimony because the counsel did not want to draw attention to that testimony, the failure to object to alleged hearsay was not problematic because the testimony of the witnesses about what the witnesses observed was not hearsay, and defendant did not otherwise show that trial counsel was ineffective. *Blunt v. State*, 275 Ga. App. 409, 620 S.E.2d 572 (2005).

Recognized exception required. — Hearsay evidence is not admissible to prove the truth of the fact asserted, unless the evidence constitutes a recognized exception to the general rule excluding hearsay. *Moore v. State*, 154 Ga. App. 535, 268 S.E.2d 706 (1980).

When the only evidence that the defendant was driving without a license was hearsay from one of the police officers, not covered by one of the exceptions and not otherwise admissible as necessary and demonstrably trustworthy, reversal of the conviction for driving without a license was required. *Day v. State*, 235 Ga. App. 771, 510 S.E.2d 579 (1998).

Evidence properly excluded because witness was available. — Witness's testimony as to a conversation the witness had with a child's mother was properly excluded as the mother testified and defendant did not ask the mother about the conversation. Georgia does not recognize a third party's admission against penal interest when that admission exculpates the defendant. *Hood v. State*, 273 Ga. App. 430, 615 S.E.2d 244 (2005).

Actual Knowledge Requirement

Witness must have actual knowledge of a fact before it is proper to allow the witness to testify positively as to the existence of such fact. *Bennett v. State*, 49 Ga. App. 804, 176 S.E. 148 (1934); *State Hwy. Dep't v. Wilkes*, 106 Ga. App. 634, 127 S.E.2d 715 (1962).

Presumption of personal knowledge. —

When a witness testifies to a fact, the presumption is, in the absence of anything to the contrary, that the witness is testifying from the witness's own knowledge. *Bailey v. Newberry*, 52 Ga. App. 693, 184 S.E. 357 (1935); *Johnson v. Woodward Lumber Co.*, 76 Ga. App. 152, 45 S.E.2d 294 (1947).

When it appears that the witness has no direct or personal knowledge of the transactions testified to, and that the witness's testimony is based upon hearsay and is negative in character, the testimony is properly excluded. *Banks v. Kilday*, 88 Ga. App. 307, 76 S.E.2d 642 (1953); *State Farm Mut. Ins. Co. v. Moss*, 152 Ga. App. 84, 262 S.E.2d 248 (1979); *In re J.C.*, 163 Ga. App. 822, 296 S.E.2d 117 (1982).

Testimony was properly excluded as hearsay since a property manager lacked any immediate and independent personal knowledge of past due condominium association assessments as the manager did not prepare the documents, personally supervise preparation of the documents, or make any entries of the underlying facts used to compile the documents. *Dunwoody-Woodlands Condominium Ass'n v. Hedquist*, 199 Ga. App. 91, 403 S.E.2d 893 (1991).

Investigators, as agents of the state or otherwise, may not testify to the fruits of their investigations without regard for the hearsay rule; rather, such witnesses, even agents of the state, are bound by that rule and must testify from their own first-hand knowledge alone. *Cawthon Motor Co. v. Scheufler*, 153 Ga. App. 282, 265 S.E.2d 96 (1980).

Criminal Law

1. Constitutional Rights

Refusal to admit certain hearsay may violate due process. — In determining whether or not to impose the death penalty, refusal to admit testimony that defendant had not committed the crime for which the penalty was to be imposed on the grounds that such testimony was hearsay may constitute a violation of the due process clause of U.S. Const., amend. 14. *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

Constitutional right to confrontation does not require that all hearsay evidence be

excluded from evidence in criminal cases. *Littles v. Balkcom*, 245 Ga. 285, 264 S.E.2d 219 (1980).

When defendant admitted the commission of armed robbery of a witness as described in the indictment, the defendant waived the defendant's right to challenge the witness's statements regarding the incident; therefore, the admission of the evidence did not violate defendant's right of confrontation, and there was no error in admitting the statements under the necessity exception of subsection (b) of O.C.G.A. § 24-3-1. *Johnson v. State*, 247 Ga. App. 157, 543 S.E.2d 439 (2000).

Incriminating statements by another raise confrontation issues. — Since the declarant made a statement which incriminated defendant to police while under suspicion for the crimes, the declarant's statement did not have sufficient guarantees of trustworthiness and the statement's admission under the necessity exception to the hearsay rule violated defendant's constitutional right of confrontation. *Yancey v. State*, 275 Ga. 550, 570 S.E.2d 269 (2002).

Hearsay evidence of witnesses properly admitted. — With regard to several defendants' convictions for violating the Georgia Racketeering Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-1 et seq., the trial court did not err by allowing the state to introduce out-of-court statements made by four witnesses since the witnesses' veracity had been attacked during cross-examination, the witnesses were present, testified under oath, and were subject to cross-examination. The fact that the witnesses were discharged before the out-of-court statements were presented to the jury did not alter the result. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Harmless error. — Admission of a hearsay statement was erroneous due to the lack of a genuinely close relationship between the victim and the declarant to support both a necessity and trustworthiness finding. However, the error was deemed harmless as the statement was cumulative of other legally admissible evidence of the same facts, did not touch on the central issue of the case, and could not have significantly contributed to the verdict in light of eyewitness testimony

regarding the crime. *Brooks v. State*, 281 Ga. 514, 640 S.E.2d 280 (2007).

2. Basis for Conviction

Hearsay testimony alone will not support a conviction though admitted without objection. *Slater v. State*, 44 Ga. App. 295, 161 S.E. 271 (1931).

Without corroboration one cannot be convicted of a crime upon hearsay testimony as to statements of a child who is incompetent as a witness because too young to appreciate the nature and sanctity of the oath. *Nelson v. State*, 247 Ga. 172, 274 S.E.2d 317, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981).

Application and Examples

1. Admissible Hearsay

Indicia of reliability required for admissibility are that the statements be nonnarrative, that the declarant is shown by the evidence to know whereof the declarant speaks, that the witness is not apt to be proceeding on faulty recollection, and that the circumstances show that the declarant had no apparent reason to lie to the witness; it is not required that all of the indicia be present for the statement to be admissible. *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

"Spontaneous declaration" is admissible hearsay testimony. — Statement which is a spontaneous reaction to a startling event is admissible hearsay testimony. *House v. State*, 252 Ga. 409, 314 S.E.2d 195 (1984); *Daker v. State*, 243 Ga. App. 848, 533 S.E.2d 393 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002).

Assertion of spousal privilege meets the necessity requirement for admission of hearsay under the O.C.G.A. § 24-3-1(b) necessity exception. *Herring v. State*, 252 Ga. App. 4, 555 S.E.2d 233 (2001).

Hearsay evidence is admissible for impeachment, though inadmissible for other purposes. *Seaboard Coast Line R.R. v. Smalley*, 127 Ga. App. 652, 194 S.E.2d 612 (1972).

Hearsay testimony is admissible to prove the location of a county line. *Poulos v. State*,

Application and Examples (Cont'd)**1. Admissible Hearsay (Cont'd)**

49 Ga. App. 20, 174 S.E. 253 (1934).

Market price can be shown by hearsay. *McKenzie v. Perdue*, 67 Ga. App. 202, 19 S.E.2d 765, rev'd on other grounds, 194 Ga. 356, 21 S.E.2d 705 (1942).

Admission of necessity. — When statements explaining the circumstances of the murder were spontaneous and unsolicited, and made immediately after the shooting, after the defendant fled the scene, the statements satisfied the criteria for an admission out of necessity. *White v. State*, 276 Ga. 583, 581 S.E.2d 18 (2003).

Because the testimony of two witnesses recounting what the victim said to the witnesses prior to the victim's death was relevant to demonstrate the prior difficulties between defendant and the victim, and was accompanied by particular guarantees of trustworthiness, the trial court did not err in admitting the testimony under the "necessity" exception to the hearsay rule. *Mathis v. State*, 279 Ga. 100, 610 S.E.2d 62 (2005).

In defendant's prosecution for murdering defendant's former girlfriend, the girlfriend's statements to two friends were properly admitted under O.C.G.A. § 24-3-1(b) because the statements were uncontradicted statements made to people the victim had known for over a year, in whom the girlfriend placed great confidence and to whom the girlfriend regularly turned for advice with personal problems and to discuss personal matters, so the trial court could find the statements contained particularized guarantees of trustworthiness. *Williams v. State*, 279 Ga. 731, 620 S.E.2d 816 (2005).

Parent's statement that the parent's child, a passenger in the defendant's car, came to the parent sick and vomiting after a sleepless night and told the parent that the passenger witnessed a murder was nontestimonial in nature and fell within the necessity exception to the hearsay rule. Testimony by the parent and by a police investigator who was looking for the passenger showed that the passenger was unavailable, and this was a situation where a declarant made a statement to a person in whom the declarant placed great confidence and to whom the declarant turned for help with problems. *Shipman v. State*, 288 Ga. App. 134, 653 S.E.2d 383 (2007).

Hearsay statements by a murder victim were necessary, as the victim was deceased and unavailable. *Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

Defendant's spouse's statement necessary and trustworthy. — Defendant's spouse's statement was properly admitted in defendant's criminal trial under the necessity exception to the hearsay rule, pursuant to O.C.G.A. § 24-3-1(b), since it was necessary and it evidenced a guarantee of sufficient trustworthiness; the spouse was unavailable because the spouse refused to testify, the statements were trustworthy because the statements were made to police during their investigation of the criminal incident, and the statements were necessary because the statements provided insight into defendant's state of mind. *Scott v. State*, 261 Ga. App. 756, 583 S.E.2d 579 (2003).

Double hearsay proper. — Double hearsay was properly admitted about what a witness heard an individual say because the individual's credibility had been placed at issue by way of an attack on the witness's motive. *Dillard v. State*, 272 Ga. App. 523, 612 S.E.2d 804 (2005).

Hearsay evidence admissible at transfer hearing in juvenile cases. — Given that the right of confrontation is a trial right, there is no reason to apply that right to a transfer hearing involving a juvenile; therefore, hearsay evidence is admissible at such hearings. In *the Interest of T. F.*, 295 Ga. App. 417, 671 S.E.2d 887 (2008).

2. Hearsay Not Found

That portion of the birth certificate which relates to the date of birth and the sex of the child, and certain facts concerning the name, race, place of residence, and other facts concerning the child's mother, is not obtained by the physician through hearsay and is clearly admissible. *Posey v. State*, 46 Ga. App. 290, 167 S.E. 340 (1932).

Evidence not offered to prove truth of matter asserted. — Challenged testimony was not inadmissible hearsay because: (1) neither the identification testimony by the victim, nor a detective regarding the alleged hearsay in obtaining the defendant's name, violated the defendant's rights to confrontation and cross-examination as neither witness actually repeated any alleged hearsay; (2) the evidence did not create a credibility

problem that could only be cured by cross-examination, and the state did not offer the evidence to establish the truth of the matter asserted; and (3) the testimony explained why the police included the defendant's photograph in the line-up. *Jennings v. State*, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, 2007 Ga. LEXIS 667 (Ga. 2007).

Homeowner countersued a contractor for fraud. Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay, because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. *Lumpkin v. Deventer N. Am., Inc.*, 295 Ga. App. 312, 672 S.E.2d 405 (2008).

Locksmith receipt indicating that defendant had a key made for a vehicle was not inadmissible hearsay evidence in the defendant's prosecution for, inter alia, trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) because the receipt was not offered as proof of what was asserted therein but as evidence that a piece of paper with the defendant's name on it was found in the same residence where cocaine and firearms were located, thereby linking the defendant circumstantially to the residence and the contraband; thus, the receipt was original evidence. *Weems v. State*, 295 Ga. App. 680, 673 S.E.2d 50 (2009).

As an officer's testimony about a dispatcher's statement that two Hispanic males were involved in a firearm discharge was not offered for the truth of the dispatcher's statement, but to explain the officer's subsequent conduct, the testimony was not hearsay. *Herieia v. State*, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

Evidence that defendant was told age of victims. — Counsel was not ineffective for failing to object to testimony that defendant was told that the declarant "didn't want any guy to take off with [the declarant's] 16-year-old daughter"; the testimony was not hearsay as the testimony was admitted to show that defendant was told that the girls were only 16. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Anything seen or heard by a witness in the presence of a defendant is admissible and

does not constitute hearsay. *Grindle v. State*, 151 Ga. App. 164, 259 S.E.2d 166 (1979).

Receipt removed from burglarized house. — In a burglary case, the trial court did not err in allowing a receipt from one of the burglarized homes to be admitted into evidence and in allowing the occupant of the home to testify about the receipt; the receipt and the testimony were not offered to demonstrate who purchased the item or any of the circumstances surrounding that purchase, but to show that the defendant removed the receipt from the home, and the testimony did not constitute hearsay. *Perez v. State*, 284 Ga. App. 212, 643 S.E.2d 792 (2007).

Cumulative evidence of properly admitted proof of title. — In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to properly admitted evidence showing a legal property owner's record title, and the evidence was not hearsay, as alleged by a claimant who sought title to the property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. *Smith v. Stacey*, 281 Ga. 601, 642 S.E.2d 28 (2007).

When a witness testifies as to what the witness told another person, the statement is not hearsay. *Holloman v. State*, 167 Ga. App. 683, 307 S.E.2d 266 (1983).

When facts testified to are proved without contravention by witness whose knowledge of the facts is immediate and personal, this is not hearsay, and the admission of like statements made by another, even if hearsay, does not under these circumstances constitute reversible error. *Johnson v. State*, 158 Ga. App. 183, 279 S.E.2d 483 (1981).

Testimony of phone conversation with officer. — Trial court did not admit hearsay testimony by allowing a police officer to testify as to a conversation the officer had with defendant over the phone and to authenticate defendant's voice as being the voice of the person defendant talked to over the phone; voluntary, noncustodial, incriminating statements of defendants are admissible through the testimony of anyone who heard them. *Ingram v. State*, 268 Ga. App. 149, 601 S.E.2d 736 (2004).

Testimony not hearsay that was based on officer's observation of cell phone calls. —

Application and Examples (Cont'd)
2. Hearsay Not Found (Cont'd)

Testimony by an investigating officer that after confiscating a codefendant's cell phone, the officer used the recently called function and discovered that the phone had been used to call a taxi service just prior to the robbery of a taxi driver was properly admitted as the evidence was not hearsay under O.C.G.A. § 24-3-1 because the evidence was based on the officer's own veracity and competence. *Troutman v. State*, 297 Ga. App. 196, 676 S.E.2d 836 (2009).

Testimony of police sergeant's own actions was not hearsay. — With regard to a defendant's murder conviction, the trial court did not err by overruling a hearsay objection to testimony by a police sergeant regarding investigative work performed on the case since the sergeant participated in the investigation through desk work; using information gained by the police obtained telephone records and subscriber information to identify potential suspects; and testified on the stand to the steps the sergeant personally took that led to the identification of the defendant as a suspect. The testimony of the sergeant was not hearsay as the sergeant did not relay information told by other persons and the testimony was nothing more than a recitation of the sergeant's own actions. *Henley v. State*, 285 Ga. 500, 678 S.E.2d 884 (2009), cert. denied, U.S. , 130 S. Ct. 800, 175 L. Ed. 2d 559 (2009).

Investigator's testimony was original evidence. — Although defendant contended that the waiver certificate was hearsay under O.C.G.A. § 24-3-1 and improperly placed the defendant's character in issue, testimony was considered hearsay only if the witness was testifying to another party's statement in order to prove or demonstrate the truth of that statement; otherwise it was a verbal act and thus original evidence rather than hearsay. Therefore, defendant's hearsay objection was meritless because the investigator wrote the statement as well as read the statement into evidence, and thus, the statement was original evidence. *Bynum v. State*, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Testimony of security agent as to value of shoplifted items. — Defendant was properly

convicted of felony theft by shoplifting because a jury was permitted to consider a security agent's testimony regarding the value of the items stolen since the agent had personal knowledge of the prices of the subject merchandise from a cash register readout. *Bell v. State*, 262 Ga. App. 788, 586 S.E.2d 455 (2003).

Testimony of investigating officer that "co-indictee's name is Lawrence" was not hearsay, but was a statement of undisputed fact, identifying for the jury that person to whom the officer was then talking. *Jackson v. State*, 209 Ga. App. 53, 432 S.E.2d 649 (1993).

Testimony of caseworker in parental termination case. — In a termination of parental rights case, a parent failed to show that the testimony of the sole witness, a caseworker, was hearsay; although another employee worked on the case before the witness, the witness was the caseworker at the time of the hearing, and the record did not show that the witness lacked personal knowledge of the facts the witness testified to, most of which were memorialized in the trial court's previous orders, which were admitted without objection at the termination hearing. In the Interest of M.D.L., 285 Ga. App. 357, 646 S.E.2d 331 (2007).

Investigating officer's testimony about original lead. — Investigating officer's testimony that the officer investigated defendant based on information the officer received from an unnamed source did not constitute hearsay because the officer did not divulge the content of that information. *Jenkins v. State*, 268 Ga. 468, 491 S.E.2d 54 (1997), cert. denied, 523 U.S. 1029, 118 S. Ct. 1318, 140 L. Ed. 2d 481 (1998).

Questions summarizing prior testimony. — Prosecution's questioning of a state's witness, summarizing incriminating testimony of previous state's witnesses for the witness, who was then asked whether that witness had, in fact, heard that testimony, was not objectionable on the ground that it sought to elicit hearsay, where the previous witnesses' testimony was offered under oath and was subject to cross-examination. *King v. State*, 185 Ga. App. 698, 365 S.E.2d 852, cert. denied, 185 Ga. App. 910, 365 S.E.2d 852 (1988).

Admission of transcript from earlier conviction. — When defendant in a prosecution

for rape and aggravated sodomy pled guilty to a prior charge of aggravated sexual assault, admission of a transcript of the prior victim's testimony given at a hearing to compel the witness to testify was proper under the necessity exception to hearsay evidence. *McBee v. State*, 228 Ga. App. 16, 491 S.E.2d 97 (1997).

Deposition testimony of driver and passenger involved in traffic accident was not hearsay in a suit wherein occupants of another vehicle sought damages from the driver of a truck parked in the emergency lane of a highway. *Reid v. Midwest Transp.*, 270 Ga. App. 557, 607 S.E.2d 170 (2004).

An official publication of the New York Stock Exchange, purporting to show the monthly average prices of cotton, which was introduced without objection in a hearing before an auditor and acted on by the auditor and the parties as if the quotations were correct, cannot, on a hearing by the judge of exceptions of fact to the auditor's report, be excluded on the ground that it was hearsay evidence. *McKenzie v. Perdue*, 67 Ga. App. 202, 19 S.E.2d 765, rev'd on other grounds, 194 Ga. 356, 21 S.E.2d 705 (1942).

Prior consistent statement. — Because the veracity of a witness's trial testimony was placed in issue, the witness's prior testimony was properly admitted as a prior consistent statement. *Jackson v. State*, 271 Ga. App. 278, 609 S.E.2d 207 (2005).

Victim's statement to a doctor was properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant had asserted in opening statement and the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. *Smith v. State*, 282 Ga. App. 339, 638 S.E.2d 791 (2006).

When a victim testified that the victim could not remember all of the details of a robbery, which occurred six years before the trial, it was not error to introduce the victim's prior consistent statement. The victim was a forgetful witness who testified at trial

and who was cross-examined by the defendant. *Williams v. State*, 291 Ga. App. 279, 661 S.E.2d 658 (2008).

After the victim's mother testified that the defendant admitted to the mother that the defendant molested the victim, the trial court did not err in allowing an investigator to testify that the mother had told the investigator the same thing because the mother testified at trial and was cross-examined, and the defendant placed the mother's veracity in issue during cross-examination by attempting to show that the mother had an improper motive for testifying against the defendant, a motive that developed after the mother made the prior consistent statement to the investigator. *Davis v. State*, No. A10A0868, 2010 Ga. App. LEXIS 403 (Apr. 21, 2010).

Identification of defendant in photo array. — In a prosecution for armed robbery and related offenses, the trial court properly allowed hearsay evidence of identification. It was not error to allow a police officer to testify as to who the victims identified in the photo arrays as a law enforcement officer could testify to a pre-trial identification if the person who actually made the identification testified at trial and was subject to cross-examination. *Monfort v. State*, 281 Ga. App. 29, 635 S.E.2d 336 (2006).

Evidence rested upon veracity of witness, not other person. — In a trial for theft by taking, it was error to preclude a witness from giving testimony that potentially would have corroborated the defendant's explanation for the defendant's possession of a stolen trailer on the ground that the testimony was hearsay under O.C.G.A. § 24-3-1(a). The value of the evidence rested upon the veracity of the witness, not the veracity of the person referred to by the witness; furthermore, the error was not harmless, as the unsatisfactoriness of the defendant's explanation for possessing the trailer was central to the conviction. *Boivin v. State*, 298 Ga. App. 411, 680 S.E.2d 415 (2009).

3. Contents of Books and Records

Testimony concerning the content of records, unsupported in the evidence by the records themselves, which are never offered in evidence, should be excluded as hearsay. *Foster v. National Ideal Co.*, 119 Ga. App.

Application and Examples (Cont'd)**3. Contents of Books and Records (Cont'd)**

773, 168 S.E.2d 872 (1969).

Testimony concerning information acquired solely through books and records kept by a third person is inadmissible as hearsay. *Porterfield v. State*, 150 Ga. App. 303, 257 S.E.2d 372 (1979).

Article stating costs of raising children not "notoriously accurate." — In a divorce case, it was reversible error for the trial court to have admitted in evidence, over the husband's objection, a publication of the United States Department of Agriculture entitled, "Family Economics Review," which the wife sought to admit in evidence because of tables stating the costs of raising children. This article was not admissible under the exception to the hearsay rule allowing the admission of books, such as mortality tables and almanacs which have become "notoriously accurate" with respect to the facts or scientific propositions sought to be proved. *Suarez v. Suarez*, 257 Ga. 102, 355 S.E.2d 649 (1987).

Documents not properly authenticated. — Check to a condominium unit occupant from a property management company for water damage and a handwritten listing of repair costs allegedly included in this payment were hearsay and were not properly authenticated. *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

County report containing opinions of employees and other persons. — Report, although issued by the county, was not admissible under the public record exception to the hearsay rule since the report was merely a compilation of opinions by various private parties and unnamed public employees and stated only that its purpose was to present recommendations regarding a sanitary land-fill question; it did not purport to be, nor was any evidence admitted to indicate that the report was, an expression or declaration of county policy or that the report's contents had been adopted, endorsed, or otherwise approved by the county. *United Waste, Ltd. v. Fulton County*, 184 Ga. App. 694, 362 S.E.2d 476 (1987).

Witness's testimony of what the witness figures written on a slip of paper by a loan

officer meant is hearsay, as the witness did not create the writing. *Rodgers v. Cumberland Volkswagen, Inc.*, 167 Ga. App. 826, 307 S.E.2d 721 (1983).

Billing records are generally admissible evidence after testimony providing the proper foundation pursuant to O.C.G.A. § 24-3-1. *Rowan v. Reuss*, 246 Ga. App. 139, 539 S.E.2d 241 (2000).

Hospital records admitted to rebut earlier testimony. — In a medical malpractice action, when hospital records were admitted not for the purpose of proving that the diagnosis contained in the records was the correct one, but to counter the incorrect impression made on cross-examination of the plaintiff's expert that a notation appeared nowhere in the medical chart, any error in the allowance of these exhibits was harmless. *Doctors Hosp. v. Bonner*, 195 Ga. App. 152, 392 S.E.2d 897 (1990).

Affidavits based on business records inadmissible. — As the affidavits of an assignee's chief financial officer (CFO) showed that the CFO's knowledge of the facts sworn to was based on the CFO's review of the attached business records and not personal knowledge, the affidavits were inadmissible hearsay. *Nyankojo v. North Star Capital Acquisition*, 298 Ga. App. 6, 679 S.E.2d 57 (2009).

Victim's ministry ordination certificates. — Because the trial court's admission of prejudicial hearsay testimony regarding the victim's ministry ordination certificates was harmless error, given the overwhelming evidence of the defendant's guilt, a voluntary manslaughter conviction, as a lesser-included offense of murder, was upheld on appeal. *Smith v. State*, 283 Ga. App. 722, 642 S.E.2d 399 (2007).

4. Conversations

Testimony of one person to a conversation had with another person over the telephone, in which the person testifying did not know the other person, or recognize the other's voice, and that person's identity is not established otherwise than from what was said in the conversation itself, is hearsay and inadmissible, when the person sought to be bound thereby as the other party to the conversation is not shown to have admitted having such conversation, and testified pos-

itively to the contrary. *Greble v. Morgan*, 69 Ga. App. 641, 26 S.E.2d 494 (1943).

Testimony of the victim's close friend regarding a conversation with the victim on the telephone immediately before defendant killed the victim was admissible. *Fetty v. State*, 268 Ga. 365, 489 S.E.2d 813 (1997).

Testimony of a witness as to a conversation with two men who visited the witness in jail would be hearsay and inadmissible as evidence. *Ratcliff v. State*, 237 Ga. 496, 228 S.E.2d 879 (1976).

Casually rendered statement by deceased victim. — Trial court did not abuse the court's discretion in excluding a statement by a deceased victim to a coworker made after the victim, returning from a lunch break, "just nonchalantly walked in and was talking to the witness." *Gissendaner v. State*, 272 Ga. 704, 532 S.E.2d 677 (2000).

Statement overheard by juror. — When a foreman's affidavit is submitted to prove that a "third person" made a prejudicial statement which a juror overheard, the affidavit is inadmissible as hearsay. *Central of Ga. R.R. v. Nash*, 150 Ga. App. 68, 256 S.E.2d 619, cert. dismissed, 244 Ga. 495, 260 S.E.2d 909 (1979).

Conversation deputy had with defendant spouse. — Even assuming the trial court erred by allowing a deputy sheriff to testify about a conversation the deputy had with defendant's spouse after defendant's spouse refused to testify at defendant's trial on a charge of possession of marijuana to prove that marijuana found in defendant's home belonged to defendant, the error was harmless because testimony which showed that defendant provided police with a urine sample that tested positive for marijuana metabolites was sufficient, in and of itself, to sustain defendant's conviction. *Cargile v. State*, 261 Ga. App. 319, 582 S.E.2d 473 (2003).

Statement in an affidavit. — An affidavit that contained a statement by the owner of several building material suppliers that the owner asked the suppliers' credit manager to obtain a personal guaranty on a line of credit extended to a builder constituted hearsay that could not be used in opposition to a motion for summary judgment filed by the builder's former president regarding the guaranty. *Atlanta Glass, Inc. v. Tucker*, 291 Ga. App. 760, 663 S.E.2d 272 (2008).

E-mail conversations. — In a deprivation proceeding when the Department of Family and Child Services sought to extend the department's custody of a child, the trial court was presumed to have ignored an e-mail recommending that the child remain with the child's father to the extent that the e-mail contained hearsay. Even without the e-mail, ample evidence supported the trial court's decision to extend the deprivation order. In the *Interest of Q.H.*, 291 Ga. App. 598, 662 S.E.2d 358 (2008).

Conversation with police inadmissible when defendant chose not to testify. — As a defendant and the defendant's spouse chose not to testify in the defendant's trial for, inter alia, felony murder, defense counsel could not comment in closing argument on the existence of statements made by both to the police to try to raise an inference of accident as those statements were inadmissible hearsay. *Alexander v. State*, 285 Ga. 9, 673 S.E.2d 208 (2009).

5. Criminal Cases

Testimony of a police officer as to a witness's verbal identification or physical gesture pointing out a suspect in a police line-up is inadmissible hearsay evidence if the witness is present and available to testify. *Brown v. State*, 234 Ga. 632, 217 S.E.2d 150 (1975).

Victim's statement made within minutes of a crime to a police officer was admissible as part of the *res gestae*, under O.C.G.A. § 24-3-3, including the fact that the victim recognized one of the perpetrators of the crime as the defendant. *Inman v. State*, 281 Ga. 67, 635 S.E.2d 125 (2006), cert. denied, U.S. , 128 S. Ct. 42; 169 L. Ed. 2d 40 (2007).

When a robbery victim testified at trial about the description the victim gave of the robber to police and was subject to cross-examination, this testimony was not hearsay. Although a police officer also testified about the description, that evidence was cumulative of the victim's testimony. *Smashum v. State*, 293 Ga. App. 41, 666 S.E.2d 549 (2008), cert. denied, 2008 Ga. LEXIS 952 (Ga. 2008).

Testimony of police officer as to statement of defendant's husband. — Testimony of a police officer that when defendant and her husband entered the sheriff's office, in

Application and Examples (Cont'd)
5. Criminal Cases (Cont'd)

response to the officer's question whether he could help them, the husband stated in defendant's presence that defendant had killed her niece was admissible from necessity because the husband had claimed the marital privilege and because the husband gave the statement immediately upon meeting the officer and never sought to change it. *Luallen v. State*, 266 Ga. 174, 465 S.E.2d 672 (1996). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Testimony of officer. — Defendant's conviction of sexual assault against a person in custody, O.C.G.A. § 16-6-5.1(c)(1)(A), was supported by sufficient evidence because the evidence showed that defendant used defendant's position as a police officer to induce the victim to have sex with the defendant, and consent of the victim was not a defense to prosecution, O.C.G.A. § 16-6-5.1(c)(3). Furthermore, although the trial court erred in admitting hearsay evidence pursuant to O.C.G.A. § 24-3-1 to explain a detective's conduct in investigating the case, it was highly probable that the testimony did not contribute to the verdict. *Krauss v. State*, 263 Ga. App. 488, 588 S.E.2d 239 (2003).

Trial court erred in admitting hearsay testimony from two police officers as to their investigation of a murder as nothing necessitated an inquiry by the state into the conduct, motive, or mental processes of the investigating officers; however, the error was harmless in light of the overwhelming evidence of defendant's guilt. *Lewis v. State*, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Officer's testimony as to pretrial identifications by two witnesses who did not appear at trial was inadmissible hearsay; however, the error was harmless because the testimony was merely cumulative of legally admissible evidence provided by a third witness. *Wyche v. State*, 291 Ga. App. 165, 661 S.E.2d 226 (2008), cert. denied, 2008 Ga. LEXIS 914 (Ga. 2008).

Trial court did not err in admitting a detective's testimony that there were two knives recovered from the scene of a robbery because the detective's testimony that the detective personally observed two knives at

the police station was not hearsay, and, even assuming that the trial court erred in admitting the testimony, the testimony's admission was harmless; the objectionable testimony was cumulative of the detective's admissible testimony regarding the detective's own observation of the two knives and of a codefendant's testimony that the codefendant and the defendant both wielded knives during the attempted robbery, and there was overwhelming evidence of the defendant's guilt, including the testimony of the victim, the codefendant's testimony about the defendant's involvement in the robbery, and the fact that the defendant was apprehended immediately after the robbery, in the same area. *Marcia-Hernandez v. State*, 302 Ga. App. 93, 690 S.E.2d 236 (2010).

Testimony of defendant's wife. — Statements by the defendant's wife to the police were admissible under the necessity exception since, on the day of the murder at issue, the wife described the defendant's threatening behavior and the bloody condition of their apartment, but claimed the marital privilege at trial. *Perkins v. State*, 269 Ga. 791, 505 S.E.2d 16 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

In a prosecution for family violence battery, when defendant's wife, the victim, refused to testify, her statements to the police within minutes of her injuries were admissible. *Kwon v. State*, 238 Ga. App. 617, 517 S.E.2d 83 (1999).

Testimony of victim who invoked marital privilege at trial. — When the only witness to the crime was the victim, who was the defendant's wife, and she invoked the marital privilege at trial, her prior verbal and written statements made to the arresting officer shortly after the defendant's arrest were admissible under the necessity exception. *Sorrow v. State*, 234 Ga. App. 357, 505 S.E.2d 842 (1998), cert. denied, 528 U.S. 811, 120 S. Ct. 44, 145 L. Ed. 2d 40 (1999).

Testimony of absent victim. — Statement from the victim of defendant's prior offense was allowed to be read into evidence since the victim could not be located, and the prosecutor provided documentation of the reasonable efforts made to locate the victim. *Smalls v. State*, 251 Ga. App. 516, 554 S.E.2d 273 (2001).

Although the court erred by admitting the

victim's mother's hearsay testimony that the victim told the mother that the victim was going to a club with a coworker, under the necessity exception, the testimony was cumulative; the fact that defendant accompanied the victim to a club was established by the testimony of defendant's girlfriend that defendant told the girlfriend that defendant went to a club with a man who had drugged and robbed defendant, and that defendant had killed the man and left the victim in the victim's car in the local elementary school parking lot. *Belmar v. State*, 279 Ga. 795, 621 S.E.2d 441 (2005).

Trial court did not err in admitting hearsay statements made by the victim under the necessity exception, finding that the victim was unavailable, the statements were trustworthy, and the statements were made in confidence to the victim's parent. *Buttram v. State*, 280 Ga. 595, 631 S.E.2d 642 (2006).

Testimony as to statements of third persons. — In a prosecution for rape, the trial court properly barred defendant's cross-examination of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. *Lee v. State*, 241 Ga. App. 182, 525 S.E.2d 426 (1999).

Hearsay statement made by a neighbor to the police that a friend admitted to shooting the victim using defendant's gun without defendant's knowledge was inadmissible under the necessity exception; although the neighbor was unavailable because the neighbor had moved away from Georgia, the statement by the friend lacked trustworthiness because it was made more than four months after the shooting while both the friend and neighbor were on drugs. *Bragg v. State*, 279 Ga. 156, 611 S.E.2d 17 (2005).

Defendant was not allowed to use the defense counsel's testimony about what an uncalled witness had been expected to say in order to establish the truth of that uncalled witness's testimony, since such testimony was hearsay with no probative value; because the defendant did not call a witness at the motion for new trial hearing or present a legally acceptable substitute for the witness's direct testimony, it was impossible for the defendant to show there was reasonable probability that the results of the proceeding would have been different, and defendant's claim of ineffective assistance of counsel failed.

Dickens v. State, 280 Ga. 320, 627 S.E.2d 587 (2006).

Testimony of defendant's employer as to statements of an unidentified person from a service station who had called the employer to demand payment of a check after the employer stopped payment on the check was inadmissible hearsay and had no probative value. *Archer v. State*, 291 Ga. App. 175, 661 S.E.2d 230 (2008).

Even if an officer's testimony that an unavailable codefendant had identified the defendant as "Paco" was hearsay, the testimony did not amount to a pretrial identification of the defendant as the perpetrator of the crime. The testimony merely established that the officer believed that a person known as "Paco" lived at an address where the officer decided to conduct a search. *Melendez v. State*, 291 Ga. App. 402, 662 S.E.2d 183 (2008).

Trial court did not err when it declined to admit hearsay after finding that the party seeking to use the hearsay had not made the necessary proffer because, although defense counsel asserted that the persons who would testify to the utterances purportedly made by the victims were friends of the victims who reported the utterances to police shortly after the victims were killed, such a presentation was insufficient to authorize the admission of hearsay pursuant to the necessity exception found in O.C.G.A. § 24-3-1(b) since there was no showing of the required special relationship between the deceased declarants and the proffered witnesses. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

Trial court did not abuse its discretion in refusing to allow testimony under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), that the victim had told her sister that her neighbor had raped her several months prior to her murder because the hearsay testimony was not proper impeachment evidence when it was not relevant to the crimes for which the defendant was on trial, and it was also not relevant to the neighbor's motive or interest in testifying; although the victim, the declarant, was deceased and unavailable, the defendant failed to prove that the hearsay testimony was relevant to and probative of a material fact since the alleged rape occurred several months prior to the victim's murder, there

Application and Examples (Cont'd)

5. Criminal Cases (Cont'd)

was no evidence connecting either the rape or the neighbor to it, and even assuming the proffered testimony's trustworthiness, the fact that the neighbor had raped the victim in the past did not directly connect him to the victim's murder or show that he committed the murder or a similar crime. *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009).

Language conduit rule. — Use of a translator between the defendant and a witness did not render the witness's testimony about the substance of the translation inadmissible, pursuant to the language conduit rule, as no evidence was presented to the trial court to show that the translator had a motive to distort the translation. *Lopez v. State*, 281 Ga. App. 623, 636 S.E.2d 770 (2006).

Statements not offered for truth of matter asserted. — Defendant did not receive ineffective assistance of counsel as: (1) a hearsay objection to statements the defendant made during an argument and to testimony that the defendant stated that the defendant should have killed the other witnesses would have been futile as the statements were not offered for the truth of the matter asserted; (2) a hearsay objection to a witness's testimony as to the defendant's statements during a van ride would also have been futile as the statements were admissible under O.C.G.A. § 24-3-3; and (3) counsel's strategic decision to attack certain testimony through cross-examination was not ineffective assistance of counsel. *Johnson v. State*, 281 Ga. 229, 637 S.E.2d 393 (2006).

Testimony of unavailable witness. — Witness's statements to a police officer were properly admitted under the necessity exception to the hearsay rule to counter defendant's claim that no person who had been shot could have traveled from the crime scene to the nursing home in the time available, as the findings that the witness was unavailable, that the state made diligent efforts to locate the witness, and that the witness's statements had sufficient indicia of reliability were not clearly erroneous. *Porter v. State*, 275 Ga. App. 513, 621 S.E.2d 523 (2005).

Admission of a first witness's statement and audiotaped interview under the neces-

sity exception to the hearsay rule violated the confrontation clause, but the error was harmless as: (1) the jury was properly instructed on attempted impeachment; (2) the fact that a second witness told a police officer that the second witness knew nothing about the motel murder was not inconsistent with the second witness's testimony that the defendant said the defendant had killed a person; (3) although a third witness testified that the events related in the third witness's videotaped interview were fabricated, there was considerable reason not to credit that portion of the third witness's testimony; (4) additional evidence demonstrated the defendant's guilt and corroborated the evidence that was the subject of the attempted impeachment; and (5) the defendant's claim that the jury could have taken the first witness's audiotape as corroboration of the "impeached" testimony was rejected. *Richard v. State*, 281 Ga. 401, 637 S.E.2d 406 (2006).

Testimony of defendant's mother. — Even assuming the statements of the defendant's mother were admissible under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), the statements' exclusion was harmless error as the statements were cumulative of other evidence admitted at trial, making it highly probable that the statements' exclusion did not affect the verdict. *Nix v. State*, 280 Ga. 141, 625 S.E.2d 746 (2006).

Statements attributed to defendant's family members. — Because the trial court properly found that testimony tending to show that the defendant's daughter possessed the methamphetamine the defendant was charged with possessing was hearsay, and testimony from the defendant's grandson was irrelevant, the defendant's conviction for possession was affirmed on appeal. *Corbin v. State*, 287 Ga. App. 194, 651 S.E.2d 101 (2007).

Third party statements of guilt not admissible in favor of accused. — Statements by a third party to the effect that the third party, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused upon the accused's trial. *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944); *Hornbuckle v. State*, 76 Ga. App. 111, 45 S.E.2d 98 (1947); *Little v. Synchroncombe*, 227 Ga. 311, 180 S.E.2d 541 (1971).

In a trial for larceny where the prosecution was relying upon the recent possession of the stolen property in the defendant to establish the crime and the evidence disclosed that on each occasion when the defendant was seen with the property another person not charged with the property's theft was also with the property, testimony of witnesses on behalf of defendant to the effect that the witnesses had heard such other person make statements claiming the property, the property's possession and the right to so possess the property, was properly excluded as hearsay. *Hornbuckle v. State*, 76 Ga. App. 111, 45 S.E.2d 98 (1947).

Since a co-indictee did not testify, the defendant's uncle's recitation of the co-indictee's purported confession would fall squarely within the hearsay rule (O.C.G.A. §§ 24-3-1 and 24-3-52) and was not admissible pursuant to any hearsay exception. *Gardner v. State*, 263 Ga. 197, 429 S.E.2d 657 (1993).

Out-of-court statement of close friend of defendant was not admissible under the necessity exception since there was no indicia of reliability and the statement lacked any spontaneity or timeliness. *Atwater v. State*, 233 Ga. App. 339, 503 S.E.2d 919 (1998).

Employees' testimony in shoplifting prosecution of being instructed to "watch out for" defendants was relevant and material to show the conduct of the employees in watching defendants and calling the police, and was not inadmissible because it may have incidentally put defendant's character in issue. *Jenkins v. State*, 172 Ga. App. 715, 324 S.E.2d 491 (1984).

Statements of confidential informant. — When no evidence of a confidential informant's trustworthiness was established, and in light of the very circumstances surrounding the informant's cooperation with the police, the informant's statements did not constitute probative evidence of defendant's possession of narcotics under the *res gestae* doctrine because it could not be said that such statements were free from all suspicion of device, or even that the statements were spontaneous in nature. *Hammond v. State*, 220 Ga. App. 760, 470 S.E.2d 302 (1996).

Informant's written statement to an attorney made two weeks after defendant's arraignment was insufficiently trustworthy to

be admissible under the "necessity" exception. *Nelson v. State*, 226 Ga. App. 93, 485 S.E.2d 582 (1997).

Defendant's probation was improperly revoked because the defendant's alleged trafficking in cocaine had not been established by a preponderance of the evidence as required by O.C.G.A. § 42-8-34.1(b). An informant's hearsay statements were not competent to show the defendant arranged a drug sale, and no evidence connected the defendant with cocaine found in a house where the informant said the sale was to occur. *Brown v. State*, 294 Ga. App. 1, 668 S.E.2d 490 (2008).

Testimony regarding statements by prior rape victims. — Police officer's testimony concerning statements made by defendant's prior rape victims was admissible as an exception to the general hearsay rule since defendant's guilty pleas to those prior offenses waived defendant's earlier opportunity to cross-examine the victims when the victims made the complaints against the defendant. *Moore v. State*, 207 Ga. App. 412, 427 S.E.2d 779 (1993).

Statements by deceased victim to lover. — In a prosecution for murder, it was error for the court to permit the introduction into evidence of statements made by the victim to her lover about the defendant (her husband) since they did not possess the requisite indicia of reliability; a married person's complaints about that person's spouse, made to one with whom the married person is conducting an adulterous affair, are subject to the possibility of exaggeration if not outright falsehood. *Azizi v. State*, 270 Ga. 709, 512 S.E.2d 622 (1999).

Trial court did not improperly allow the victim's girlfriend to testify about certain statements uttered by the victim concerning the defendant's personality and demeanor as: (1) the declarant-victim died and was thus unavailable; (2) the statements were relevant to the defendant's relationship with the victim, and the defendant's apparent motive, pattern of conduct, and opportunity to commit the crimes; and (3) the statements had particular guarantees of trustworthiness because of the close relationship between the victim and the defendant. *Lyons v. State*, 282 Ga. 588, 652 S.E.2d 525 (2007), overruled on other grounds, *Garza v. State*, 2008 Ga. LEXIS 865 (Ga. 2008).

Application and Examples (Cont'd)**5. Criminal Cases (Cont'd)**

Statement by deceased victim to fiancé. — Trial court did not err in admitting the testimony of the victim's fiancé that the victim had told her about his desire for a restraining order against the defendant and about a prior difficulty with the defendant earlier on the day of the shooting because the victim was unavailable due to his murder, the statements were relevant to material facts and more probative thereof than other available evidence, and the statements had particular guarantees of trustworthiness because the victim and the fiancé had been living together for over a year and had a very close relationship; in light of the overwhelming evidence of the defendant's involvement in the crimes, it was highly probable that the admission of the contested testimony did not contribute to the verdicts, and, therefore, any error in admitting the statements was not harmful. *McIlwain v. State*, No. S10A0068, 2010 Ga. LEXIS 318 (Apr. 19, 2010).

Victim's statements to a divorce attorney regarding the victim's spouse's violence were not admissible since there was insufficient indicia of reliability to admit the statements under the necessity exception. *Dix v. State*, 267 Ga. 429, 479 S.E.2d 739 (1997).

Admission of an audio tape of an out-of-court interview of the defendant's wife under the necessity exception to the bar against hearsay testimony, O.C.G.A. § 24-3-1(b), violated the confrontation clause of U.S. Const., amend. 6 however, the content of the wife's speech was barely discernible on the tape, and, to the extent that the tape was audible, the wife's statements were cumulative of other testimony, so there was no reasonable possibility that the tape contributed to the convictions, and the error in admitting the tape was harmless. *Daniels v. State*, 280 Ga. 349, 628 S.E.2d 110 (2006).

Testimony regarding statement by defendant's former spouse. — Georgia Bureau of Investigation agent's testimony regarding a statement by defendant's former spouse implicating defendant in a killing was admissible as an exception to the general hearsay rule, since the former spouse remarried defendant before refusing to testify at defendant's trial, and there was a "necessity" that

the finder of fact be acquainted with the statement of the only eyewitness to the homicide. *Higgs v. State*, 256 Ga. 606, 351 S.E.2d 448 (1987); *Wallace v. State*, 216 Ga. App. 718, 455 S.E.2d 615 (1995).

Testimony of mother of child-victim was not admissible under O.C.G.A. § 24-3-16 as to talk uttered by the child in the child's sleep in trial for aggravated sodomy. *Godfrey v. State*, 258 Ga. 28, 365 S.E.2d 93 (1987). But see 187 Ga. App. 319, 370 S.E.2d 183 (1988) (on remand, holding such testimony admissible under O.C.G.A. § 24-3-1).

Testimony of supposed drug purchaser. — Officer's testimony that witness told the officer that defendant had sold the witness drugs was hearsay, which violated defendant's right to a fair trial; because evidence against defendant was not overwhelming, admission of the evidence was not harmless error. *Welch v. State*, 231 Ga. App. 74, 498 S.E.2d 555 (1998).

Investigator's testimony not original evidence of alibi. — Investigator's testimony that defendant gave a purported alibi was not original evidence as to the fact of alibi and insofar as it established the fact of alibi, the evidence did not derive any value from the witness, but derived its value solely on the veracity and competency of defendant who never testified. Therefore, although such evidence is not hearsay, it nevertheless does not qualify as even "slight" evidence of an affirmative defense so as to require a charge on alibi. *Hartley v. State*, 207 Ga. App. 683, 428 S.E.2d 683 (1993).

Investigator testifying as expert. — In an aggravated assault case, it was permissible for an investigator, testifying as an expert, to state that based on the investigator's experience, persons who suffered from cuts or stab wounds often did not remember being stabbed. This was a conclusion that was beyond the ken of the average layperson; even if the investigator's testimony was somewhat based upon hearsay, the opinion was mainly derived from the investigator's many years of professional experience. *Jackson v. State*, 291 Ga. App. 287, 661 S.E.2d 665 (2008).

Self-serving statement by nontestifying defendant. — Testimony that a burglary defendant had stated that the defendant was "looking for a place to sleep" was self-serving inadmissible hearsay; the state-

ment could be construed to mean that the defendant did not have the intent to commit burglary, and the defendant had not testified. *Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

Statement to show defendant's motive. — Evidence was properly admitted by the trial court in defendant's trial for aggravated assault in violation of O.C.G.A. § 16-5-21 since statements of a witness that another screamed for help when the witness saw the victim and defendant fighting were part of the *res gestae* exception to hearsay pursuant to O.C.G.A. § 24-3-3. Statements by a witness that defendant was ordered to leave the premises were not hearsay under O.C.G.A. § 24-3-1 because the statements were used to explain defendant's motive and conduct of remaining on the premises and waiting for the victim pursuant to O.C.G.A. § 24-3-2, and statements regarding information from a police report which was not admitted into evidence were deemed harmless as cumulative. Regardless, there was sufficient evidence without the disputed evidentiary rulings to support defendant's conviction based on observations of several witnesses and the cuts on the victim's face and body. *Kelley v. State*, 260 Ga. App. 238, 581 S.E.2d 584 (2003).

Trial court did not abuse the court's discretion in admitting a victim's statements to the victim's close friends as to defendant's threats against the victim, defendant's physical and mental abuse, and other difficulties under the necessity exception to the hearsay rule as the victim was dead, the statements were relevant to defendant's intent, motive, and state of mind, and the statements had particularized guarantees of trustworthiness. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Trial court did not err by allowing the victim's parent to testify that the victim told the parent that the defendant had threatened to kill the victim if the victim sought a divorce under the necessity exception to the hearsay rule as: (1) the victim was the declarant; (2) the victim was unavailable because the victim had been murdered; (3) the victim's statement was uniquely relevant to show the defendant's motive, intent, and bent of mind; and (4) the victim's statement was trustworthy because the victim made the statement while confiding in the victim's

parent. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Prior inconsistent statement. — Given that a hearsay witness disavowed a prior inconsistent statement, the trial court did not err in admitting the statement as substantive evidence of the fact that defendant and a codefendant acted in concert to commit an armed robbery. *Claritt v. State*, 280 Ga. App. 384, 634 S.E.2d 81 (2006).

Certificate of drug analysis authorized under former O.C.G.A. § 35-3-16 did not fit within any statutorily recognized hearsay exception. *Miller v. State*, 266 Ga. 850, 472 S.E.2d 74 (1996).

Police reports. — In defendant's trial for multiple offenses, including possessing methamphetamine, the trial court properly refused to let defendant, who proceeded pro se, enter into evidence a police report concerning a drug raid because the report was offered for the truth of the matter asserted, namely, when the raid had occurred. *Bridges v. State*, 263 Ga. App. 849, 589 S.E.2d 616 (2003).

Defendant's claim that an investigator employed by the district attorney was bound by the ethical and legal standards that prohibited the district attorney from testifying before the grand jury was rejected as an agent could not delegate the agent's authority unless specifically empowered to do so and as the discretionary powers conferred upon public agents could not be delegated without authorization; further, an unlicensed individual could not practice law and a witness could not testify to hearsay other than in specified cases. *Hall v. State*, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

Victim's statements to officers. — To the extent that evidence contested by defendant consisted of out-of-court statements that the victim made to officers during investigations of complaints made by the victim, it was inadmissible hearsay; however, a Crawford violation was harmless since the hearsay was cumulative of other admissible evidence, and since there was such additional admissible evidence, including the testimony of friends recounting what the victim said about the difficulties with defendant, which statements were admissible under the necessity exception, any error was harmless. *Chapman v. State*, 280 Ga. 560, 629 S.E.2d 220 (2006).

Application and Examples (Cont'd)

5. Criminal Cases (Cont'd)

Medical records. — Forensic pediatrician who examined a battered infant was properly allowed to testify about seizures noted in the baby's medical records, and about a radiologist's report that confirmed suspicions about the extent of an injury because the pediatrician's opinion was not based solely on those records, but also on an examination of the baby. *Nichols v. State*, 278 Ga. App. 46, 628 S.E.2d 131 (2006).

No error in excluding experts' affidavits. — Trial court did not err by denying a defendant's request to admit testimony regarding the contents of affidavits used, in part, by the defendant's expert witnesses as the basis for the experts' opinions regarding the defendant's mental status as, in applying O.C.G.A. § 24-9-67.1, the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as the facts rested on the veracity and competency of persons not in court and did not come within any statutorily-recognized hearsay exception. The trial court then balanced the probative value of the affidavits against the prejudicial effect, noting that the affidavits were originally submitted in the defendant's habeas proceeding, contained identical language thereby casting suspicion on the affidavits' trustworthiness, contained conclusory statements and irrelevant and prejudicial information related to the defendant's alleged alcohol and drug use and the crime of murder for which the defendant was convicted; and, therefore, the affidavits had little probative information and were cumulative of other evidence. *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, U.S. , 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008).

Evidence lacked reliability. — Trial court did not abuse the court's discretion by excluding from the evidence an out-of-court statement by one of the men convicted for the home invasion and a letter from another man who was convicted of the home invasion because the statement and the letter lacked any indicia of reliability. Thus, the defendant was not entitled to introduce the evidence under the necessity exception to the hearsay

rule, O.C.G.A. § 24-3-1(b). *Pope v. State*, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

Overwhelming evidence of guilt made deputy's improper testimony harmless. — With regard to charge of first-degree forgery and charge of identity fraud involving checks taken from the company checkbook of defendant's employer, deputy's improper hearsay testimony that driver's license number written on the checks matched defendant's driver's license number was harmless error given the overwhelming evidence of guilt, including all of the stolen checks having been made payable to defendant by someone other than employer, defendant's endorsement appearing on all of the checks, and defendant's image captured on a bank security camera cashing one check. *Archer v. State*, 291 Ga. App. 175, 661 S.E.2d 230 (2008).

Evidence admissible under necessity exception. — Hearsay statements were admissible under the necessity exception despite the fact that some of the statements were made during the pendency of separations or a divorce action; the statements were made over a 10-year period and many of the statements were not made during the separations or the divorce action. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Any error in admitting a victim's statements to a deputy responding to a 9-1-1 call under the necessity exception to the hearsay rule was harmless as the hearsay portion of the deputy's testimony consisted of no more than two sentences, was cumulative of the other properly admitted evidence, and did not go to the core issue of the case. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

In a defendant's prosecution for malice murder and cruelty to children, testimony by the five-year-old victim's grandmother as to prior difficulties between the victim and the defendant, including a statement by the victim to the grandmother that the defendant had hit the victim in the stomach on the day prior to the fatal incident, was properly admitted under the necessity exception as the grandmother took care of the victim on a regular basis and was concerned for the victim's welfare. *Wright v. State*, 285 Ga. 57, 673 S.E.2d 249 (2009).

6. Deceased Persons

Materiality and probative value. — Death or unavailability of the declarant cannot

alone satisfy the necessity component without allowing the exception to swallow the rule; additionally, the proponent of the evidence must show that the statement is relevant to a material fact and that the statement is more probative on that material fact than other evidence that may be procured and offered. *Chapel v. State*, 270 Ga. 151, 510 S.E.2d 802 (1998).

Declarations of persons since deceased must be trustworthy before the declarations are admissible under the rule of necessity, and self-serving declarations are not admissible. *Chrysler Motors Corp. v. Davis*, 226 Ga. 221, 173 S.E.2d 691 (1970).

Mere fact that a witness is dead does not render the declarations admissible, although, if in addition to the death of a witness there are circumstances which attribute verity to the witness's declarations, the hearsay rule may be relaxed to permit the admission of such declaration. *Irby v. Brooks*, 246 Ga. 794, 273 S.E.2d 183 (1980), overruled on other grounds, *Swain v. Citizens & S. Bank*, 258 Ga. 547, 372 S.E.2d 423 (1988).

Testimony by a friend of the victim, that the victim planned to meet with defendant, was not sufficiently trustworthy to be admissible under the "necessity" exception to the hearsay rule in light of the fact that the victim made a contradictory statement to the victim's son as to where the victim was going on the night the victim was killed. *State v. Mallory*, 261 Ga. 625, 409 S.E.2d 839 (1991). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Decedent's declaration, when coupled with circumstances which attribute verity to the decedent's declaration, is admissible. *White v. White*, 262 Ga. 168, 415 S.E.2d 467 (1992). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Wife's statements prior to her death respecting an alleged affair between the wife and her priest were not admissible under the necessity exception to hearsay rule or as a declaration against interest because there was no judiciousness of trustworthiness and the statements lacked reliability. *Boehm v. Abi-Sarkis*, 211 Ga. App. 181, 438 S.E.2d 410 (1993).

Mere fact that a witness is dead does not render the witness's declarations admissible, but if the statement was made in circum-

stances in which it is unlikely to have been untrue, it meets the threshold trustworthiness standard. *Lewis v. Emory Univ.*, 235 Ga. App. 811, 509 S.E.2d 635 (1998).

When a witness who died prior to trial was the only person who had conducted a medical procedure on the deceased and was in the best position to know how easy the procedure was, and where there was no evidence that the witness's statements against the interests of the witness's employer, made to professional colleagues in the course of their professional work, were self-serving, calculated to benefit the deceased, or untruthful, the witness's statements were admissible to counter the recollections of others on the scene and of defendant's experts. *Lewis v. Emory Univ.*, 235 Ga. App. 811, 509 S.E.2d 635 (1998).

Requirement of particularized guarantees of trustworthiness has not been met as to witnesses who had known the deceased victim for only a short time before the deceased began confiding in them about the problems in the marriage to defendant. *Slakman v. State*, 272 Ga. 662, 533 S.E.2d 383 (2000).

Fact that the statement of the deceased benefits the witness purporting to hear the statement and offering the statement as evidence is not a factor in determining the trustworthiness of the statement for admissibility purposes. Also, statements favorable to the interest of the declarant are not admissible in evidence as proof of the facts asserted, and the subsequent death of the declarant does not change this rule. *Dodd v. Scott*, 250 Ga. App. 32, 550 S.E.2d 444 (2001).

Trial court did not err in admitting a friend's testimony as to the statements the murder victim made to the friend about the murder victim's relationship with defendant and the way defendant treated the murder victim since sufficient guarantees of trustworthiness existed to warrant admission of that testimony; the evidence showed that the friend and the murder victim worked together for a year and that the murder victim confided in the friend on a daily basis about the details of the murder victim's relationship with defendant, and, thus, the testimony was admissible under the necessity exception to the rule prohibiting hearsay evidence because the declarant was deceased and the testimony was more probative on the

Application and Examples (Cont'd)**6. Deceased Persons (Cont'd)**

issues of motive and intent than other evidence offered at trial. *Brinson v. State*, 276 Ga. 671, 581 S.E.2d 548 (2003).

Trial court did not err in admitting the testimony of a long-time friend of the deceased wife about prior difficulties between the deceased wife and defendant as such testimony was admissible under the necessity exception to the hearsay rule; the deceased wife was unavailable, the testimony contained particular guarantees of trustworthiness, and the testimony was relevant to the relationship between the deceased wife and defendant, and was more probative of that than other evidence that could be procured and offered. *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119 (2003).

Because the U.S. Supreme Court case of *Crawford* had not yet been decided when defendant's criminal trial was held, defendant's counsel could not have been deemed ineffective under U.S. Const., amend. 6 for failing to anticipate a change in the law and make such an argument with respect to the admissibility of a deceased witness's statement; rather, the statement was properly admitted under the necessity exception to the hearsay rule, pursuant to O.C.G.A. § 24-3-1(b), as there was no indication that the statement was not accompanied by indicia of reliability, and in any event, admission thereof was harmless because the statement was cumulative of other evidence admitted in the trial. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

Decedent's declarations are admissible if there are no other witnesses. — Declarations of a decedent, or where there is equivalent unavailability of the declarant, to whomsoever made are admissible in evidence if there are no other witnesses to the alleged occurrence. "Other witnesses" within the meaning of this rule would include eyewitnesses, whether favorable or unfavorable to the party offering the evidence, but would exclude those who merely testify that they did not see the alleged occurrence. *Moore v. Atlanta Transit Sys.*, 105 Ga. App. 70, 123 S.E.2d 693 (1961). For comment, see 14 *Mercer L. Rev.* 445 (1963).

Statement of deceased victim admitted. — Statements made by a victim concerning a

prior incident when the defendant allegedly kidnapped the victim, now not available due to her death allegedly due to the defendant, were admissible as trustworthy because the victim made the statements within hours of being released, and because the statements were made during the course of an official investigation. While the victim decided not to pursue charges, the victim never disavowed the statements, or claimed the statements were inaccurate or untruthful. *McKissick v. State*, 263 Ga. 188, 429 S.E.2d 655 (1993). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Statements made by a deceased victim to a sister in whom the victim placed great confidence and to whom the victim turned for help with the victim's problems were trustworthy. Thus the sister's hearsay testimony was admissible. *Roper v. State*, 263 Ga. 201, 429 S.E.2d 668 (1993). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Testimony by a police officer concerning statements made by a deceased victim to the officer for whom the victim had worked and to whom the victim had provided information about defendant were admissible. *Hayes v. State*, 265 Ga. 1, 453 S.E.2d 11 (1995). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Statements of a victim to the victim's father, boyfriend, and a close friend concerning defendant's threats on the victim's life were admissible. *McGee v. State*, 267 Ga. 560, 480 S.E.2d 577 (1997).

Decedent's declaration to decedent's spouse that the decedent had been dropped while in the hospital was admissible under the necessity exception to the hearsay rule. *Lane v. Tift County Hosp. Auth.*, 228 Ga. App. 554, 492 S.E.2d 317 (1997).

Admission of victim's statement made two months before the victim's death was not error since it was established that the declarant was unavailable due to death; that the declarant's statement regarding gang membership was relevant to a material fact — the motive for the shooting; and that the most probative evidence of the declarant's gang membership was the declarant's admission of that fact. *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Evidence of statements by a deceased victim to friends was properly admitted. *Abraham v. State*, 271 Ga. 309, 518 S.E.2d 894 (1999).

Testimony of the victim's sister as to the victim's statements to the sister was admissible under the necessity exception to the hearsay rule. *Givens v. State*, 273 Ga. 818, 546 S.E.2d 509 (2001).

Statements of the victim concerning prior difficulties between the victim and defendant that were made to investigating officers shortly after the events reported by the victim were admissible. *Chapman v. State*, 273 Ga. 865, 548 S.E.2d 278 (2001).

Although the statements were not dying declarations, statements by the murdered victim to the victim's friends regarding death threats made by the victim's spouse carried sufficient indicia of reliability to be admissible. *Morris v. State*, 275 Ga. 601, 571 S.E.2d 358 (2002).

Trial court did not err in allowing a deceased witness's sister to testify, pursuant to the necessity exception to the hearsay rule, regarding statements the decedent made to the sister prior to the murder, which implicated the defendant, as the decedent was unavailable, the statements were relevant to show motive, and the statements were trustworthy because the decedent was confiding in the sister regarding a fear of being associated with the robbery defendant committed. *Grimes v. State*, 280 Ga. 363, 628 S.E.2d 580 (2006).

When the deceased victim was unavailable, statements the victim made which were relevant to show motive for the defendant's fatal act, made shortly before the victim's death to one to whom no reason to lie or to misrepresent existed, were properly admitted, and not hearsay; moreover, as the defendant was found guilty of involuntary manslaughter rather than murder, the admission of this testimony appeared to have been harmless. *Banegas v. State*, 283 Ga. App. 346, 641 S.E.2d 593 (2007).

In felony murder and robbery convictions in connection with a fatal assault upon an elderly man, even if admission of the victim's statements to a police officer, made shortly after the victim was discovered, asserting that defendant had hurt the victim and taken the victim's pistol, keys, and car was erroneous, any error in admitting these statements under the necessity exception to the hearsay rule was harmless due to the overwhelming evidence of guilt and the fact that the statements made to the police echoed those

made to relatives and neighbors. *Treadwell v. State*, 285 Ga. 736, 684 S.E.2d 244 (2009).

Statements admitted under necessity exception. — Pretrial written statement by a victim given to a police officer when the victim identified defendant in a photographic array was admissible under the necessity exception. *Ingram v. State*, 233 Ga. App. 356, 504 S.E.2d 254 (1998).

Trial court did not err when the court admitted statements under the necessity exception, which were made by a victim, who subsequently died, to the victim's son and a police deputy, to the effect that the victim thought defendant, the victim's youngest son, had committed the crime. *Hill v. State*, 258 Ga. App. 339, 574 S.E.2d 394 (2002).

Admission of statements made by the defendant's cousin prior to the cousin's murder were proper under the necessity exception to the hearsay rule pursuant to O.C.G.A. § 24-3-1(b) because the statements indicated that the cousin was going to tell the defendant to move out of a shared apartment and the statements were probative on the issues of the defendant's motive and intent; the statements were trustworthy because the statements were made to the cousin's family members, whom the cousin confided in. *Jackson v. State*, 284 Ga. 826, 672 S.E.2d 640 (2009).

Statements failed to meet necessity exception. — When the prosecution asked only how long each witness had known the murder victim and whether each witness was familiar with the relationship between defendant and the victim, there was no showing of the required particularized guarantees of trustworthiness to permit admission of the hearsay statements of the victim under the necessity exception of O.C.G.A. § 24-3-1(b); there was no testimony about the nature of the relationships between the witnesses and the victim. *Mote v. State*, 277 Ga. 429, 588 S.E.2d 748 (2003), cert. denied, 541 U.S. 1066, 124 S. Ct. 2395, 158 L. Ed. 2d 968 (2004).

Trial court erroneously admitted an officer's testimony regarding a statement made by one of the victims who died of natural causes prior to trial as the admission violated the defendant's right to confrontation; moreover, because the appeals court could not hold that a reasonable probability existed that the decedent's statement did not

Application and Examples (Cont'd)
6. Deceased Persons (Cont'd)

contribute to the verdict as to a second count of armed robbery, the error was not harmless and both the defendant's armed robbery convictions were reversed. *Gifford v. State*, 287 Ga. App. 725, 652 S.E.2d 610 (2007).

In a will contest action, the trial court did not err by refusing the challenger's proffer of having a grandchild for the decedent testify that the decedent was unaware of a change in a medical appointment as the testimony did not fit the hearsay necessity exception. The trial court did not abuse the court's discretion by finding that the alleged statement to the grandchild, who certainly had an interest in seeing that the objector, the grandchild's parent, benefited from the admission of the testimony and, therefore, the testimony lacked sufficient trustworthiness. *Horton v. Hendrix*, 291 Ga. App. 416, 662 S.E.2d 227 (2008), cert. denied, 2008 Ga. LEXIS 780 (Ga. 2008).

Statements of deceased witness admitted. — Statements of deceased witness were properly admitted out of necessity under O.C.G.A. § 24-3-1. *Jackson v. State*, 202 Ga. App. 582, 414 S.E.2d 905, cert. denied, 202 Ga. App. 906, 414 S.E.2d 905 (1992).

Statements of a deceased juvenile made to a police detective in the course of an official investigation were admissible under the "necessity" exception to the rule against the admission of hearsay. *White v. State*, 268 Ga. 28, 486 S.E.2d 338 (1997).

At defendant's trial for incest and child molestation, testimony from one of defendant's daughters, which was read from a transcript from a 1985 trial at which defendant was also convicted of child molestation, was hearsay evidence properly admitted under O.C.G.A. § 24-3-1 based on necessity since the daughter was now deceased; there were sufficient guarantees of trustworthiness in the daughter's testimony when it was made under oath during trial and the testimony was corroborated by her sister and medical records; and the testimony was clearly relevant to and more probative than other testimony the state could present on the issue of whether defendant sexually abused and committed incest with one of defendant's daughters when she reached a

certain age when it demonstrated defendant's plan, scheme, bent of mind, and course of conduct, whereby defendant would subject defendant's daughters to the defendant's acts of sexual abuse. *Booth v. State*, 264 Ga. App. 393, 590 S.E.2d 789 (2003).

Decedent's declarations are admissible as to cause of injury. — When death has sealed the mouth of a witness, necessity would make admissible the witness's representations to the witness's physician as to the witness's injury and its cause; it being contended that such injury was the cause of the witness's death, and there being no other witness thereto except the deceased. *Mutual Life Ins. Co. v. Davis*, 48 Ga. App. 742, 173 S.E. 471 (1934); *Lathem v. Hartford Accident & Indem. Co.*, 60 Ga. App. 523, 3 S.E.2d 916 (1939); *City of Atlanta v. Crouch*, 91 Ga. App. 38, 84 S.E.2d 475 (1954).

Post testamentary declarations to prove genuineness of will. — Post testamentary declarations, though the declarations may not be admissible, when standing alone, to prove or disprove the genuineness of the instrument offered for probate, are admissible in cases where the genuineness of the instrument has been assailed by other proper evidence, either to strengthen or weaken the assault. *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Heard v. Lovett*, 273 Ga. 111, 538 S.E.2d 434 (2000).

Decedent's hearsay statements in support of change of beneficiary not admissible. — In an action involving the rights to proceeds of an accidental death insurance policy paid into the registry of the court by the decedent's insurer, the decedent's estate failed to create a genuine issue of material fact over whether the decedent did substantially all that the decedent could do to effect a change of beneficiary in favor of the decedent's children from a prior marriage, but could only produce hearsay evidence to support a change. Thus, the originally-designated beneficiary, the decedent's second ex-wife, was properly granted summary judgment as the sole beneficiary under the decedent's insurance policy. *Stanton v. Fisher*, 290 Ga. App. 274, 659 S.E.2d 692 (2008).

Decedent's declaration not admissible to show criminal defendant's motive or conduct. — O.C.G.A. § 24-3-1 and *Momon v.*

State, 249 Ga. 865, 294 S.E.2d 482 (1982) do not allow out-of-court statements made by the deceased to others to be used to ascertain the motive or the conduct of the accused. *Jackson v. State*, 256 Ga. 536, 350 S.E.2d 428 (1986).

Documentary evidence. — Former Georgia dead man's statute, which still applies to causes of action that arose before 1979, does not apply to documentary evidence. Thus, the rule does not affect the letters and other documents written by persons now deceased, but the rule does limit that to which affiants are competent to testify regarding statements made by defendant's agents that are now deceased. *McLendon v. Georgia Kaolin Co.*, 782 F. Supp. 1548 (M.D. Ga. 1992).

Dual agency. — Former dead man's statute did not apply to dual agency, that is, the language in that statute referred to the agent or attorney of one of the parties to a transaction and not to the agents or attorneys of both parties. *McLendon v. Georgia Kaolin Co.*, 782 F. Supp. 1548 (M.D. Ga. 1992).

7. Evidence from Other Trials

Transcript of the testimony of certain witnesses in another trial would not be admissible in a prosecution for perjury alleged to have been committed in such trial, to prove the truth of their testimony, since as such, it would be purely hearsay. *Clackum v. State*, 55 Ga. App. 44, 189 S.E. 397 (1936).

Uncertified document purportedly originating from Department of Homeland Security. — In a deprivation proceeding, it was error to admit a faxed copy of a document purportedly originating from the United States Department of Homeland Security that stated that an investigation had been initiated to determine whether the parent in question was subject to deportation. In the absence of any relevant witness testimony or documentary evidence properly certifying the record, it consisted entirely of hearsay, which lacked probative value even in a dispositional hearing. In the *Interest of A. R.*, 296 Ga. App. 62, 673 S.E.2d 586 (2009).

8. Letters

Letter is hearsay when author not before court. — When the author of a letter is not before the court and available for cross-examination, the letter itself is incom-

petent as hearsay. *Page v. State*, 237 Ga. 20, 227 S.E.2d 8 (1976).

Letters at trial are inadmissible hearsay when their value depends upon the credibility of an out-of-court asserter, the author of the letters. *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981).

Letter improperly admitted. — Admission of letter received by defendant, which was not in any way an utterance of any agent or attorney for plaintiff, was improperly admitted in evidence over objection that it was hearsay. *Everitt v. Harris*, 67 Ga. App. 64, 19 S.E.2d 545 (1942).

Letter properly excluded. — Trial court properly excluded a letter allegedly written by defendant's accomplice, confessing to a burglary the letter failed to fall within the necessity exception codified in O.C.G.A. § 24-3-1(b) since: (1) the only evidence that the letter was written by the accomplice and was mailed and received by defendant came from the accomplice's own testimony; (2) no independent witness authenticated the letter; (3) there was no reason to conclude that the letter's contents were reliable as the accomplice and defendant were indicted for the same crime, were lovers, and the accomplice could be motivated to lie by the accomplice's feelings for defendant; (4) the fact that the accomplice refused to testify was inconsistent with a letter in which the accomplice confessed to the crime; and (5) the letter was inconsistent with the facts as a woman's menstrual pad was found in the male victim's trash can, and defendant had possession of at least one of the items stolen in the burglary. *Holmes v. State*, 265 Ga. App. 409, 593 S.E.2d 932 (2004).

9. Reputation

Public opinion, as to a person's insanity, is hearsay evidence. *Foster v. Brooks*, 6 Ga. 287 (1849).

Reputation of ownership is hearsay. — Evidence that a place has the "reputation" of belonging to a party is hearsay and inadmissible in evidence, and is without probative value when admitted without objection. *Burke v. State*, 54 Ga. App. 225, 187 S.E. 614 (1936).

10. Rumors

Rumors from unknown source are hearsay. — Trial court properly refused to allow a

Application and Examples (Cont'd)**10. Rumors (Cont'd)**

witness for the state to testify as to a rumor the witness heard from an unknown source on the grounds that it was inadmissible hearsay. *Plemons v. State*, 155 Ga. App. 447, 270 S.E.2d 836 (1980), overruled on other grounds, *Barnes v. State*, 157 Ga. App. 582, 277 S.E.2d 916 (1981).

11. Statements by Physicians**Opinion as to cause of injury not hearsay.**

— When solely on the basis of one's first-hand observation, a doctor testified that, in the doctor's opinion, the wound was made with a knife-like object, such testimony was not based upon hearsay. *Bray v. State*, 151 Ga. App. 428, 260 S.E.2d 383 (1979).

Opinion of unidentified doctor. — Hearsay evidence of the opinion as to the plaintiff's condition expressed by an alleged and otherwise unidentified doctor who came upon the scene of an automobile collision is inadmissible, there being no showing of the qualifications of the doctor, nor is it admissible in this case under the *res gestae* rule. *Camp v. Ledford*, 103 Ga. App. 197, 119 S.E.2d 54 (1961).

Doctor's testimony improperly admitted.

— In a personal injury case, the court erred in permitting a doctor, a witness for the plaintiff, to testify over objections of the defendants as to certain statements made to the doctor by the plaintiff and also to opinions formed from statements made to the doctor by the plaintiff because this testimony was hearsay and inadmissible. *Atlantic Coast Line R.R. v. Clinard*, 93 Ga. App. 64, 90 S.E.2d 923 (1955).

In a medical malpractice suit, the testimony of two witnesses that the plaintiff's mother did not go to the hospital because her doctor told her not to do so, neither of which witnesses heard the actual conversation, was hearsay, incompetent, and inadmissible, considering that the testimony of the mother had already been admitted to explain her conduct. *Highsmith v. Fillingim*, 171 Ga. App. 548, 320 S.E.2d 391 (1984).

12. Hearsay Found

Opinion as to reason for death. — In an action seeking to prevent a husband from

receiving benefits under his wife's life insurance policy and from inheriting her estate on grounds that he allegedly killed his wife, the detective's testimony that an IRS agent said that in the agent's opinion her death was related to a federal tax fraud investigation and attorney's testimony that the IRS agent told the detective that the federal government was concerned that her death was linked to the investigation, were inadmissible hearsay. A memorandum in which the detective wrote that IRS agents stated it was their opinion that she died as a result of a conspiracy involving two corporations was also hearsay. *Krause v. Vance*, 207 Ga. App. 615, 428 S.E.2d 595 (1993).

Anonymous statement. — Trial court erred in admitting the testimony of a witness who stated that after the shooting and while talking to police officers investigating the crimes, the witness heard a member of the crowd which had gathered around the victim's residence yell at the witness to tell police that defendant was the shooter. *Lindsey v. State*, 271 Ga. 657, 522 S.E.2d 459 (1999).

While the trial court erred in admitting hearsay testimony regarding: (1) "leaders of the community" informing police that defendant had been selling drugs; (2) people fearing defendant and being unwilling to cooperate with police; (3) police using a drug dog to search defendant's car based on information they received about defendant transporting drugs; and (4) one of the confidential informants being unable to testify due to the informant's being sick on the day of trial, this error was harmless in light of the overwhelming evidence of defendant's guilt. *Banks v. State*, 270 Ga. App. 221, 606 S.E.2d 34 (2004).

Investigating officer's statement inadmissible. — In a prosecution for simple battery, the testimony of the investigating officer as to a statement by one codefendant was not admissible when two additional adult eyewitnesses were present at the defendants' home on the night of the incident. *Harrison v. State*, 238 Ga. App. 485, 518 S.E.2d 755 (1999).

Police investigator's hearsay statements admissible. — Because defendant was provided a full opportunity for confrontation regarding the victim's prior out-of-court statements, the trial court did not err in

admitting a police investigator's hearsay evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

Detective's statement meant to bolster witness testimony. — Trial court erred in permitting the detective to testify about what five witnesses told the detective, after the five witnesses testified against defendant, and in then comparing their statements to what defendant had said on the same subject in defendant's statements to police, which demonstrated inconsistencies between defendant's statements and those made by the five witnesses; the statements of the five witnesses were prior consistent statements that were inadmissible hearsay because they were offered solely to bolster their testimony in the eyes of the jury since the veracity of their testimony had not been challenged when they testified earlier in the case before the detective testified. *Baugh v. State*, 276 Ga. 736, 585 S.E.2d 616 (2003).

Exclusion of videotape of defendant's statement. — Trial court did not err in excluding a videotape of a statement defendant gave to a detective at the time of defendant's arrest as the statement was not offered to rebut a charge of recent fabrication, improper influence, or improper motive and was pure hearsay. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Evidence of 9-1-1 call. — In a DUI case, it was error for the trial court to overrule the defendant's objection to a police officer's testimony as to what a 9-1-1 caller had said to the officer, but the error was harmless; the hearsay was cumulative because the officer's testimony that the defendant was asleep behind the wheel mirrored that of the caller. *Hopkins v. State*, 283 Ga. App. 654, 642 S.E.2d 356 (2007).

Contract issues. — Partial summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to a labor supplier in a construction company's counterclaim alleging tortious interference with its contractual relations, based on an allegedly illegal lien filed by the supplier against a property, since no factual basis was found for the counterclaim and, accordingly, it was dismissed; it was noted that the affidavit of the administrative manager of the company contained irrelevant matter which was properly excluded under O.C.G.A. § 24-2-1, as it related to the supplier's failure to sign a lien

waiver and it had no logical bearing to the material fact in issue and, further, it was found to be inadmissible hearsay under O.C.G.A. § 24-3-1(a). *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence, pursuant to O.C.G.A. §§ 13-2-2(1), 24-3-1(b), 24-6-1, and 24-6-2; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. *Zaglin v. Atlanta Army Navy Store, Inc.*, 275 Ga. App. 855, 622 S.E.2d 73 (2005).

Statement from insured on critical issues. — In an insurance case in which a jury found in favor of an insurer, which had denied property insurance coverage after a house fire to two insureds based on suspected arson, for retrial purposes, it was error to allow the insurer to elicit hearsay testimony from one of the insureds on the critical issue of whether the exterior doors of the insureds' home were locked when the firefighters arrived because the testimony was elicited to prove that the exterior doors were locked at the time of the fire. *Bantz v. Allstate Ins. Co.*, 263 Ga. App. 855, 589 S.E.2d 621 (2003).

When an account statement summarized the invoices therein, but also listed a fee for which no supporting business record was presented, that entry was hearsay and could not be considered in determining the amount owed by the defendant. *Walter R. Thomas Assocs. v. Media Dynamite, Inc.*, 284 Ga. App. 413, 643 S.E.2d 883 (2007).

Accident reconstruction expert report. — In a negligence action, based on a husband's visit to the accident scene where the wife was injured, despite having no formal training in accident reconstruction, the husband could

Application and Examples (Cont'd)**12. Hearsay Found (Cont'd)**

testify as to the personal knowledge gained from that excursion; but, an accident reconstruction expert's report, which both parties referred to in the narrative portion of the police report, was inadmissible hearsay under the circumstances presented. *Morton v. Horace Mann Ins. Co.*, 282 Ga. App. 734, 639 S.E.2d 352 (2006), cert. denied, 2007 Ga. LEXIS 201 (Ga. 2007).

Summary of a summary of a detailed report regarding a pesticide chemical was hearsay evidence and should not have been admitted in a trial filed by a personal injury plaintiff as portions of a laboratory report that contained the opinions or conclusions of a third party not before the court were inadmissible until a proper foundation was laid from the person who entered such opinions or conclusions and that person had to qualify as an expert and relate the facts upon which the entry was based; hence, the trial court also erred in allowing a defense witness to testify as to the report who was not qualified as an expert by the court. *Chancey v. Peachtree Pest Control Co.*, 288 Ga. App. 767, 655 S.E.2d 228 (2007), cert. denied, 2008 Ga. LEXIS 459 (Ga. 2008).

Proof of agency. — Since there was no evidence that a principal authorized someone to act as the principal's agent, agency could not have been proven by declarations of the alleged agent, and a summary judgment affidavit describing statements made by a payee's attorney which had allegedly accelerated a note was properly excluded since the only evidence that the attorney was the payee's agent was the affidavit itself. *McManus v. Turner*, 266 Ga. App. 5, 596 S.E.2d 201 (2004).

Objections

1. Specificity of Objections

General rule requires that an objection to testimony point out in detail why the testimony is subject to the objection made. *Jones v. State*, 154 Ga. App. 806, 270 S.E.2d 201 (1980).

When general objection fails. — When an objection is made to evidence as a whole or

en bloc, a part of which is not subject to the objection, the entire general objection fails. *Jones v. State*, 154 Ga. App. 806, 270 S.E.2d 201 (1980).

2. Admission over Objection

Illegal admission over objection requires new trial. — If, by the introduction of hearsay evidence, it is probable that the jury might have been led to believe that the jury could consider it as sufficient to establish the fact stated, then if that fact be material, and timely objection be urged, a new trial should result. *Glisson v. State*, 57 Ga. App. 169, 194 S.E. 877 (1938).

Illegal admission over proper objection of hearsay evidence not embraced within any of the exceptions, relating to a vital issue, as to which the other evidence is in conflict, which admission is prejudicial to the losing party, is cause for a new trial. *Fuller v. State*, 196 Ga. 237, 26 S.E.2d 281 (1943).

Inadmissible hearsay which is received over objection does not require a new trial if it appears that the evidence could not have affected the verdict because other evidence by a witness with immediate and personal knowledge is sufficient to establish the fact in question. *Glass v. State*, 235 Ga. 17, 218 S.E.2d 776 (1975).

Necessity exception satisfied to warrant admission of hearsay. — With regard to a defendant's convictions for malice murder and other crimes, the trial court did not err in admitting hearsay testimony of a witness who testified about prior difficulties between the defendant and the victim, over the hearsay objection of trial counsel, under the necessity exception to the hearsay rule; considering the totality of the circumstances, the trial court did not abuse the court's discretion in permitting the testimony under the necessity exception since the witness in question testified that the victim and the witness were roommates for a while, were teammates on a college track team, and had become close enough in the course of their friendship to have shared intimate details of their lives and relationships, including the witness's observations of bruises on the victim, which the victim told the witness were inflicted by the defendant. *Culmer v. State*, 282 Ga. 330, 647 S.E.2d 30 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Computer print-outs. — Although computer print-out sheets are generally classified as hearsay and to be admissible into evidence, computer print-outs must fall within an exception to the well-known hearsay rule, subject to the discretion of the court, com-

puter print-out sheets or records stored in an electronic computer may be admissible into evidence when such are permanent records made in the regular course of business. 1973 Op. Att'y Gen. No. 73-91.

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 668.

C.J.S. — 31A C.J.S., Evidence, § 282 et seq.

ALR. — Extrajudicial admissions by principal as evidence against surety, 60 ALR 1500.

Evidence as to threats made to keep witness away from criminal trial, 62 ALR 136.

Admissibility of statements of alleged agent for the purpose of showing that other party dealt with him as agent and not as principal, as distinguished from the purpose of showing the existence or extent of agency, 80 ALR 604.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 ALR 825.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Admissibility of oral or written statement by deceased as to fact or terms of an antenuptial or postnuptial agreement which cannot be found, 140 ALR 1133.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 ALR2d 752.

Admissibility of evidence of reputation or declaration as to matter of public interest, 58 ALR2d 615.

Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 ALR2d 619; 98 ALR Fed. 20.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 ALR2d 890.

Admissibility in evidence, in automobile negligence action, of charts showing braking distance, reaction times, etc., 9 ALR3d 976.

Propriety of considering hearsay or other

incompetent evidence in establishing probable cause for issuance of search warrant, 10 ALR3d 359.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Grand jury: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 ALR3d 612.

Admissibility of physician's testimony as to patients' statements or declaration, other than *res gestae*, during medical examination, 37 ALR3d 778.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Admissibility of evidence to establish oral antenuptial agreement, 81 ALR3d 453.

Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442; 77 ALR4th 927.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 ALR3d 1138.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay—state cases, 89 ALR4th 456.

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 ALR5th 784.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 ALR5th 672.

Sufficiency of hearsay evidence in probation revocation hearings, 21 ALR6th 771.

What constitutes similar motive for purposes of Rule 804(b)(1) of Federal Rules of Evidence, excepting such testimony from hearsay rule if party against whom such testimony is offered had opportunity and

“similar motive” to develop testimony, 138 ALR Fed 367.

When is witness “unavailable” for purposes of admission of evidence under Rule 804 of Federal Rules of Evidence, providing hearsay exception where declarant is unavailable, 174 ALR Fed. 1.

Construction and application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., hearsay exception based on unavailable witness’s wrongfully procured absence, 193 ALR Fed. 703.

24-3-2. Original evidence distinguished.

When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence not as hearsay but as original evidence. (Orig. Code 1863, § 3694; Code 1868, § 3718; Code 1873, § 3771; Code 1882, § 3771; Civil Code 1895, § 5176; Penal Code 1895, § 997; Civil Code 1910, § 5763; Penal Code 1910, § 1023; Code 1933, § 38-302.)

Law reviews. — For article discussing exceptions to the hearsay rule and advocating elimination of the *res gestae* exception, see 5 Mercer L. Rev. 257 (1954). For article, “Evidence from Computers,” see 8 Ga. L. Rev. 562 (1974). For article surveying cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For article surveying Georgia cases in the area of evidence from June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983). For article surveying law of evidence in 1984-1985, see 37 Mercer L. Rev. 249 (1985). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, “Wills, Trusts & Administration of Estates,” see 53 Mercer L. Rev. 499 (2001). For survey article on evidence law for the period from June 1, 2002

through May 31, 2003, see 55 Mercer L. Rev. 249 (2003). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009).

For comment on *Brewer v. Henson*, 96 Ga. App. 501, 100 S.E.2d 661 (1957), holding that statements made by patient to physician which are not equivalent to spontaneous and voluntary expressions of present pain and suffering are not admissible as evidence, see 21 Ga. B.J. 97 (1958). For comment as to admissibility of evidence of a criminal conviction in a civil action arising out of the same factual situation, in light of *Hurt v. Stirone*, 416 Pa. 493, 206 A.2d 624 (1965), see 16 Mercer L. Rev. 464 (1965). For comment, “24-3-2: Evidence to Explain Conduct and Ascertain Motive Gets Disciplined,” see 36 Mercer L. Rev. 733 (1985).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSTITUTIONALITY

CONSTRUCTION

CONDUCT

MOTIVE

ADMISSIBILITY

1. IN GENERAL
2. ORIGINAL EVIDENCE
3. SELF-SERVING DECLARATIONS
4. EVIDENTIARY VALUE

APPLICATION AND EXAMPLES

1. ALIMONY AND SEPARATE MAINTENANCE
2. ARRESTS
3. CONVERSATIONS
4. DECEASED PERSONS
5. DECLARATIONS
6. DEEDS
7. EVIDENCE OF OTHER TRANSACTIONS
8. INFORMANTS
9. WRITINGS
10. NEGOTIATIONS
11. PRESENCE AT PARTICULAR PLACE
12. RELATIONSHIPS
13. SAFETY INSTRUCTIONS
14. SEARCHES
15. TESTIMONY OF LAW ENFORCEMENT OFFICERS
16. EXAMPLES NOT WITHIN RULE

General Consideration

Jury instructions. — When there is no request to charge the purpose for which testimony can be considered under O.C.G.A. § 24-3-2, failure to so instruct the jury does not constitute reversible error. *Payne v. State*, 163 Ga. App. 276, 293 S.E.2d 483 (1982).

Cited in *Southwestern R.R. v. Rowan & McCaury*, 43 Ga. 411 (1871); *Lyman v. State*, 69 Ga. 404 (1882); *Glover v. State*, 15 Ga. App. 44, 82 S.E. 602 (1914); *Purvis v. Atlanta N. Ry.*, 145 Ga. 517, 89 S.E. 571 (1916); *Stanford v. State*, 153 Ga. 219, 112 S.E. 130 (1922); *Garrett v. State*, 157 Ga. 817, 122 S.E. 211 (1924); *Alvaton Mercantile Co. v. Caldwell*, 34 Ga. App. 151, 128 S.E. 781 (1925); *Sloan v. State*, 35 Ga. App. 347, 133 S.E. 269 (1926); *Davis v. Farmers & Traders Bank*, 36 Ga. App. 415, 136 S.E. 816 (1927); *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Aiken v. State*, 170 Ga. 895, 154 S.E. 368 (1930); *Coleman v. State*, 43 Ga. App. 350, 158 S.E. 627 (1931); *Central of Ga. Ry. v. Dabney*, 44 Ga. App. 143, 160 S.E. 818 (1931); *Eley v. Holden*, 48 Ga. App. 152, 172 S.E. 75 (1933); *Mutual Life Ins. Co. v. Davis*, 48 Ga. App. 742, 173 S.E. 471 (1934); *Monroe v. State*, 50 Ga. App. 291, 177 S.E. 836 (1934); *Jenkins v. Elliott*, 180 Ga. 303, 178 S.E. 702 (1935); *Williams v. State*, 53 Ga. App. 388, 186 S.E. 143 (1936); *Electric Paint & Varnish Co. v. Lunsford*, 58 Ga. App. 270, 198 S.E. 277 (1938); *Tilley v. King*, 190 Ga. 421, 9 S.E.2d 670 (1940); *Harris v. State*, 195 Ga. 555, 13 S.E.2d 459 (1941); *Atlanta & W.*

Point R.R. v. Truitt, 65 Ga. App. 320, 16 S.E.2d 273 (1941); *Rogers v. Rogers*, 65 Ga. App. 806, 16 S.E.2d 490 (1941); *Daniel v. State*, 66 Ga. App. 59, 17 S.E.2d 91 (1941); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263 (1943); *Jacobs v. State*, 71 Ga. App. 808, 32 S.E.2d 403 (1944); *Lamb v. Fedderwitz*, 72 Ga. App. 406, 33 S.E.2d 839 (1945); *Caraway v. State*, 72 Ga. App. 504, 34 S.E.2d 303 (1945); *Petroleum Carrier Corp. v. Snyder*, 161 F.2d 323 (5th Cir. 1947); *United Motor Freight Term. Co. v. Hixon*, 78 Ga. App. 638, 51 S.E.2d 679 (1949); *Brown v. Sheridan*, 83 Ga. App. 725, 64 S.E.2d 636 (1951); *Kaylor v. Romines*, 85 Ga. App. 839, 70 S.E.2d 395 (1952); *Seymour v. State*, 210 Ga. 21, 77 S.E.2d 519 (1953); *Spradlin v. State*, 90 Ga. App. 97, 82 S.E.2d 238 (1954); *Allstate Ins. Co. v. Phoenix*, 90 Ga. App. 619, 83 S.E.2d 335 (1954); *Willis v. Henry*, 95 Ga. App. 593, 98 S.E.2d 150 (1957); *Brewer v. Henson*, 96 Ga. App. 501, 100 S.E.2d 661 (1957); *Davis v. Palmer*, 213 Ga. 862, 102 S.E.2d 478 (1958); *Weiss v. Johnson & Johnson Constr. Co.*, 98 Ga. App. 858, 107 S.E.2d 708 (1959); *New Amsterdam Cas. Co. v. Thompson*, 100 Ga. App. 677, 112 S.E.2d 273 (1959); *Bobo v. State*, 101 Ga. App. 266, 113 S.E.2d 468 (1960); *Gresham v. State*, 216 Ga. 106, 115 S.E.2d 191 (1960); *Reynolds v. State*, 101 Ga. App. 715, 115 S.E.2d 214 (1960); *School Boy Sportwear Corp. v. Cornelia Garment Co.*, 106 Ga. App. 99, 126 S.E.2d 248 (1962); *Ferguson v. State*, 218 Ga. 173, 126 S.E.2d 798 (1962); *Griffie v. State*, 107 Ga. App. 356, 130 S.E.2d 149 (1963); *Carmichael v. Gonzalez*, 111 Ga. App. 695, 143 S.E.2d 190

General Consideration (Cont'd)

(1965); *Smallwood v. State*, 114 Ga. App. 459, 151 S.E.2d 789 (1966); *Elkins v. State*, 222 Ga. 746, 152 S.E.2d 377 (1966); *Thruway Serv. City, Inc. v. Townsend*, 116 Ga. App. 379, 157 S.E.2d 564 (1967); *Atlantic Coast Line R.R. v. Daugherty*, 116 Ga. App. 438, 157 S.E.2d 880 (1967); *Jones v. State*, 224 Ga. 283, 161 S.E.2d 302 (1968); *Park v. State*, 224 Ga. 467, 162 S.E.2d 359 (1968); *Daniel v. State*, 118 Ga. App. 370, 163 S.E.2d 863 (1968); *Estes v. State*, 224 Ga. 687, 164 S.E.2d 108 (1968); *Neal v. State*, 118 Ga. App. 407, 164 S.E.2d 150 (1968); *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968); *Patton v. Southern Bell Tel. & Tel. Co.*, 387 F.2d 360 (5th Cir. 1968); *Bowen v. State*, 225 Ga. 423, 169 S.E.2d 322 (1969); *Harrison v. State*, 120 Ga. App. 812, 172 S.E.2d 328 (1969); *Walden v. State*, 121 Ga. App. 142, 173 S.E.2d 110 (1970); *Sisk v. Carney*, 121 Ga. App. 560, 174 S.E.2d 456 (1970); *Scott v. State*, 122 Ga. App. 204, 176 S.E.2d 481 (1970); *Pitts v. State*, 226 Ga. 878, 178 S.E.2d 177 (1970); *Morris v. State*, 228 Ga. 39, 184 S.E.2d 82 (1971); *Rozier v. State*, 124 Ga. App. 481, 184 S.E.2d 203 (1971); *Moore v. State*, 228 Ga. 662, 187 S.E.2d 277 (1972); *Hendrix v. State*, 125 Ga. App. 327, 187 S.E.2d 557 (1972); *Reese v. Termplan, Inc.*, 125 Ga. App. 473, 188 S.E.2d 177 (1972); *Tanner v. State*, 228 Ga. 829, 188 S.E.2d 512 (1972); *Bryant v. State*, 229 Ga. 60, 189 S.E.2d 435 (1972); *Fielding v. Driggers*, 126 Ga. App. 365, 190 S.E.2d 601 (1972); *Hewitt v. State*, 127 Ga. App. 180, 193 S.E.2d 47 (1972); *Jones v. Spindel*, 128 Ga. App. 88, 196 S.E.2d 22 (1973); *Wilcher v. State*, 230 Ga. 294, 196 S.E.2d 864 (1973); *Clayton County Bd. of Educ. v. Hooper*, 128 Ga. App. 817, 198 S.E.2d 373 (1973); *Cowart Trucking Co. v. Stone*, 129 Ga. App. 327, 199 S.E.2d 608 (1973); *White v. Hammond*, 129 Ga. App. 408, 199 S.E.2d 809 (1973); *McAllister v. State*, 231 Ga. 368, 202 S.E.2d 54 (1973); *Watkins v. State*, 231 Ga. 481, 202 S.E.2d 442 (1973); *Lundy v. State*, 130 Ga. App. 171, 202 S.E.2d 536 (1973); *Goughf v. State*, 232 Ga. 178, 205 S.E.2d 844 (1974); *Peters v. State*, 131 Ga. App. 513, 206 S.E.2d 623 (1974); *English v. Milby*, 223 Ga. 7, 209 S.E.2d 603 (1974); *Newton v. State*, 132 Ga. App. 873, 209 S.E.2d 690 (1974); *Hibbs v. State*, 133 Ga. App. 407, 211 S.E.2d 24

(1974); *American Express Co. v. Varnedoe*, 133 Ga. App. 437, 211 S.E.2d 392 (1974); *Arnold v. State*, 133 Ga. App. 451, 211 S.E.2d 404 (1974); *Patterson v. State*, 233 Ga. 724, 213 S.E.2d 612 (1975); *Shepherd v. State*, 234 Ga. 75, 214 S.E.2d 535 (1975); *Teal v. State*, 234 Ga. 159, 214 S.E.2d 888 (1975); *Wilkins v. Wilkins*, 234 Ga. 404, 216 S.E.2d 302 (1975); *English v. State*, 234 Ga. 602, 216 S.E.2d 851 (1975); *Davis v. State*, 135 Ga. App. 203, 217 S.E.2d 343 (1975); *Prater v. State*, 135 Ga. App. 341, 217 S.E.2d 644 (1975); *Liberty Mut. Ins. Co. v. Carnley*, 135 Ga. App. 599, 218 S.E.2d 307 (1975); *Stamper v. State*, 235 Ga. 165, 219 S.E.2d 140 (1975); *Braden v. State*, 135 Ga. App. 827, 219 S.E.2d 479 (1975); *Franklin Life Ins. Co. v. Hill*, 136 Ga. App. 128, 220 S.E.2d 707 (1975); *Barrow v. State*, 235 Ga. 635, 221 S.E.2d 416 (1975); *Boggus v. State*, 136 Ga. App. 917, 222 S.E.2d 686 (1975); *Parker v. State*, 137 Ga. App. 6, 223 S.E.2d 6 (1975); *Floyd v. State*, 137 Ga. App. 181, 223 S.E.2d 230 (1976); *Herlong v. State*, 236 Ga. 326, 223 S.E.2d 672 (1976); *McFarland v. State*, 137 Ga. App. 354, 223 S.E.2d 739 (1976); *Weaver v. State*, 137 Ga. App. 470, 224 S.E.2d 110 (1976); *McLaughlin v. State*, 236 Ga. 577, 224 S.E.2d 412 (1976); *Bradley v. State*, 137 Ga. App. 670, 224 S.E.2d 778 (1976); *Hall v. State*, 138 Ga. App. 20, 225 S.E.2d 705 (1976); *Hayes v. State*, 138 Ga. App. 223, 225 S.E.2d 749 (1976); *Gale v. State*, 138 Ga. App. 261, 226 S.E.2d 264 (1976); *R.D. v. State*, 138 Ga. App. 440, 226 S.E.2d 289 (1976); *Marks v. State*, 237 Ga. 277, 227 S.E.2d 334 (1976); *Hickox v. State*, 138 Ga. App. 882, 227 S.E.2d 829 (1976); *Delvers v. State*, 139 Ga. App. 119, 227 S.E.2d 844 (1976); *Wynne v. State*, 139 Ga. App. 355, 228 S.E.2d 378 (1976); *Nobles v. State*, 139 Ga. App. 371, 228 S.E.2d 391 (1976); *Lavender v. Wilkins*, 237 Ga. 510, 228 S.E.2d 888 (1976); *Moon v. Moon*, 237 Ga. 635, 229 S.E.2d 440 (1976); *Bramblett v. State*, 139 Ga. App. 745, 229 S.E.2d 484 (1976); *Carpenter v. State*, 140 Ga. App. 368, 231 S.E.2d 97 (1976); *Burrell v. State*, 140 Ga. App. 900, 232 S.E.2d 172 (1977); *Hutchins v. State*, 141 Ga. App. 197, 232 S.E.2d 925 (1977); *Bell v. State*, 141 Ga. App. 277, 233 S.E.2d 253 (1977); *Hall v. State*, 141 Ga. App. 289, 233 S.E.2d 262 (1977); *Sherrell v. State*, 141 Ga. App. 502, 233 S.E.2d 869 (1977); *Redd v. State*, 141 Ga. App. 888, 234 S.E.2d 812

(1977); *Bruce v. State*, 142 Ga. App. 211, 235 S.E.2d 606 (1977); *Austin v. State*, 142 Ga. App. 881, 237 S.E.2d 242 (1977); *Hurt v. State*, 239 Ga. 665, 238 S.E.2d 542 (1977); *Edgeworth v. Edgeworth*, 239 Ga. 811, 239 S.E.2d 16 (1977); *Hunter v. State*, 143 Ga. App. 541, 239 S.E.2d 212 (1977); *Fortson v. State*, 240 Ga. 5, 239 S.E.2d 335 (1977); *Custom Panel Sys. v. Bank of Hampton*, 143 Ga. App. 681, 239 S.E.2d 558 (1977); *Bowman v. State*, 144 Ga. App. 681, 242 S.E.2d 480 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Bunn v. State*, 144 Ga. App. 879, 243 S.E.2d 105 (1978); *Wilson v. State*, 145 Ga. App. 33, 243 S.E.2d 304 (1978); *Farley v. State*, 145 Ga. App. 98, 243 S.E.2d 322 (1978); *Ramsey v. State*, 145 Ga. App. 60, 243 S.E.2d 555 (1978); *Reed v. State*, 145 Ga. App. 353, 243 S.E.2d 710 (1978); *Harrell v. State*, 241 Ga. 181, 243 S.E.2d 890 (1978); *Gerarin v. State*, 145 Ga. App. 626, 244 S.E.2d 139 (1978); *Reserve Ins. Co. v. Smith*, 145 Ga. App. 850, 245 S.E.2d 66 (1978); *Shaw v. State*, 241 Ga. 308, 245 S.E.2d 262 (1978); *Mullins v. State*, 147 Ga. App. 337, 248 S.E.2d 706 (1978); *Belcher v. State*, 147 Ga. App. 537, 249 S.E.2d 369 (1978); *Bryan v. State*, 148 Ga. App. 428, 251 S.E.2d 338 (1978); *Wilson v. State*, 148 Ga. App. 368, 251 S.E.2d 387 (1978); *Andrews v. State*, 148 Ga. App. 709, 252 S.E.2d 210 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Georgia Power Co. v. Busbin*, 149 Ga. App. 274, 254 S.E.2d 146 (1979); *International Ass'n of Bridge Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 254 S.E.2d 438 (1979); *Freeman v. Saxton*, 243 Ga. 571, 255 S.E.2d 28 (1979); *Roberts v. State*, 149 Ga. App. 667, 255 S.E.2d 126 (1979); *Johnson v. State*, 149 Ga. App. 775, 256 S.E.2d 51 (1979); *Bryant v. State*, 149 Ga. App. 777, 256 S.E.2d 52 (1979); *Goswick v. State*, 150 Ga. App. 279, 257 S.E.2d 303 (1979); *Boatright v. State*, 150 Ga. App. 283, 257 S.E.2d 314 (1979); *Cox v. Department of Human Resources*, 151 Ga. App. 257, 259 S.E.2d 664 (1979); *Cosby v. State*, 151 Ga. App. 676, 261 S.E.2d 424 (1979); *Black v. Georgia Power Co.*, 151 Ga. App. 727, 261 S.E.2d 461 (1979); *Craft v. State*, 152 Ga. App. 486, 263 S.E.2d 263 (1979); *Hawthorne Indus. v. Attaway Assocs.*, 153 Ga. App. 155, 264 S.E.2d 663 (1980); *Kelly v. Floor Bazaar, Inc.*, 153 Ga. App. 163, 264 S.E.2d 697 (1980); *Cawthon Motor Co. v. Scheufler*, 153

Ga. App. 282, 265 S.E.2d 96 (1980); *Brown v. State*, 245 Ga. 588, 266 S.E.2d 198 (1980); *Henry v. State*, 154 Ga. App. 120, 267 S.E.2d 653 (1980); *Moore v. State*, 154 Ga. App. 535, 268 S.E.2d 706 (1980); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980); *Bodrey v. Bodrey*, 246 Ga. 122, 269 S.E.2d 14 (1980); *Lakeview Memory Gardens, Inc. v. National Bank & Trust Co.*, 155 Ga. App. 478, 271 S.E.2d 219 (1980); *Strickland v. Douglas County*, 246 Ga. 640, 272 S.E.2d 340 (1980); *Smith v. State*, 156 Ga. App. 102, 273 S.E.2d 918 (1980); *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980); *Adbe Distrib. Co. v. Hundred E. Credit Corp.*, 156 Ga. App. 787, 275 S.E.2d 347 (1980); *Knox v. State*, 156 Ga. App. 777, 275 S.E.2d 371 (1980); *Lord v. State*, 157 Ga. App. 104, 276 S.E.2d 153 (1981); *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981); *Smith v. State*, 158 Ga. App. 330, 280 S.E.2d 162 (1981); *Prescott v. Carithers*, 158 Ga. App. 366, 280 S.E.2d 361 (1981); *Bennett v. State*, 158 Ga. App. 421, 280 S.E.2d 429 (1981); *Smith v. State*, 158 Ga. App. 663, 281 S.E.2d 631 (1981); *Cervi v. State*, 248 Ga. 325, 282 S.E.2d 629 (1981); *Harkey v. State*, 159 Ga. App. 112, 282 S.E.2d 648 (1981); *Zuber v. State*, 248 Ga. 314, 282 S.E.2d 900 (1981); *Simpson v. State*, 159 Ga. App. 235, 283 S.E.2d 91 (1981); *Peavy v. State*, 159 Ga. App. 280, 283 S.E.2d 346 (1981); *Jefferson v. State*, 159 Ga. App. 740, 285 S.E.2d 213 (1981); *Baker v. State*, 161 Ga. App. 670, 288 S.E.2d 280 (1982); *Maddox v. State*, 160 Ga. App. 860, 288 S.E.2d 575 (1982); *Garrett v. State*, 160 Ga. App. 877, 288 S.E.2d 592 (1982); *King v. State*, 161 Ga. App. 382, 288 S.E.2d 644 (1982); *Morgan v. State*, 161 Ga. App. 67, 288 S.E.2d 836 (1982); *Trice v. State*, 161 Ga. App. 10, 288 S.E.2d 844 (1982); *Howard v. State*, 161 Ga. App. 743, 289 S.E.2d 815 (1982); *Osborn v. State*, 161 Ga. App. 132, 291 S.E.2d 22 (1982); *Arp v. State*, 249 Ga. 403, 291 S.E.2d 495 (1982); *Bramlett v. State*, 162 Ga. App. 584, 291 S.E.2d 739 (1982); *Cook v. State*, 162 Ga. App. 778, 293 S.E.2d 46 (1982); *Casey v. State*, 249 Ga. 724, 293 S.E.2d 321 (1982); *Dupree v. State*, 162 Ga. App. 861, 293 S.E.2d 401 (1982); *Pruitt v. State*, 164 Ga. App. 247, 296 S.E.2d 795 (1982); *Carrollton Fed. Sav. & Loan Ass'n v. Young*, 165 Ga. App. 262, 299 S.E.2d 395 (1983); *Little v. State*, 165 Ga. App. 389, 300 S.E.2d 540 (1983); *Poteat v.*

General Consideration (Cont'd)

State, 251 Ga. 87, 303 S.E.2d 452 (1983); Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983); Mincey v. State, 251 Ga. 255, 304 S.E.2d 882 (1983); Cheney v. State, 167 Ga. App. 757, 307 S.E.2d 288 (1983); Kerrethers v. State, 169 Ga. App. 832, 315 S.E.2d 46 (1984); Hanson v. State, 169 Ga. App. 765, 315 S.E.2d 278 (1984); Johnson v. State, 169 Ga. App. 943, 315 S.E.2d 667 (1984); Craig v. State, 170 Ga. App. 6, 316 S.E.2d 18 (1984); Cheek v. State, 170 Ga. App. 230, 316 S.E.2d 583 (1984); P.H.L. Dev. Corp. v. Sammy Garrison Constr., Inc., 171 Ga. App. 393, 319 S.E.2d 543 (1984); A Child's World, Inc. v. Lane, 171 Ga. App. 438, 319 S.E.2d 898 (1984); Fowler v. State, 171 Ga. App. 491, 320 S.E.2d 219 (1984); Atlantic Bldg. Sys. v. Atlantic States Constr. Co., 172 Ga. App. 148, 322 S.E.2d 311 (1984); Woods v. State, 172 Ga. App. 551, 323 S.E.2d 855 (1984); Bennett v. State, 254 Ga. 162, 326 S.E.2d 438 (1985); Russell v. State, 174 Ga. App. 1, 329 S.E.2d 168 (1985); Wilcox v. State, 174 Ga. App. 21, 329 S.E.2d 244 (1985); Georgia Farm Bureau Mut. Ins. Co. v. Hill, 174 Ga. App. 645, 331 S.E.2d 12 (1985); Waters v. State, 174 Ga. App. 916, 331 S.E.2d 893 (1985); Mullins v. State, 176 Ga. App. 439, 336 S.E.2d 343 (1985); Hall v. State, 176 Ga. App. 498, 336 S.E.2d 604 (1985); Herron v. Metropolitan Atlanta Rapid Transit Auth., 177 Ga. App. 201, 338 S.E.2d 777 (1985); Haggins v. Employees' Retirement Sys., 255 Ga. 352, 338 S.E.2d 1 (1986); Perry v. State, 255 Ga. 490, 339 S.E.2d 922 (1986); Glenn v. State, 255 Ga. 533, 340 S.E.2d 609 (1986); Hooten v. State, 256 Ga. 31, 343 S.E.2d 481 (1986); Brown v. State, 179 Ga. App. 280, 346 S.E.2d 85 (1986); Pittman v. State, 179 Ga. App. 760, 348 S.E.2d 107 (1986); Appleby v. State, 256 Ga. 304, 348 S.E.2d 630 (1986); Lee v. State, 256 Ga. 410, 349 S.E.2d 711 (1986); Smith v. State, 180 Ga. App. 620, 349 S.E.2d 754 (1986); Jackson v. State, 256 Ga. 536, 350 S.E.2d 428 (1986); Roden v. State, 181 Ga. App. 287, 351 S.E.2d 713 (1986); Hicks v. State, 256 Ga. 715, 352 S.E.2d 762 (1987); Handcrafted Furn., Inc. v. Black, 182 Ga. App. 115, 354 S.E.2d 696 (1987); Strickland v. State, 257 Ga. 230, 357 S.E.2d 85 (1987); Jackson v. Paces Ferry Dodge, Inc., 183 Ga.

App. 502, 359 S.E.2d 412 (1987); Holland v. State, 185 Ga. App. 117, 363 S.E.2d 589 (1987); State v. Hortman, 185 Ga. App. 756, 365 S.E.2d 887 (1988); Holiday v. State, 258 Ga. 393, 369 S.E.2d 241 (1988); DOT v. Freeman, 187 Ga. App. 883, 371 S.E.2d 887 (1988); Howell v. State, 188 Ga. App. 425, 373 S.E.2d 216 (1988); Edwards v. State, 188 Ga. App. 667, 374 S.E.2d 97 (1988); Jones v. State, 188 Ga. App. 713, 374 S.E.2d 110 (1988); Louis v. Citizens & S. Bank, 189 Ga. App. 164, 375 S.E.2d 82 (1988); Pierre v. State, 189 Ga. App. 364, 375 S.E.2d 511 (1988); Potts v. State, 259 Ga. 96, 376 S.E.2d 851 (1989); Black v. State, 190 Ga. App. 137, 378 S.E.2d 342 (1989); Guskys v. Candler Gen. Hosp., 192 Ga. App. 521, 385 S.E.2d 698 (1989); Hub Motor Co. v. Burdakin, 192 Ga. App. 872, 386 S.E.2d 854 (1989); Poole v. State, 193 Ga. App. 122, 387 S.E.2d 48 (1989); Tyner v. State, 193 Ga. App. 126, 387 S.E.2d 50 (1989); Ward v. State, 193 Ga. App. 137, 387 S.E.2d 150 (1989); Wilson v. State, 194 Ga. App. 261, 390 S.E.2d 609 (1990); Walton v. State, 194 Ga. App. 490, 390 S.E.2d 896 (1990); Davis v. State, 194 Ga. App. 833, 392 S.E.2d 253 (1990); Miller v. State, 197 Ga. App. 691, 399 S.E.2d 281 (1990); Farley v. State, 260 Ga. 816, 400 S.E.2d 626 (1991); Dawson v. State, 205 Ga. App. 394, 422 S.E.2d 280 (1992); Ibrahim v. Talley & Assocs., 214 Ga. App. 609, 448 S.E.2d 707 (1994); Hale v. State, 214 Ga. App. 899, 449 S.E.2d 520 (1994); Painter v. State, 219 Ga. App. 290, 465 S.E.2d 290 (1995); Funderburk v. State, 221 Ga. App. 438, 471 S.E.2d 535 (1996); Letlow v. State, 222 Ga. App. 339, 474 S.E.2d 211 (1996); American Ass'n of Cab Cos. v. Olukoya, 233 Ga. App. 731, 505 S.E.2d 761 (1998); Smith v. State, 236 Ga. App. 122, 511 S.E.2d 223 (1999); York v. State, 242 Ga. App. 281, 528 S.E.2d 823 (2000); George v. State, 242 Ga. App. 580, 530 S.E.2d 479 (2000); Heard v. Lovett, 273 Ga. 111, 538 S.E.2d 434 (2000); Vickers v. State, 246 Ga. App. 734, 541 S.E.2d 694 (2000); Gordon v. State, 273 Ga. 373, 541 S.E.2d 376 (2001); Pruitt v. State, 274 Ga. 708, 559 S.E.2d 470 (2002); Craft v. State, 254 Ga. App. 511, 563 S.E.2d 472 (2002); Britton v. State, 257 Ga. App. 441, 571 S.E.2d 451 (2002); Mayo v. State, 261 Ga. App. 314, 582 S.E.2d 482 (2003); Whittle v. State, 282 Ga. App. 64, 637 S.E.2d 800 (2006).

Constitutionality

Sixth amendment right to confrontation is not denied by this statute. *Kelly v. State*, 241 Ga. 190, 243 S.E.2d 857 (1978); *Harrell v. State*, 241 Ga. 181, 243 S.E.2d 890 (1978); *Anderson v. State*, 247 Ga. 397, 276 S.E.2d 603 (1981) (see O.C.G.A. § 24-3-2).

Constitutional rights not violated. — Appellant's constitutional right of cross-examination and confrontation of witnesses under U.S. Const., amend. 6 and former Code 1933, §§ 2-103, 2-105, and 2-109 (see Ga. Const. 1983, Art. I, Sec. I, Paras. I, XI, and XIV) was not violated when the court allowed as evidence the recorded radio voice transmission of the deceased victim made while proceeding to the scene of the homicide, because it was allowed only for the purpose of explaining conduct to the satisfaction of the jury and not for the purpose of proving any fact. *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972).

Construction

Statute is not materially different from general rule that a declaration made in connection with and as an explanation of an act is admissible as *res gestae* of the act. It is one of the instances when a statement standing alone would be inadmissible as hearsay, and yet be admissible when closely connected with other evidence competent in itself. *Barber v. Seaboard Coast Line R.R.*, 372 F. Supp. 1232 (S.D. Ga. 1973), *aff'd sub nom. Fullford v. Seaboard Coast Line R.R.*, 488 F.2d 1056 (5th Cir. 1974).

Statute is extremely broad. *Dowdy v. State*, 152 Ga. App. 145, 262 S.E.2d 511 (1979).

Application must be closely guarded. — Statute embodies an exception to the general rule that hearsay evidence is inadmissible, and being an exception, the application of this rule must be carefully guarded. *Standard Sur. & Cas. Co. v. Johnson*, 74 Ga. App. 823, 41 S.E.2d 576 (1947).

Introduction of prejudicial evidence not prohibited. — *Kelly v. State*, 82 Ga. 441, 9 S.E. 171 (1889) does not hold, and *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976) should not be read to rule, that this statute will not allow introduction of prejudicial evidence. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 391 (1979) (see O.C.G.A. § 24-3-2).

Conduct

Words constituting conduct. — Words may constitute conduct and when that conduct is otherwise relevant in the case, the fact that the person used these words may be proved, notwithstanding the ordinary rule against the admission of hearsay. *Fitzgerald v. State*, 10 Ga. App. 70, 72 S.E. 541 (1911).

Conduct must be material in investigation. — Hearsay testimony, in order to become original evidence explaining conduct, must be with reference to some person whose conduct is material in the investigation. This rule is not a license to introduce any and all evidence because the evidence explains the conduct of a person whose conduct is entirely foreign to the issue or issues in the case. *Bennett v. State*, 49 Ga. App. 804, 176 S.E. 148 (1934).

Supreme Court of Georgia overrules *Perry v. State* — Supreme Court of Georgia overrules *Perry v. State*, 255 Ga. 490, 339 S.E.2d 922 (1986), to the extent it holds that a victim's conversations with a witness are admissible to explain the defendant's conduct under O.C.G.A. § 24-3-2 even if the conversations are unknown to the defendant. Moreover, to the extent *Perry* held that the victim's conduct was a matter concerning which the truth had to be found and that the victim's statements were admissible to explain that conduct, it was also overruled. *Character v. State*, 285 Ga. 112, 674 S.E.2d 280 (2009).

Conduct found to be relevant. — Trial court properly allowed a plaintiff to testify regarding the reason plaintiff had not returned to see the doctor for treatment since shortly after the collision at issue because the plaintiff's conduct in ceasing to seek treatment for plaintiff's injuries was relevant to an issue being tried. *Lloyd v. Tyson*, 195 Ga. App. 48, 392 S.E.2d 551 (1990).

Testimony by an officer and agent of the successor legal entity regarding the merger was relevant and material to explain the course of conduct and corporate intent of the successor corporation after the merger and how the official came to have custody of the records. *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

Consistent statements of victim admissible as original evidence. — When the victim of a crime has already testified as to the details of the crime under oath and subject to

Conduct (Cont'd)

cross-examination and is available to be recalled to testify further, and the victim's veracity is at issue, the testimony of another as to consistent statements made by the victim to that person out of court is admissible over a hearsay objection as original evidence to explain the victim's conduct after learning of the crime. *Brannon v. State*, 176 Ga. App. 781, 337 S.E.2d 782 (1985).

Child molestation case and statements of babysitter. — Trial court did not err in admitting the hearsay testimony of a witness concerning statements made by another child who was not the victim in this case, over the defendant's objection since the child hearsay statute is not limited to the out-of-court statements of the actual victim in the case. *Tatum v. State*, 203 Ga. App. 892, 418 S.E.2d 152 (1992).

Motive

Motive or conduct explained by facts. —

When information received is a fact showing motives or explaining conduct, the information ceases to be hearsay evidence and becomes admissible. *Lyman v. State*, 69 Ga. 404 (1882).

When a defendant was charged with selling cocaine, the trial court did not err in allowing the arresting officer's testimony that another suspect informed the officer that the defendant would be able to supply the officer with cocaine; the testimony explained the circumstances leading to defendant's arrest. *Frazier v. State*, 195 Ga. App. 599, 394 S.E.2d 396 (1990).

Evidence was properly admitted by the trial court in defendant's trial for aggravated assault in violation of O.C.G.A. § 16-5-21 after statements of a witness that another screamed for help when the witness saw the victim and defendant fighting were part of the *res gestae* exception to hearsay pursuant to O.C.G.A. § 24-3-3. Statements by a witness that defendant was ordered to leave the premises were not hearsay under O.C.G.A. § 24-3-1 because the statements were used to explain defendant's motive and conduct of remaining on the premises and waiting for the victim pursuant to O.C.G.A. § 24-3-2, and statements regarding information from a police report which was not admitted into evidence were deemed harmless as cumula-

tive. Regardless, there was sufficient evidence without the disputed evidentiary rulings to support defendant's conviction based on observations of several witnesses and the cuts on the victim's face and body. *Kelley v. State*, 260 Ga. App. 238, 581 S.E.2d 584 (2003).

Evidence competent to prove motive may also be used to disprove motive. — When evidence tends to describe a particular motive for testimony of a witness, it is competent to disprove the existence of such motive, and hearsay may be admitted for this purpose. *Smith v. State*, 7 Ga. App. 252, 66 S.E. 556 (1909).

Testimony from other trial to show motive. — Testimony of a victim given at the prior trial of a coindictor was admissible for the purpose of showing the motive for the crimes against the victim. *Waldrip v. State*, 267 Ga. 739, 482 S.E.2d 299 (1997), cert. denied, 522 U.S. 917, 118 S. Ct. 305, 139 L. Ed. 2d 235 (1997).

Admissibility

1. In General

Trial court must be vested with considerable discretion in determining admissibility of testimony of collateral matters. *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968).

Hearsay when admissible derives its competency from necessity of case. *Todd v. State*, 200 Ga. 582, 37 S.E.2d 779 (1946); *Price v. Whitley Constr. Co.*, 91 Ga. App. 257, 85 S.E.2d 528 (1954).

When evidence not admissible. — While hearsay evidence is admissible under some circumstances to show motive, it is not admissible to evidence the truth of the matters contained in the hearsay testimony. *Rogers v. State*, 224 Ga. 436, 162 S.E.2d 411 (1968).

Relevancy. — When, in a legal investigation, conduct and motives of an actor are matters concerning which the truth must be found (i.e., are relevant to issues on trial), then information, conversations, letters, and replies, and similar evidence known to the actor are admissible to explain the actor's conduct; but if conduct and motives of actor are not matters concerning which the truth must be found (i.e., are irrelevant to the issues of trial) then the information, etc., on which the actor acted shall not be admissible

under O.C.G.A. § 24-3-2. *Momon v. State*, 249 Ga. 865, 294 S.E.2d 482 (1982); *Teague v. State*, 252 Ga. 534, 314 S.E.2d 910 (1984); *Bryant v. Carver State Bank*, 207 Ga. App. 659, 428 S.E.2d 621 (1993); *Jackson v. Dunkin' Donuts, Inc.*, 211 Ga. App. 596, 440 S.E.2d 56 (1994).

Admissibility of evidence under O.C.G.A. § 24-3-2 is not a determination based only on the evidence's relevancy to explain conduct: the conduct to be explained must itself be a relevant issue in the case. *Noles v. State*, 172 Ga. App. 228, 322 S.E.2d 910 (1984).

When testimony regarding whether any of the plaintiff's healthcare providers had instructed plaintiff not to work after plaintiff's injuries was offered to explain why plaintiff did not return to work, it was relevant to whether plaintiff's lost income was attributable to plaintiff's injuries, and therefore admissible as original evidence, not hearsay. *Harrison v. Jenkins*, 235 Ga. App. 665, 510 S.E.2d 345 (1998).

Trial court did not abuse the court's discretion in excluding a letter offered as evidence by the defendant as the appeals court could not see how the defendant's reliance on the letter could have justified or explained the defendant's evasiveness towards an officer lawfully investigating a loud noise complaint at the defendant's residence. *Williams v. State*, 289 Ga. App. 402, 657 S.E.2d 556 (2008).

Explanation of officer's motive. — Defendant was not entitled to present testimony under O.C.G.A. § 24-3-2 of an investigating officer, which indicated that an acquaintance of the victim said that the acquaintance was not present at the scene of the crime but that a third person told the acquaintance what happened, to explain the officer's conduct and motives with regard to the officer's lack of further investigation into potentially exculpatory evidence as the motives of the officer were not relevant to any issue in the defendant's prosecution for felony murder based on arson in the first degree. *Vega v. State*, 285 Ga. 32, 673 S.E.2d 223 (2009).

What would otherwise be hearsay testimony was properly elicited by the state to explain a narcotics investigator's conduct and to ascertain the investigator's motives because the defendant was challenging the motives of the narcotics investigator and

arguing that the investigator was not acting in good faith as part of defendant's entrapment defense. *Martinez v. State*, No. A09A1687, 2010 Ga. App. LEXIS 316 (Mar. 26, 2010).

Testimony admissible to explain conduct. See *Athena Prods., Ltd. v. Geographics, Inc.*, 168 Ga. App. 828, 310 S.E.2d 547 (1983); *Thomas v. State*, 169 Ga. App. 119, 312 S.E.2d 373 (1983).

Testimony admitted for limited purpose of explaining witness's conduct. — See *Davis v. State*, 168 Ga. App. 272, 308 S.E.2d 602 (1983); *Hampton v. State*, 272 Ga. 284, 527 S.E.2d 872 (2000).

Fact that a statement may be properly admitted under O.C.G.A. § 24-3-2 does not overcome other objections such as impermissibly placing character in evidence. *Echols v. State*, 174 Ga. App. 829, 331 S.E.2d 619 (1985).

Admission of cumulative hearsay testimony is not harmful error. — Although certain portions of a police officer's testimony were erroneously admitted as being within the purview of O.C.G.A. § 24-3-2, when the hearsay testimony is merely cumulative, the admission of the testimony does not constitute harmful error requiring the reversal of the defendant's convictions. *Simmons v. State*, 174 Ga. App. 906, 331 S.E.2d 923 (1985).

2. Original Evidence

Proof of statements which are merely part of surrounding circumstances of an occurrence, not offered to prove the fact asserted in the statement, is original evidence, not an exception to hearsay. *Atlanta Gas Light Co. v. Slaton*, 117 Ga. App. 317, 160 S.E.2d 414 (1968).

Because the circumstances of the defendant's arrest would have been virtually inapplicable without the investigating officer's testimony regarding the arrest, and the officer's testimony concerned narcotics activity in the area and not the defendant's role in the activity, admission of the testimony was not erroneous, and if any error resulted by the trial court's admission, it was highly improbable that the error contributed to the verdict. *Fortson v. State*, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

When evidence is part of *res gestae* and admissible as original evidence to fix the

Admissibility (Cont'd)**2. Original Evidence (Cont'd)**

locus or explain the conduct of parties in reference to an occurrence under investigation it should not be excluded under the hearsay rule. *Ellis v. Southern Ry.*, 96 Ga. App. 687, 101 S.E.2d 230 (1957).

Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under O.C.G.A. § 24-9-83, was properly admitted as part of the *res gestae* under O.C.G.A. § 24-3-3 because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence; because the statement was used to explain the police's conduct, it could also be admitted as original evidence under O.C.G.A. § 24-3-2. *Stubbs v. State*, 293 Ga. App. 692, 667 S.E.2d 905 (2008).

Testimony as to identification. — Testimony by police officer that another officer in the officer's unit knew defendant by a nickname was not hearsay but was original evidence explaining the circumstances that led to an undercover operation involving defendant. *Kendrick v. State*, 224 Ga. App. 72, 479 S.E.2d 464 (1996).

Method of proving general reputation, reputed ownership, public rumor, general notoriety, and the like is by testimony of known facts which becomes original evidence and is not hearsay. *Caldwell v. Gregory*, 120 Ga. App. 536, 171 S.E.2d 571 (1969).

For purpose of identifying location of time or as explanatory of conduct, hearsay is admissible. *Ellis v. Southern Ry.*, 96 Ga. App. 687, 101 S.E.2d 230 (1957).

3. Self-Serving Declarations

Taint of self-serving declarations not removed by statute. — Statute provides for the admissibility of certain types of hearsay evidence, in certain situations, and does not remove the taint of self-serving declarations. *Smith v. State*, 144 Ga. App. 294, 241 S.E.2d 14 (1977).

Self-serving declarations are admissible if part of conversation. — Hearsay rule as to self-serving declarations does not apply when: (1) made in the presence of the

opposite party; or (2) the declaration are part of a conversation of which some other part has already been permitted in evidence. *Rozier v. State*, 124 Ga. App. 481, 184 S.E.2d 203 (1971).

Inadmissible self-serving declarations. — Self-serving declarations, when made by the accused either before or after the time of the commission of the alleged offense, are not admissible. *Phipps v. State*, 203 Ga. App. 128, 416 S.E.2d 319, cert. denied, 203 Ga. App. 907, 416 S.E.2d 319 (1992).

4. Evidentiary Value

Evidentiary value of testimony admitted depends not on the credibility of the out-of-court declarant, but on the credibility of the witness on the stand who is reporting the statement for the purpose of explaining the witness's conduct and who is under oath, subject to full cross-examination, and present for the jury to observe the witness's demeanor while testifying in regard to the statement. *Harrell v. State*, 241 Ga. 181, 243 S.E.2d 890 (1978).

Investigator's testimony not original evidence of alibi. — Investigator's testimony that defendant gave a purported alibi was not original evidence as to the fact of alibi and insofar as the testimony established the fact of alibi, the evidence did not derive any value from the witness, but derived value solely on the veracity and competency of defendant who never testified. Therefore, although such evidence is not hearsay, it nevertheless does not qualify as even "slight" evidence of an affirmative defense so as to require a charge on alibi. *Hartley v. State*, 207 Ga. App. 683, 428 S.E.2d 683 (1993).

Application and Examples**1. Alimony and Separate Maintenance**

In suit for alimony involving an issue as to conduct of the wife in abandoning the defendant, plaintiff may testify as to what a certain person told her to explain her conduct in leaving the defendant. *Moss v. Moss*, 147 Ga. 311, 93 S.E. 875 (1917).

Action for separate maintenance. — When, on redirect examination, grantor's wife in an action for separate maintenance was asked if she had followed her attorney's

advice in not asking that a guardian be appointed, such testimony was not hearsay but original testimony to explain conduct. *Joiner v. Joiner*, 225 Ga. 699, 171 S.E.2d 297 (1969).

2. Arrests

Hearsay statements may be used to explain arrests. — A hearsay statement, when not admitted to prove the truth of the matter asserted, but rather to explain why an investigating officer arrested the defendant, is admissible. *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979), sentence vacated, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980); *Jones v. State*, 247 Ga. 268, 275 S.E.2d 67, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 86 (1981); *Montgomery v. State*, 249 Ga. App. 777, 549 S.E.2d 463 (2001).

Detective's actions leading up to arrest may be relevant to the issue at trial because it was necessary to explain why police units were mobilized to converge on a particular car at a particular address shortly after a robbery. *Rhine v. State*, 176 Ga. App. 171, 335 S.E.2d 422 (1985).

While the statement of an out-of-court declarant would not have been admissible as evidence of defendant's guilt of the offense charged, it was nevertheless relevant and admissible to establish the events leading to the arrest of the defendant. *Thompson v. State*, 210 Ga. App. 655, 436 S.E.2d 799 (1993).

Fact that an investigator's testimony that the investigator believed the victim had been sexually abused was hearsay did not render the testimony inadmissible, since the testimony was in furtherance of the investigation leading to defendant's arrest. *Odom v. State*, 243 Ga. App. 227, 531 S.E.2d 207 (2000).

Incidental showing of other crimes is not grounds for exclusion. — When evidence is relevant for the purpose of showing the circumstances of the arrest, it will not be excluded because the evidence incidentally shows the commission of another crime. *Newman v. State*, 239 Ga. 329, 236 S.E.2d 673 (1977).

When statements admissible to explain officer's conduct or motive. — While out-of-court statements may be admissible to explain the conduct or motive of a law enforcement officer, the conduct must in-

volve matters concerning which the truth must be found (i.e. are relevant to the issues on trial), such as the facts and circumstances surrounding the arrest of a defendant. *Ivester v. State*, 252 Ga. 333, 313 S.E.2d 674 (1984).

Admission of hearsay testimony to explain officers' conduct was harmless error. — Error in admitting hearsay testimony for the purpose of explaining police officers' conduct did not warrant a new trial since the testimony did not concern defendant, and was cumulative in light of testimony concerning a confidential informant. *Zachery v. State*, 276 Ga. App. 688, 624 S.E.2d 265 (2005).

Defendant's statements may be used to explain actions of arresting officers. — When evidence of apprehended burglar's statement to the police was given to explain the conduct of the several police officers in arresting the defendant, the statement was admissible as original evidence. *Terrell v. State*, 138 Ga. App. 74, 225 S.E.2d 470 (1976).

Although statement by one co-conspirator to the sheriff was inadmissible under O.C.G.A. § 24-3-5 because the conspiracy had terminated, the statement was admissible under O.C.G.A. § 24-3-2 as original evidence to explain the sheriff's subsequent conduct in proceeding to the road behind the store to arrest the other co-conspirator. *Henderson v. State*, 161 Ga. App. 211, 288 S.E.2d 284 (1982).

Citizen's tip was substantively admissible as original evidence to explain an officer's conduct in going to a certain location and in briefly detaining defendant, specifically, for further investigation. *Brown v. State*, 245 Ga. App. 149, 537 S.E.2d 421 (2000).

Testimony regarding an anonymous call to special drug agent advising that defendant was at a certain location, wearing described clothing, and in possession of drugs was admissible as explaining police conduct and not for the truth of the matters asserted. *Reed v. State*, 222 Ga. App. 376, 474 S.E.2d 264 (1996).

Police officer's testimony as to an unidentified call the officer received regarding a group of males and drug dealing was relevant and admissible to establish events leading to defendant's arrest. *Hagood v. State*, 228 Ga. App. 693, 492 S.E.2d 606 (1997).

Application and Examples (Cont'd)

2. Arrests (Cont'd)

Reasons for arrest properly admitted. — Testimony of police officers with reference to the information officers had about the robbery of the taxicab driver was properly admitted, over the objection that the testimony was hearsay, to explain the conduct and motives of the officers in being on the lookout for the taxicab and the officers' arrest of the defendants when found in possession of the taxicab. *Phillips v. State*, 206 Ga. 418, 57 S.E.2d 555 (1950).

Statement made at time of arrest part of *res gestae*. — When suspect's brother led officers to suspect's darkened room and made statement "don't do it, don't do it," before apparently wrestling a loaded, cocked pistol from the suspect, such statement was part of the *res gestae* of the arrest and was properly admitted into evidence. *Scott v. State*, 172 Ga. App. 725, 324 S.E.2d 565 (1984).

Statement of defendant's spouse to enter home. — It was not error to admit the officers' testimony that when the officers arrived at the residence the defendant's spouse threw keys at the officers and stated "go on in if you want to get shot," which explained why the officers entered the house to make the arrest with guns drawn. *Ivester v. State*, 252 Ga. 333, 313 S.E.2d 674 (1984).

3. Conversations

Conversations are admissible under O.C.G.A. § 24-3-2 when the conversations are facts explaining conduct and ascertaining motives. *Sanborn v. State*, 159 Ga. App. 608, 284 S.E.2d 110 (1981).

When nature and character of conversation is both relevant and necessary in order to explain conduct, such as a subsequent investigation by the witness, the conversation will be admitted as original evidence. *Todd v. State*, 200 Ga. 582, 37 S.E.2d 779 (1946); *Nissen v. Goodyear Tire & Rubber Co.*, 90 Ga. App. 175, 82 S.E.2d 253 (1954).

Better practice is not to admit exact words used. — If the fact that a conversation was had is all that is relevant or needed as an inducement to explain conduct, it is more regular to admit only the fact that a conversation occurred, without going into the par-

ticulars of what was said. *Todd v. State*, 200 Ga. 582, 37 S.E.2d 779 (1946).

Although the better practice is to bring out the fact of the conversation without relating the exact words used, when the details are given, there is no reversible error unless the words are prejudicial. *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976); *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980); *Webb v. State*, 156 Ga. App. 623, 275 S.E.2d 707 (1980).

When a defendant charged with selling cocaine and trafficking in cocaine testified freely that the defendant had agreed to be a "middleman" for drug transactions, the trial court properly did not allow the defendant to recount the exact conversation; since the defendant's admitted motive was to make money, the exclusion of testimony about the defendant's conversations could not have been harmful. *Boatwright v. State*, 195 Ga. App. 440, 393 S.E.2d 707 (1990), *aff'd*, 260 Ga. 534, 397 S.E.2d 689 (1990).

Testimony as to content of phone conversation allowed. — Witness for the state was permitted to testify as to the content of a telephone conversation the witness had with the individual to whom defendant allegedly sold drugs since the substance of the conversation was that the individual volunteered to act as an undercover agent for the witness by making drug purchases. *Quick v. State*, 139 Ga. App. 440, 228 S.E.2d 592 (1976).

Because testimony about what an unidentified speaker said over the telephone was clearly relevant to explain defendant's conduct in failing to return uniforms, as required by contract, this evidence was admissible under O.C.G.A. § 24-3-2. *DI Uniform Servs., Inc. v. United Water Unlimited Atlanta, LLC*, 254 Ga. App. 317, 562 S.E.2d 260 (2002).

Telephone messages. — As telephone messages made following conversations between a party opponent and a testifying witness noted the contents of a conversation, not an act, transaction, occurrence, or event, the business records exception to the hearsay rule was inapplicable; for the contents of the party's telephone conversations to be admissible, the party would have to be given the opportunity to cross-examine the employees to whom the witness spoke with regard to the potential for misrepresenting the statements. *Bailey v. Edmundson*, 280

Ga. 528, 630 S.E.2d 396 (2006).

Testimony as to argument between victim and defendant. — Testimony as to an argument between the victim and defendant was admissible to show the state of mind and ill feelings between the victim and defendant 17 days prior to the victim's death. *Buttles v. State*, 229 Ga. App. 300, 494 S.E.2d 73 (1997).

Showing date of and reason for conduct. — When a parent related the conversation in which the parent's child had reported molestation, the evidence proffered related to the date of the offense and explained the reason for a visit to the doctor, and was therefore admissible. *Taylor v. State*, 176 Ga. App. 567, 336 S.E.2d 832 (1985).

Showing circumstances surrounding arrest. — When defendant's questioning of officer on cross-examination made the circumstances surrounding defendant's arrest relevant and in need of explanation, the officer's testimony explaining the circumstances leading to the defendant's arrest was authorized as original evidence. *Chunn v. State*, 210 Ga. App. 209, 435 S.E.2d 728 (1993).

Conversation with witness at scene of crime admissible. — When defense questioned officer as to why fingerprints and blood samples were not taken in a motel room, the officer could testify as to statements of defendant's girlfriend at the scene that the fight between defendant and the victims took place outside the room. *Holmes v. State*, 266 Ga. 530, 468 S.E.2d 357 (1996).

Conversation between detectives admissible. — In prosecution for armed robbery and possession of firearm during commission of felony, a conversation between two detectives of different counties offered to explain the manner of linking up the money bag discovered in the defendant's trailer with the robbery was admissible in evidence. *Witt v. State*, 157 Ga. App. 564, 278 S.E.2d 145 (1981).

Statement made to accomplice. — Trial court did not err in admitting testimony of defendant's accomplice in another crime that defendant threatened to kill the accomplice when defendant got out of jail since the state offered the testimony to explain why the accomplice delayed in contacting the police after the accomplice learned of defendant's role in a killing and to deflect any

negative inferences with respect to the accomplice's motive in testifying against defendant. *Collins v. State*, 273 Ga. 93, 538 S.E.2d 47 (2000).

Explanation of investigation not hearsay. — Police detective's explanation of the detective's investigation in which the detective recounted statements the victim and others had given the detective were conversations which occurred in the course of a legal investigation that explained conduct and as such were not hearsay and were admissible. *Green v. State*, 223 Ga. App. 467, 477 S.E.2d 895 (1996).

Police radio dispatcher's response to officer's query regarding the identity of a suspect was not admissible as original evidence; however, the admission was harmless error since the evidence was merely cumulative and did not contribute to the verdict. *Thompson v. State*, 201 Ga. App. 646, 411 S.E.2d 886 (1991).

Exclusion of police supervisor's remarks as to officers motive and conduct. — Erroneous exclusion of a police supervisor's remarks relating to the conduct and motive of an investigating officer in not charging plaintiff with contributing to an accident was not reversible error since exclusion of the exact content of the conversation between the officer and the officer's supervisor did not prevent defendants from adequately explaining the officer's conduct. *City of Monroe v. Jordan*, 201 Ga. App. 332, 411 S.E.2d 511 (1991).

In a medical malpractice suit, the testimony of two witnesses that the plaintiff's parent did not go to the hospital because plaintiff's doctor told plaintiff not to do so, neither of which witnesses heard the actual conversation, was hearsay, incompetent, and inadmissible considering that the testimony of the mother had already been admitted to explain her conduct. *Highsmith v. Fillingim*, 171 Ga. App. 548, 320 S.E.2d 391 (1984).

Conversation between conspirators. — Even though a conspirator may have terminated participation in the conspiracy when, at the request of the police, the coconspirator voluntarily placed a recorded call to another conspirator, statements made by the latter implicating the defendant in murder and armed robbery were admissible since the second conspirator was still conspiring to conceal the crime, and state-

Application and Examples (Cont'd)**3. Conversations (Cont'd)**

ments of the former, offered for the limited purpose of putting the second coconspirator's responses in context, were admissible as original evidence under O.C.G.A. § 24-3-2. *Bundrage v. State*, 265 Ga. 813, 462 S.E.2d 719 (1995).

Harmless error in not admitting conversations. — Exclusion of wife's testimony about conversations with her husband was in error, but the error was harmless since the evidence would not have been sufficient to sustain a verdict in the wife's favor. *Powell v. Alan Young Homes, Inc.*, 251 Ga. App. 72, 554 S.E.2d 186 (2001).

Conversation between babysitter and victim's brother. — Testimony from a child sex offense victim's babysitter regarding a statement made to the babysitter by the victim's brother that the defendant had been in the same room as the victim was proper under O.C.G.A. § 24-3-2 because the statement was relevant to show why the babysitter asked the victim what had transpired between defendant and the victim as defendant was not allowed to be with the victim in an unsupervised situation pursuant to a term of probation and defendant claimed to have been set up by the babysitter and the victim's mother. *Davenport v. State*, 278 Ga. App. 16, 628 S.E.2d 120 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

4. Deceased Persons

Testimony of third parties as to conversations with deceased. — Trial court did not err in not permitting a witness to testify to a conversation had between a witness and the daughter-in-law of the deceased in which the daughter-in-law recounted a conversation between herself and the deceased, since that conversation could not be taken to have influenced the conduct of the witness, but rather the deceased, and therefore, proof of the conversation should be made by the daughter-in-law. *Todd v. State*, 200 Ga. 582, 37 S.E.2d 779 (1946).

When witnesses testified as to a conversation between the deceased and the defendant, the witnesses were third parties not interested in the suit, and as such the witnesses' testimony was admissible to explain

the conduct or ascertain the motive of the deceased. On the other hand, the testimony of the defendant was properly excluded because the defendant was a party to the suit and the defendant could not testify in the defendant's own favor as to transactions or communications had with the deceased. *Youngblood v. Ruis*, 96 Ga. App. 290, 99 S.E.2d 714 (1957).

In trial of husband for the murder of his wife, testimony of witnesses that murder victim had told the witnesses she was seeking a divorce because of the husband's physical abuse of her concerned the victim's conduct and therefore was not admissible as an exception to the hearsay rule to explain the husband's conduct. *Dover v. State*, 250 Ga. 209, 296 S.E.2d 710 (1982), cert. denied, 459 U.S. 1221, 103 S. Ct. 1228, 75 L. Ed. 2d 462 (1983).

Testimony of witnesses regarding conversations they had with the deceased victim about the victim's prior difficulties with defendant was inadmissible as original evidence since none of the witnesses had heard the disagreements or observed defendant's actions which the deceased described to the witnesses. *Slakman v. State*, 272 Ga. 662, 533 S.E.2d 383 (2000).

Statement by deceased victim to sister admissible. — Statements made by a deceased victim to a sister in whom the victim placed great confidence and to whom the victim turned for help with the victim's problems were trustworthy. The sister's hearsay testimony was admissible. *Roper v. State*, 263 Ga. 201, 429 S.E.2d 668 (1993). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Statement made by deceased mother to her son was admissible. — Mother's statement to the son that the retirement benefits would continue to be paid to their account after the mother's death was admissible as original evidence of the son's conduct and motives in a retirement system's suit seeking to recover retirement benefits erroneously made to the account after the mother's death. *Applebury v. Teachers' Ret. Sys.*, 275 Ga. App. 194, 620 S.E.2d 452 (2005).

Threats made by deceased victim admissible. — Testimony about prior threats made against defendant by the deceased victim should not have been excluded; however, the trial court did not commit reversible

error because there was ample other evidence that the victim was a violent person who had threatened defendant. *Sturkey v. State*, 271 Ga. 572, 522 S.E.2d 463 (1999).

Documentary evidence. — Former Georgia dead man's statute, which still applies to causes of action that arose before 1979, does not apply to documentary evidence. Thus, the rule does not affect the letters and other documents written by persons now deceased, but the rule does limit that to which affiants are competent to testify regarding statements made by defendant's agents that are now deceased. *McLendon v. Georgia Kaolin Co.*, 782 F. Supp. 1548 (M.D. Ga. 1992).

In a will contest in which it was disputed whether the decedent was married by common law to the putative widower, medical records referring to the widower as the decedent's husband, which were admitted to explain the conduct of the widower and the decedent, which was relevant to whether they held themselves out as husband and wife, were original evidence, rather than hearsay, under O.C.G.A. § 24-3-2. In *re Estate of Love*, 274 Ga. App. 316, 618 S.E.2d 97 (2005).

5. Declarations

Husband and wife. — In a divorce action the declarations of the wife, when in the act of leaving her husband's house and taking certain articles of household furniture with her, made in the presence of his two sons and others, are admissible in evidence for the purpose of showing and explaining her motive and conduct at the time, although her husband was not present. *Odom v. Odom*, 36 Ga. 286 (1867), overruled on other grounds, *Wise v. Wise*, 156 Ga. 477, 119 S.E. 418 (1923).

Declarations of purchaser of goods on credit. — Declarations of a purchaser of goods on credit, who made to the seller certain misrepresentations to obtain the goods, are admissible on the trial of an issue as to whether the return of the goods was an illegal preference. *Silvey & Co. v. Tift*, 123 Ga. 804, 51 S.E. 748, 1 L.R.A. (n.s.) 386 (1905).

Declarations of person afterwards slain, explanatory of the person's conduct, are admissible on trial for murder. *Shirley v. State*, 168 Ga. 344, 148 S.E. 91 (1929).

Statements made by a grantee to the effect that the grantor was incapable of transacting business, even if not admissible to prove the grantor's lack of mental capacity, are admissible to show that the grantee had notice and knowledge of the grantor brother's condition, and also to explain the grantee's conduct and, as such, are not hearsay. *Fletcher v. Fletcher*, 242 Ga. 158, 249 S.E.2d 530 (1978).

9-1-1 call. — Trial court erred in permitting a police officer to testify regarding the statements of a 9-1-1 caller as it was not necessary for the officer to relate to jurors the caller's exact words, specifically, that a white woman who appeared to be drunk was trying to drive over a curb, as it was sufficient for the officer to explain that the officer was responding to a 9-1-1 dispatch; but, the error was harmless, as the improperly admitted hearsay was cumulative of other testimony establishing the defendant's guilt. *Moore v. State*, 281 Ga. App. 141, 635 S.E.2d 408 (2006).

6. Deeds

Evidence to show intention of maker of deed. — Declarations and documents tending to show the intention of the maker of a deed are admissible when the solvency of the maker at the time of executing the deed and the maker's reasons for such execution are at issue. *Cohen v. Parish*, 105 Ga. 339, 31 S.E. 205 (1898).

Deed properly admitted to show decedent's motive for gift. — Testimony which was not introduced into evidence for the purpose of establishing the fact that the deed had been made, but for the purpose of explaining the motive behind decedent's gift was properly admitted as original evidence. *Stevens v. Way*, 167 Ga. App. 688, 307 S.E.2d 507 (1983).

Documents held properly admitted solely for the purpose of explaining party's conduct. *B & L Serv. Co. v. Gerson*, 167 Ga. App. 679, 307 S.E.2d 262 (1983).

7. Evidence of Other Transactions

Frequently state of mind accompanying doing of an act is illustrated by other acts of a similar nature done by the defendant in such a way as to indicate a general practice or course of conduct, or as to display motive, knowledge, intent, good faith, bad faith, and

Application and Examples (Cont'd)**7. Evidence of Other****Transactions (Cont'd)**

a variety of other such things. The relevancy being patent, and other methods of proof being difficult or inadequate, the weight of expediency is in favor of admitting the proof of these other acts, though the acts themselves constitute crimes. *Humphries v. State*, 154 Ga. App. 596, 269 S.E.2d 90 (1980).

Use of hearsay testimony to establish evidence of similar crimes is not authorized by any exception. *Hart v. State*, 174 Ga. App. 134, 329 S.E.2d 178 (1985).

Officer's testimony of conversation with defendant was not relevant to explain officer's conduct. — It was error to admit an officer's testimony that the officer told the defendant that the officer had received complaints that the defendant was selling methamphetamine; the hearsay improperly placed the defendant's character into evidence, was not relevant to explain the officer's conduct under O.C.G.A. § 24-3-2, was not cumulative, and was extremely prejudicial. *Doyal v. State*, 287 Ga. App. 667, 653 S.E.2d 52 (2007).

Evidence incidentally showing commission of other crimes will not be excluded if relevant. — If evidence is relevant for the purpose of showing flight, it will not be excluded because the evidence incidentally shows the commission of other crimes. *McClung v. State*, 206 Ga. 421, 57 S.E.2d 559 (1950).

Proof of former crimes must show connection and tend to prove crime charged. — Evidence of similar independent crimes committed by a defendant is admissible if there is sufficient similarity or connection between the independent crime and the offense charged so that proof of the former tends to prove the latter. *Lee v. State*, 154 Ga. App. 562, 269 S.E.2d 65 (1980).

Evidence concerning independent crime may be admitted for purpose of showing identity, motive, plan, scheme, bent of mind, and course of conduct. *Lee v. State*, 154 Ga. App. 562, 269 S.E.2d 65 (1980).

When evidence of other crimes admissible. — Evidence of other crimes is admissible when the extraneous crime forms a part of the *res gestae*; or is one of a system of mutually dependent crimes; or is evidence of

guilty knowledge; or may bear upon the identity of the accused, or articles connected with the offense; or is evidence of prior attempts by the accused to commit the same crime upon the victim of the offense for which one stands charged; or when it tends to prove intent, motive, scheme, or the like, when such element enters into the offense. *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980).

Evidence of other crimes is admissible if it shows prior attempts by the accused to commit the same crime upon the victim of the offense for which the accused stands charged as tending to prove malice, intent, or motive. *Haygood v. State*, 154 Ga. App. 633, 269 S.E.2d 480 (1980).

Evidence admissible to show motive for commission of crime. — While evidence tending to show the existence of the accused's *malus animus* toward the deceased, or a motive for the commission of the crime charged, is admissible in a prosecution for homicide, it is essential that the facts on which the motive is assigned shall be within the knowledge of the person accused. *Spradlin v. State*, 88 Ga. App. 230, 76 S.E.2d 435 (1953), later appeal, *Spradlin v. State*, 90 Ga. App. 77, 82 S.E.2d 238 (1954).

Conduct in other transactions held irrelevant. — While there may be a logical connection between prior transactions and that involved in the case in the minds of defendants, statutory and case law clearly declare evidence of conduct in other transactions to be irrelevant. *Security Life Ins. Co. v. Newsome*, 122 Ga. App. 137, 176 S.E.2d 463 (1970).

Within court's discretion to exclude evidence of similar transactions. — In the event previous acts similar to those involved in the case should fall within one of the exceptions to the general rule of inadmissibility, it is still within the discretion of the trial court to exclude evidence of these acts because of remoteness in time or prejudicial effect. *Security Life Ins. Co. v. Newsome*, 122 Ga. App. 137, 176 S.E.2d 463 (1970).

Why property was examined. — Testimony of a witness that the witness had heard that the prosecutor lost certain clothing was not inadmissible as hearsay, when offered solely for the purpose of showing why the witness had carefully examined the property found in the possession of the defendant.

Stafford v. State, 121 Ga. 169, 48 S.E. 903 (1904).

No error found in admission of evidence of prior incidents. — When the defendant is charged with aggravated assault it is not reversible error for the trial court to allow the state to introduce evidence of prior incidents when the defendant was discharging firearms if the trial court allows admission for the sole purpose of showing intent and bent of mind, and when the court states that it should not be considered in determining the guilt or innocence of the defendant. Clary v. State, 151 Ga. App. 301, 259 S.E.2d 697 (1979).

Trial court does not err in admitting evidence of a previous difficulty between a defendant and victim which illustrates the state of feeling between them. Jones v. State, 246 Ga. 109, 269 S.E.2d 6 (1980).

When the defendant is charged with aggravated assault with intent to rape it is not reversible error for the trial court to allow the state to introduce evidence of prior similar incidents if the trial court allows admission for the limited purposes of showing defendant's modus operandi, bent of mind, and lustful disposition. Mims v. State, 191 Ga. App. 628, 382 S.E.2d 414 (1989).

Harmless error. — It was harmless error once a trial court admitted, over defendant's objection, hearsay statements of the defendant's girlfriend because the statements were offered only in conjunction with a similar transaction, and did not contribute to the judgment because the state's testimony more than sufficed to establish the defendant's identity as the attacker. Johnson v. State, 236 Ga. App. 252, 511 S.E.2d 603 (1999), *aff'd*, 272 Ga. 254, 526 S.E.2d 549 (2000).

Testimony about pretrial statements given by an accomplice. — Trial court committed reversible error in allowing the prosecution to elicit testimony about pretrial statements given by the accomplice concerning five homicides in which the accomplice and persons other than defendant were involved. The case may be retried on the evidence. Booker v. State, 242 Ga. App. 80, 528 S.E.2d 849 (2000).

8. Informants

Testimony of conversations with informants is admissible as original evidence to

explain the conduct of a detective in meeting with a defendant and entering into a drug transaction with the defendant. Bennett v. State, 153 Ga. App. 21, 264 S.E.2d 516 (1980).

Testimony of a drug agent that a confidential informant identified defendant to the agent at the time of a drug purchase was admissible to explain the agent's conduct in making the purchase. Key v. State, 214 Ga. App. 338, 447 S.E.2d 697 (1994).

Testimony of conversation with informant not admissible. — Trial court's admission of a police officer's testimony as to what a confidential informant told the officer regarding defendant's participation in a drug deal was improper for purposes of showing the officer's explanation for the officer's conduct pursuant to O.C.G.A. § 24-3-2; however, such error did not mandate reversal of defendant's convictions because it was not found to be harmful in that the evidence against defendant was overwhelming and it was found to be highly probable that the testimony did not contribute to the verdict. Collins v. State, 263 Ga. App. 601, 588 S.E.2d 799 (2003).

An investigating detective's testimony regarding what an informant told the detective constituted inadmissible hearsay and was not admissible as original evidence explaining law enforcement's motives and conduct under O.C.G.A. § 24-3-2. Kimble v. State, 301 Ga. App. 237, 687 S.E.2d 242 (2009).

Exception to the hearsay rule applies to information received from confidential informants. Rogers v. State, 167 Ga. App. 770, 307 S.E.2d 685 (1983); Goldsby v. State, 186 Ga. App. 180, 367 S.E.2d 84 (1988).

9. Writings

Genuineness of writing must be proved. — Writing, alleged to be in the handwriting or signature of a party, is inadmissible unless the writing is proved or acknowledged to be genuine; the genuineness of the writing, however, may be proved by circumstantial evidence. State v. Smith, 246 Ga. 129, 269 S.E.2d 21 (1980).

Secondary evidence of lost letter was not hearsay but was original evidence which might explain conduct of alleged accomplice and ascertain the accomplice's motives in implicating defendant in the offense.

Application and Examples (Cont'd)**9. Writings (Cont'd)**

Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Memorandum used in making alleged contract. — It was held not to be improper to admit in evidence a part of the history of events leading up to the making of an alleged contract, a written memorandum drawn from the tax-books of a certain county by the chairman of the board of equalizers purporting to show certain tax returns. *Roberts v. Allen*, 31 Ga. App. 660, 122 S.E. 86, cert. denied, 31 Ga. App. 812 (1924).

Claim letter required by the department of transportation as part of the department's contract with a contractor was admissible as original evidence and as a business record. *DOT v. Dalton Paving & Constr., Inc.*, 227 Ga. App. 207, 489 S.E.2d 329 (1997).

Memorandum found on person of deceased was held admissible on trial for murder as original evidence. *Etheridge v. State*, 163 Ga. 186, 136 S.E. 72 (1926).

Evidence as to nature of letter properly admitted. — When a letter written by the defendant to the prosecutor was introduced in evidence, it was not error to ask the defendant what kind of letter defendant had written, to which defendant answered that it was for information as the thrust of the question was to establish the defendant's motive in writing the letter rather than the truth of the letter's contents. *Lancette v. State*, 151 Ga. App. 740, 261 S.E.2d 405 (1979).

Writing of persons not involved in case held inadmissible. — Statute is a qualification of the hearsay rule but when the letters and other documents were, in part, communications between strangers to the case, not between parties to the case or persons for whose statements the parties might be legally responsible, it is apparent that none of the documents were admissible. *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957).

Letters properly introduced as evidence of reason for bringing lawsuit. — When, in declaratory judgment actions seeking clarification of lessors' obligations under certain leases, letters written subsequent to the execution of the leases by lessees advised lessors of the legislative abolition of the federally

controlled peanut acreage allocations and their opinion as to the effect this would have on the lease agreements, these letters did not attempt to vary the terms of the agreements, but merely stated the basis for bringing the lawsuits. As such the letters were relevant and admissible under O.C.G.A. § 24-3-2 as facts to explain conduct and ascertain motive. *Cook Farms, Inc. v. Bostwick*, 165 Ga. 692, 302 S.E.2d 574 (1983).

Letters evidencing attempts to resolve dispute before suit filed properly admitted. — In a couple's suit for the negligent construction of a swimming pool brought against a contractor, the trial court did not err by admitting two letters into evidence from the contractor's attorney to the couple as the letters were not offered for the truth of specific matters contained in the letters but were offered to show that the couple had attempted to contact the contractor about the problems with the pool installed and to show that those attempts occurred prior to the filing of the lawsuit. Further, the letters were admissible to establish the couple's attempts to mitigate the damages by giving the contractor the opportunity to correct the problems that the negligent construction had caused and to prove the contractor's motive and intent. *Dave Lucas Co. v. Lewis*, 293 Ga. App. 288, 666 S.E.2d 576 (2008).

Unsigned note properly admitted to explain investigating officer's conduct. — In prosecution for failure to perform duty upon striking an unattended vehicle, an unsigned note placed on a damaged automobile was properly admitted to explain the conduct of an investigating officer. *Johnson v. State*, 168 Ga. App. 686, 310 S.E.2d 249 (1983).

Report of an expert expressing the expert's opinion as to the result of a scientific experiment is not admissible under O.C.G.A. § 24-3-2 to explain conduct or motive when the foundation for admission of that opinion is not properly laid. *Tucker v. State*, 249 Ga. 323, 290 S.E.2d 97 (1982).

10. Negotiations

Testimony of plaintiff that his wife told him that the defendant's wife said to her that the defendant was angry and "not to mention" the rent in question was admissible in

explanation of the plaintiff's reason for not asking the defendant for the rent in a settlement between them. *Burgamy v. Holton*, 22 Ga. App. 723, 97 S.E. 199 (1918).

Antecedent negotiations culminating in contract. — If a contract was admissible as original evidence on proof of the contract's execution and of knowledge thereof by the defendant prior to the defendant's purchase of the property, it was not error to admit testimony in relation to antecedent negotiations which culminated in the contract. *Collier v. Moore*, 31 Ga. App. 227, 120 S.E. 441 (1923).

Negotiations concerning property settlement. — In suit by attorneys for reasonable value of services rendered in connection with defendant's divorce, testimony as to what husband said during negotiations concerning a property settlement, although hearsay, was admissible to establish not the truth of the statements, but the factum of husband's having made the statements during the negotiations, illustrating his attitude and the difficulty which confronted the plaintiffs in the performance of the task of reaching a property settlement. *Beard v. Westmoreland*, 90 Ga. App. 632, 84 S.E.2d 93 (1954).

11. Presence at Particular Place

Presence at place of accident. — In proceedings under Workers' Compensation Act, hearsay testimony is admissible to explain the conduct of the deceased in going to the place of injury, the deceased's presence at the place where the accident occurred, and the deceased's purpose in being there. *Fitzgerald Motor Co. v. Ross*, 94 Ga. App. 636, 95 S.E.2d 721 (1956).

Defendant's presence at place of crime. — Admission in evidence, in a rape trial, of statements made by the accused immediately before the crime was committed, tending to prove that the accused was present at the place and at the time the crime was committed was not error especially since the accused in the accused's statement admitted the accused was at the place of the crime and had a physical difficulty with the victim. *Sims v. State*, 195 Ga. 485, 25 S.E.2d 1 (1943).

Victim's presence at place of homicide. — When one contention of the defendant was that the person slain went to the place of the homicide for the purpose of having a diffi-

culty with the defendant, it was not hearsay to allow the mother of the deceased to testify that she had asked her son to do something for her, the performance of which would require the deceased to go to the place where the homicide occurred. *Harper v. State*, 129 Ga. 770, 59 S.E. 792 (1907), *aff'd*, 131 Ga. 771, 63 S.E. 339 (1909); *Ricketson v. State*, 134 Ga. 306, 67 S.E. 881 (1910).

Evidence of a message received by the deceased, which purported to come from the accused, requesting the deceased to come to the place of business of the accused, was properly admitted under the rule that information received which shows motive or explains conduct is admissible in evidence, not as hearsay, but as original evidence. *Duren v. State*, 158 Ga. 735, 124 S.E. 343 (1924).

Ordinarily the reason of the deceased for seeking the defendant or the deceased's purpose in going to the scene of a homicide expressed to another, but not communicated to the defendant, is hearsay and not admissible to explain the conduct of the deceased. *Clarke v. State*, 221 Ga. 206, 144 S.E.2d 90 (1965).

Testimony in regard to the acts and doings of the murder victim is original evidence. *Pinion v. State*, 225 Ga. 36, 165 S.E.2d 708 (1969).

Testimony of counsel as to whereabouts of witness. — It was held in view that counsel should not have been allowed to testify as to what was told counsel concerning the whereabouts of a witness, by a telephone operator, who was in turn told the same by the mother of the witness as this was hearsay; though if the telephone operator had been testifying as to information the operator got from the mother of the witness, this would not have been hearsay and would have been competent and admissible. *Estill v. Citizens & S. Bank*, 153 Ga. 618, 113 S.E. 552 (1922).

No error found in admission of testimony as to why witness went to place. — It was not error to admit the answer of a witness for the state to a question as to why the witness was sent and why the witness went to the place. *Stevens v. State*, 77 Ga. 310, 2 S.E. 684 (1886); *Hall v. State*, 22 Ga. App. 112, 95 S.E. 936 (1918).

When testimony objected to as hearsay was testimony as to why a witness went to a particular booth in the witness's restaurant

Application and Examples (Cont'd)**11. Presence at Particular Place (Cont'd)**

to require certain persons, including the defendant, to stop creating a disturbance in the witness's place of business, and since the testimony alleged to be hearsay was merely that a guest asked the witness to request the defendant and others to cease and desist their loud talking and cursing, which the witness testified the witness found when called to the witness's attention, the trial court may allow it in evidence solely as an exception to the hearsay rule to explain the witness's conduct. *Oliver v. State*, 123 Ga. App. 666, 182 S.E.2d 191 (1971).

Employees' testimony in shoplifting prosecution of being instructed to "watch out for" defendants was relevant and material to show the conduct of the employees in watching defendants and calling the police and was not inadmissible because it may have incidentally put defendant's character in issue. *Jenkins v. State*, 172 Ga. App. 715, 324 S.E.2d 491 (1984).

Prison warden's hearsay testimony to effect that drugs would be smuggled into facility by a person masquerading as a law enforcement official supposedly visiting an inmate was admissible to explain warden's conduct in calling in an outside agency to establish a surveillance team to observe comings and goings at the prison. *Brownlee v. State*, 173 Ga. App. 138, 325 S.E.2d 815 (1984).

12. Relationships

There is a distinction between bare assertions or denials of legal relationship by parties to it as opposed to such statements by outsiders. In the first instance the presumption of personal knowledge is strong, and the statement is more like a summary of many facts and the personal understanding of one's status vis-a-vis another, than a conclusion of law. This is particularly true when the negation of the relationship is the issue. On the other hand, the existence of the relationship is not within the personal knowledge of an outsider. What the outsider may know are certain facts which might lead to that conclusion. *Phillips v. Aetna Cas. & Sur. Div.*, 148 Ga. App. 351, 251 S.E.2d 180 (1978).

Establishment of marital relationship. —

When equivocal conduct such as cohabitation is relied upon as a circumstance material to the issue to prove marriage, declaration of one of the parties since deceased, made pending the period of cohabitation, disaffirming the marriage are admissible. *Drawdy v. Hesters*, 130 Ga. 161, 60 S.E. 451 (1908).

When the issue at trial was whether plaintiff, who was seeking year's support, was married by common law to deceased and was, therefore, his widow upon his death, information for an obituary that was supplied to the newspaper by the funeral home director, who testified that the director was also responsible for the information on the death certificate showing that plaintiff was not his widow, was not objectionable as hearsay but was admissible for impeachment purposes. *Murray v. Clayton*, 151 Ga. App. 720, 261 S.E.2d 455 (1979).

13. Safety Instructions

Evidence of safety instruction received by plaintiff was admissible to explain plaintiff's conduct in dismounting while leaving the motor running in the plaintiff's truck. *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968).

14. Searches

Why search was made. — When it is material to explain how or why a search for property was made, it is competent to show that this was done in consequence of information received; but statements conveying such information are not admissible affirmative proof of the facts contained in the statements. *Cody v. State*, 124 Ga. 446, 52 S.E. 750 (1905); *Forbes v. State*, 51 Ga. App. 465, 180 S.E. 914 (1935).

Subsequent searches. — When, in prosecution for burglary, police officer testified that woman arrested with defendant told the officer that other property taken during the burglary was at the house of defendant's mother, such testimony was admissible not as hearsay but as original evidence to explain the officer's subsequent search of the house. *Moore v. State*, 155 Ga. App. 721, 272 S.E.2d 575 (1980).

15. Testimony of Law Enforcement Officers

Chain of custody relevancy. — It was not error to allow the jury to see the accused's name written on the outside of an envelope which contained suspected cocaine. The mere fact the printed name of accused appeared on the envelope was in and of itself relevant to the issue of chain of custody; without regard to proof that the accused was in fact the "owner" of the contents of the envelope. *Morgan v. State*, 204 Ga. App. 178, 419 S.E.2d 313 (1992).

By virtue of this statute, an investigating officer is permitted to explain the officer's conduct. *White v. State*, 231 Ga. 290, 201 S.E.2d 436 (1973); *Howard v. State*, 144 Ga. App. 208, 240 S.E.2d 908 (1977); *Mitchell v. State*, 169 Ga. App. 630, 314 S.E.2d 468 (1984); *Storey v. State*, 205 Ga. App. 610, 422 S.E.2d 879 (1992), cert. denied, 205 Ga. App. 901, 422 S.E.2d 879 (1992) (see O.C.G.A. § 24-3-2).

Explaining conduct of officer admissible. — When a police officer presented testimony that the officer took the victim to the hospital for a vaginal and rectal examination after she told the officer she had been raped and sodomized, such testimony was admissible to explain the officer's conduct. *Ellis v. State*, 181 Ga. App. 630, 353 S.E.2d 822 (1987).

Allowing the state to elicit testimony from an investigating officer and an informant to the effect that defendant was a known drug dealer was not reversible error since the testimony was received with a limiting instruction that the testimony was to be considered only to explain the officer's conduct and not as substantive proof of defendant's guilt, and it was highly probable that the testimony did not contribute to the verdict. *Osborne v. State*, 193 Ga. App. 276, 387 S.E.2d 383 (1989).

Conversations had in the course of a legal investigation may be admitted as original evidence to explain the conduct of a law enforcement official provided the conduct involves a matter relevant to the issue on trial. *Matthews v. State*, 194 Ga. App. 386, 390 S.E.2d 873 (1990); *Evans v. State*, 201 Ga. App. 20, 410 S.E.2d 146 (1991).

There was no error in the admission of the statements of a concerned citizen since the only purpose of the statement was to explain

the conduct of an officer in proceeding to an intersection and approaching defendant. Testimony of the arresting officer with reference to the legal investigation and circumstances surrounding the arrest is authorized as original evidence under O.C.G.A. § 24-3-2. *Aaron v. State*, 203 Ga. App. 658, 418 S.E.2d 66, cert. denied, 203 Ga. App. 902, 418 S.E.2d 66 (1992).

Testimony of a police officer as to information given to the officer by the victim was inadmissible as original evidence to explain the officer's conduct in investigating a robbery, but was admissible as a hearsay exception, because the victim was present at trial and could be cross-examined, and as a prior consistent statement. *Perkins v. State*, 226 Ga. App. 613, 487 S.E.2d 365 (1997).

Officer's testimony that a detective interviewing a codefendant recommended that the officer search defendant's pockets was admissible to explain the officer's conduct in searching defendant's pockets. *Jones v. State*, 226 Ga. App. 619, 487 S.E.2d 371 (1997); *State v. Ledford*, 247 Ga. App. 412, 543 S.E.2d 107 (2000).

Testimony of detective, that a canvass of the area where the shooting took place resulted in police learning the defendant was a possible suspect, was inadmissible because the conduct of the officer was not a relevant issue. *Weems v. State*, 269 Ga. 577, 501 S.E.2d 806 (1998).

In establishing that a defendant obstructed police officers, the state was required to prove that they were acting in the lawful discharge of their official duties at the time of the obstruction, the state thus needed the arresting officer to testify about the information the officer received from another officer to explain the officer's conduct in stopping defendant; accordingly, the testimony was admissible as original evidence to explain that the officers were lawfully discharging the officers' official duties. *Penland v. State*, 258 Ga. App. 659, 574 S.E.2d 880 (2002).

Because the trial court did not commit reversible error when the court permitted a police officer to explain the officer's conduct under O.C.G.A. § 24-3-2, defendant failed to show that counsel's failure to object constituted ineffective assistance. *Harris v. State*, 279 Ga. 522, 615 S.E.2d 532 (2005).

Explaining conduct of officer inadmissible. — After investigating officer was allowed

Application and Examples (Cont'd)

15. Testimony of Law Enforcement Officers (Cont'd)

to recount that when the officer asked other prisoners whether the prisoners had seen or heard anything happen in the drunk tank, no one responded, the testimony served to explain the conduct of the investigating officer but this specific conduct was not relevant to the issue at trial and thus the admission of the testimony was error. Nevertheless, the error was harmless. *Griffin v. State*, 170 Ga. App. 287, 316 S.E.2d 797 (1984).

Since the conduct of the investigating officer was not relevant to any issue in a murder trial, the trial court abused the court's discretion by allowing the officer to testify to a statement made by an individual who had seen the defendant and the victim together. *Miller v. State*, 260 Ga. 191, 391 S.E.2d 642 (1990), overruled on other grounds, *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998).

Trial court erred in permitting an investigator to recount the investigator's conversations with witnesses and other persons on the basis that it explained the investigator's conduct in investigating defendant as a suspect in the case. *Brinson v. State*, 268 Ga. 227, 486 S.E.2d 830 (1997); *Jones v. State*, 272 Ga. 154, 527 S.E.2d 543 (2000).

In a prosecution for driving under the influence, the trial court erred in allowing, as an explanation of conduct, a police officer's testimony that a witness told the officer defendant was the driver of the truck. *Arnold v. State*, 228 Ga. App. 137, 491 S.E.2d 205 (1997).

Testimony of police officer regarding the statement of a second officer, who had implemented defendant's secondary detention at a roadblock, was not admissible as probative evidence of articulable suspicion on the second officer's part under the "explanation of conduct" exception to the hearsay rule. *State v. Fischer*, 230 Ga. App. 613, 497 S.E.2d 79 (1998).

Investigator's testimony that a fireman, salvage yard owner, and insurance adjuster had informed the investigator that no gun was found, was not admissible to show the officer's conduct because the "conduct" of an investigations officer will rarely need to

be explained. *Robbins v. State*, 269 Ga. 500, 499 S.E.2d 323 (1998).

Testimony of a detective that explained the detective's conduct in the course of an investigation of a robbery was admissible for that purpose. *Madison v. State*, 238 Ga. App. 589, 519 S.E.2d 698 (1999).

Testimony of arresting officer that explained the officer's conduct in arresting defendant was not admissible to explain the officer's conduct. *Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001).

Hearsay evidence from anonymous callers inadmissible to explain officer's conduct. — Under O.C.G.A. § 24-3-2, it was error to admit evidence of hearsay information provided by anonymous callers in order to explain police conduct. *DeLoatch v. State*, 296 Ga. App. 65, 673 S.E.2d 576 (2009).

Investigation and circumstances of arrest. — Investigators may not testify to the fruits of their investigations without regard for the hearsay rule; rather such witnesses are bound by that rule and must testify from their own first-hand knowledge alone. *Jones v. State*, 247 Ga. 268, 275 S.E.2d 67, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 85 (1981).

When an investigating officer's statement explains the events leading up to and surrounding an arrest, such evidence is being offered for a permissible purpose, and is admissible. *In re K.D.J.*, 246 Ga. App. 500, 540 S.E.2d 682 (2000).

Detective could not testify from a colleague's notes regarding the colleague's interview with defendant since the detective had no first-hand knowledge of what was said, and there was no necessity to explain any conduct of the detective in response to the notes. *Dukes v. State*, 224 Ga. App. 305, 480 S.E.2d 340 (1997).

Testimony not admissible as evidence of guilt. — Testimony is admissible as original evidence to explain conduct of the investigating officer, not as original evidence of the defendant's guilt. *Germany v. State*, 235 Ga. 836, 221 S.E.2d 817 (1976); *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980).

Hearsay testimony to explain the conduct of an investigating officer is original evidence to explain the officer's conduct but not original evidence as to the defendant's guilt. *Latimore v. State*, 170 Ga. App. 848, 318 S.E.2d 722 (1984); *Patterson v. State*, 210 Ga. App. 735, 437 S.E.2d 602 (1993).

Testimony of two detectives offered to prove that deceased was raped and that defendant committed the rape was hearsay and was not admissible under O.C.G.A. § 24-3-2. *Momon v. State*, 249 Ga. 865, 294 S.E.2d 482 (1982).

Eyewitness's identification. — Police officer's testimony as to an eyewitness's identification is not hearsay and is admissible to establish the fact that an identification was made. *Momon v. State*, 161 Ga. App. 629, 288 S.E.2d 767, aff'd, 249 Ga. 865, 294 S.E.2d 482 (1982); *White v. State*, 244 Ga. App. 54, 537 S.E.2d 364 (2000), aff'd, 273 Ga. 787, 546 S.E.2d 514 (2001).

In the absence of some other viable hearsay exception, such as "necessity" or "res gestae," a law enforcement officer may not testify to a pretrial identification of the accused unless the person who actually made the identification testifies at trial and is subject to cross-examination, and such testimony is not automatically admissible as original evidence to explain the officer's conduct. *White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001).

Law enforcement officer is permitted to testify to a vocal fact of identification witnessed by the officer without its being subject to a hearsay objection. *Woodard v. State*, 175 Ga. App. 449, 333 S.E.2d 645 (1985).

Testimony as to investigation and arrest showing knowledge of rights. — Testimony of an arresting officer in response to queries concerning the officer's investigation and whether defendant understood defendant's Miranda rights, that defendant stated that defendant had been on a chain gang before and understood defendant's rights, is authorized as original evidence under O.C.G.A. § 24-3-2. *Moses v. State*, 166 Ga. App. 425, 304 S.E.2d 528 (1983).

Testimony admissible to explain officers' conduct not admissible as substantive proof. — Testimony which may be admissible under O.C.G.A. § 24-3-2 to explain the investigating officers' conduct is admissible only for that purpose, and not as substantive proof of the matters asserted therein. *Goodman v. State*, 167 Ga. App. 378, 306 S.E.2d 417 (1983).

Explanation for arrest. — Evidence of an investigating officer's conversation is admissible when it involves information upon which the officer acted in charging the

defendant with a crime. *Little v. State*, 167 Ga. App. 880, 307 S.E.2d 761 (1983).

Trial court may allow a police officer to testify about the content of a conversation the officer had with the victim at the scene of a crime when the conversation was sufficient to confirm the officer's belief that a crime had been committed and authorized the officer's action of detaining the defendant. *Morton v. State*, 168 Ga. App. 18, 308 S.E.2d 41 (1983).

Investigating officer's testimony that rape victim told the officer that defendant raped her was admissible since the conversation the officer had with the victim was sufficient to authorize the officer's action of arresting defendant. *Miller v. State*, 194 Ga. App. 533, 390 S.E.2d 901 (1990).

Testimony given by a detective at a motion to suppress hearing concerned an on-the-scene investigation which led to defendant's apprehension and arrest was admissible as original evidence to explain the detective's conduct in arresting the defendant. *McCloud v. State*, 210 Ga. App. 69, 435 S.E.2d 281 (1993); *Posey v. State*, 215 Ga. App. 565, 451 S.E.2d 463 (1994).

Testimony admitted for limited purpose of explaining officer's conduct in continuing investigation of robbery. *Teague v. State*, 169 Ga. App. 285, 312 S.E.2d 818 (1983), aff'd, 252 Ga. 534, 314 S.E.2d 910 (1984).

Testimony properly admitted to explain why agent interviewed defendant. — Testimony of an FBI agent was properly admitted as providing a necessary link in the chain of circumstances explaining why the agent ultimately interviewed defendant during the course of the agent's investigation of the theft of certain objects d'art from plaintiff's collection. *Hankinson v. Rackley*, 177 Ga. App. 734, 341 S.E.2d 231 (1986).

Testimony explaining reason for going to defendant's house admissible. — Police agent's testimony over objection that the reason the agent went to the defendant's residence was because defendant's name was among those provided to the agents by the local sheriff as being suspects in the local drug trade was admissible as evidence under O.C.G.A. § 24-3-2. *Bettis v. State*, 160 Ga. App. 109, 286 S.E.2d 759 (1981).

Testimony admissible to explain officer's conduct in returning to accident scene. See *Allen v. Brookshire*, 169 Ga. App. 391, 312 S.E.2d 862 (1984).

Application and Examples (Cont'd)
15. Testimony of Law Enforcement Officers (Cont'd)

Testimony as to other suspects. — Trial court did not err in not allowing defense counsel to question police officers concerning information received about other suspects during the steps of their investigation since the court did allow counsel to ask the officers whom the officers interviewed as suspects, and defendant subpoenaed one of the suspects to testify at trial. *Renner v. State*, 260 Ga. 515, 397 S.E.2d 683 (1990).

Testimony harmful if character placed in issue. — An investigator's hearsay explanation of the investigator's basis for obtaining a search warrant based on accusations by an unidentified informant did not meet the criteria required and was not harmless. The allegations of an unrelated drug deal where a car allegedly driven by the defendant at another time had been seized clearly placed defendant's character in issue. *Lowe v. State*, 208 Ga. App. 49, 430 S.E.2d 169 (1993), overruled on other grounds, *Kelly v. State*, 212 Ga. App. 278, 442 S.E.2d 462 (1994).

Testimony inadmissible to explain officer's reason for making arrest. — When defendant's arrest was not an issue in trial, the arresting officer's testimony as to what defendant's wife said leading to arrest was not admissible. *Glass v. State*, 171 Ga. App. 156, 319 S.E.2d 60 (1984).

Grant of immunity. — Trial court correctly allowed a sheriff, following a cross-examination that put in issue the question whether the sheriff might have tampered with a key witness for the prosecution and might have acted improperly in recommending that the witness be granted immunity, to explain that, before the sheriff recommended immunity, the sheriff required the witness to give a complete statement of the events surrounding the offense subject to a polygraph examination. *Cromer v. State*, 253 Ga. 352, 320 S.E.2d 751 (1984).

In the following cases, testimony of police officers was properly admitted. — See *Caraway v. State*, 72 Ga. App. 504, 34 S.E.2d 303 (1945) (rape and child abuse investigation); *Marshman v. State*, 88 Ga. App. 250, 76 S.E.2d 443 (1953) (lottery prosecution); *Campbell v. State*, 90 Ga. App. 1, 81 S.E.2d 880 (1954) (conversation with defendant's

employer); *Coleman v. State*, 124 Ga. App. 313, 183 S.E.2d 608 (1971) (appearance at scene of alleged crime); *Lingerfelt v. State*, 231 Ga. 354, 201 S.E.2d 445 (1973) (conversation with victim prior to death); *Zilinson v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006) (conduct of photographic lineup); *Truman v. State*, 144 Ga. App. 461, 241 S.E.2d 579 (1978) (victim's identification of defendant); *Williams v. State*, 244 Ga. 485, 260 S.E.2d 879 (1979) (felony-murder prosecution); *Cosby v. State*, 151 Ga. App. 676, 261 S.E.2d 424 (1979) (investigation of burglary); *Gibson v. State*, 160 Ga. App. 615, 287 S.E.2d 595 (1981) (spoken identification); *Teems v. State*, 161 Ga. App. 339, 287 S.E.2d 774 (1982) (conversation with third party regarding defendant's drug possession); *Lynch v. State*, 164 Ga. App. 317, 296 S.E.2d 179 (1982) (conversation explaining conduct of officer); *Gaskins v. State*, 250 Ga. 386, 297 S.E.2d 729 (1982) (continuation of investigation and procurement of warrant); *Mallory v. State*, 166 Ga. App. 812, 305 S.E.2d 656 (1983) (conversations to learn defendant's identity and location); *Davis v. State*, 169 Ga. App. 422, 313 S.E.2d 127 (1984) (investigation of robbery); *Spaulding v. State*, 169 Ga. App. 836, 315 S.E.2d 48 (1984) (statements made by informant concerning unlawful acts of defendant); *Henderson v. State*, 170 Ga. App. 482, 317 S.E.2d 343 (1984) (conversation with third party regarding persons in automobile).

16. Examples Not Within Rule

Ownership of clothing. — When a person testifies that certain articles of clothing exhibited to the person are similar to those worn by a suspect in a murder case, whom the accused is attempting to identify as the guilty party, it is proper to exclude hearsay testimony identifying the ownership of the clothing as being that of the suspect; this evidence does not come within the exception to the hearsay evidence rule. *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944).

Testimony of arresting officer as to statements made to the officer by a cab driver, in the presence of the accused, regarding the activities of the accused, while a passenger during the night after the crime was committed, was hearsay, not being original evidence,

nor an exception to the hearsay rule. *Rosborough v. State*, 209 Ga. 362, 72 S.E.2d 717 (1952).

Questions propounded by counsel were not proper under O.C.G.A. § 24-3-2 since the questions simply did not constitute an attempt to ascertain an explanation of the witness's course of conduct. *Jones v. State*, 247 Ga. 268, 275 S.E.2d 67, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 85 (1981).

Evidence of defendant's character. — Testimony which places defendant's character in evidence without defendant having first done so personally cannot be admitted under O.C.G.A. § 24-3-2. *Anderson v. State*, 252 Ga. 103, 312 S.E.2d 113 (1984).

Victim's reputation for violence. — Murder victim's reputation for violence may be offered by the accused upon making a prima facie showing that the victim was the aggressor and was assaulting the accused, who acted to defend oneself. *Woods v. State*, 269 Ga. 60, 495 S.E.2d 282 (1998).

Evidence that a murder charge against a witness had been dropped after the witness took a lie detector test was inadmissible since the defense did not place the state's conduct in dismissing the murder charge in issue. Furthermore, the admission constituted harmful error because it created an inference that the witness had passed the polygraph examination and bolstered the credibility of the witness. *Wilson v. State*, 254 Ga. 473, 330 S.E.2d 364 (1985).

Murder defendant's testimony that victim had knifed another person. — Although murder defendant's testimony that the victim had knifed another person would have been admissible under O.C.G.A. § 24-3-2 as an attempt to explain the murder as the result of the defendant's reasonable fear of the victim, the testimony was properly excluded as an attempt to prove the victim's character by a specific act. *Echols v. State*, 174 Ga. App. 829, 331 S.E.2d 619 (1985).

Affidavits of conversations from third parties. — In an action by lessors against guarantors, the affidavit of an attorney representing the guarantors, recalling a conversation the attorney had with an officer of the lessee, was not admissible because the affidavit's evidentiary value depended on the credibility of the affiant, not on the credibility of the attorney. *Athens Int'l, Inc. v. Venture Capital*

Properties, Inc., 230 Ga. App. 286, 495 S.E.2d 900 (1998).

Uncommunicated threat of victim. — Although evidence of a death threat against a defendant may fall within the exception under O.C.G.A. § 24-3-2 when offered, not for the truth of the matter asserted, but to show the victim's state of mind, this hearsay exception did not apply since the evidence did not support defendant's contention that the uncommunicated threat showed the victim's state of mind. *Massey v. State*, 272 Ga. 50, 525 S.E.2d 694 (2000).

Prior difficulty evidence. — Supreme Court of Georgia overrules *Perry v. State*, 255 Ga. 490, 339 S.E.2d 922 (1986), to the extent it holds that a victim's conversations with a witness are admissible to explain the defendant's conduct under O.C.G.A. § 24-3-2 even if they are unknown to the defendant. Moreover, to the extent *Perry* held that the victim's conduct was a matter concerning which the truth had to be found and that the victim's statements were admissible to explain that conduct, it was also overruled. *Character v. State*, 285 Ga. 112, 674 S.E.2d 280 (2009).

With regard to two defendants' convictions for malice murder, aggravated assault, and other crimes, the trial court did not abuse the court's discretion by allowing the admission of prior difficulty evidence and concluding that those statements were admissible under the necessity exception to the hearsay rule because the statements, which involved the aggravated assault victim testifying about one defendant robbing one of the murder victims of money won in a dice game and that the same defendant had tried to start an argument with the aggravated assault victim at a nightclub the same night the crimes took place, were not testimonial since the statements were not offered for the truth of the matter asserted. Further, even if the statements were not admissible under O.C.G.A. § 24-3-2, the trial court properly admitted the statements under the necessity exception to the hearsay rule as the aggravated assault victim and the murder victim at issue were long-time friends who placed great confidence in each other and it was established that the murder victim confided in the aggravated assault victim in times of trouble. *Character v. State*, 285 Ga. 112, 674 S.E.2d 280 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 671.

ALR. — Character and sufficiency of evidence to show that letter was mailed, 25 ALR 9; 86 ALR 541.

Evidence as to threats made to keep witness away from criminal trial, 62 ALR 136.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, 133 ALR 1454.

Extrajudicial declarations of agent as admissible in action against principal for personal injuries for purpose of showing knowledge of relevant fact or condition at or prior to time of injury, 141 ALR 704.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or is incompetent to testify because of age or other reason, 157 ALR 1359.

Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe, 20 ALR2d 1012.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 ALR2d 817.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 ALR2d 752.

Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him, 44 ALR2d 1027.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 ALR2d 820.

Admissibility on behalf of accused in homicide case of evidence that killing was committed at victim's request, 71 ALR2d 617.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 ALR2d 903.

Admissibility in civil action, apart from res gestae, of lay testimony as to another's expressions of pain, 90 ALR2d 1071.

Impeachment of witness with respect to intoxication, 8 ALR3d 749.

Admissibility of evidence of habit, customary behavior, or reputation as to care of pedestrian on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 ALR3d 1293.

Admissibility of physician's testimony as to patients' statements or declaration, other than res gestae, during medical examination, 37 ALR3d 778.

Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence, 79 ALR3d 79.

Evidence: admissibility of memorandum of telephone conversation, 94 ALR3d 975.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 ALR3d 934.

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 ALR5th 784.

24-3-3. When declarations part of res gestae.

Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the res gestae. (Orig. Code 1863, § 3696; Code 1868, § 3720; Code 1873, § 3773; Code 1882, § 3773; Civil Code 1895, § 5179; Penal Code 1895, § 998; Civil Code 1910, § 5766; Penal Code 1910, § 1024; Code 1933, § 38-305.)

Law reviews. — For article discussing exceptions to the hearsay rule and advocating

elimination of the res gestae exception, see 5 Mercer L. Rev. 257 (1954). For article, "The

Demise of the Corroboration Requirement — Its History in Georgia Rape Law,” see 26 Emory L.J. 805 (1977). For article surveying Georgia cases in the area of evidence from June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980). For annual survey of criminal law, see 38 Mercer L. Rev. 129

(1986). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

For note discussing *res gestae*, see 3 Ga. B.J. 69 (1940).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RES GESTAE DEFINED

TIME REQUIREMENTS

SPONTANEITY

DECLARANT

DISCRETION OF COURT

APPLICATION AND EXAMPLES

1. ACCOUNTS
2. AGENTS
3. ASSIGNMENTS
4. BYSTANDERS
5. CHILDREN
6. CRIMINAL LAW — DEFENDANTS
7. CRIMINAL LAW — INVESTIGATING OFFICERS
8. CRIMINAL LAW — OTHER CRIMES
9. CRIMINAL LAW — VICTIMS
10. DONORS
11. EMPLOYEES
12. OPINIONS
13. PERSONAL INJURIES
14. PRINCIPAL AND SURETY
15. SALES
16. TRANSCRIPTS
17. WILLS

General Consideration

Prerequisites to admission. — To bring a declaration within the exception of the *res gestae*, the declaration must grow out of the main fact; the declaration must serve to illustrate the fact, and the declaration must be made contemporaneously with the fact. When these things are true of declarations, the declarations are provable, not as the testimony of the declarant, but as partaking of the nature of facts. *Mitchum v. State*, 11 Ga. 615 (1852).

Declarations of a party to be admitted as part of the *res gestae* must be at the time of the transaction the declarations are intended to explain, must be calculated to unfold its nature and quality, and must harmonize with it. *Standard Oil Co. v. Reagan*,

15 Ga. App. 571, 84 S.E. 69 (1915); *Wallace v. State*, 151 Ga. App. 177, 259 S.E.2d 172 (1979).

To satisfy the standards of this statute, the exclamation must be contemporaneous, voluntary, and made at a time which indicates the lack of deliberation and deception. *Gaines v. State*, 232 Ga. 727, 208 S.E.2d 798 (1974) (see O.C.G.A. § 24-3-3).

Construction with Ga. Unif. Super. Ct. R. 31.3. — Proper *res gestae* evidence was admissible without having to follow the rules regarding prior similar transactions as nothing in Ga. Unif. Super. Ct. R. 31.3(E) was intended to prohibit the state from introducing evidence of similar transactions or occurrences which were immediately related in time and place to the charge being tried, as part of a single, continuous transaction.

General Consideration (Cont'd)

White v. State, 282 Ga. App. 286, 638 S.E.2d 426 (2006).

When an act is material, declarations accompanying the act are admissible as part of the *res gestae*. *Atlanta & W. Point R.R. v. Truitt*, 65 Ga. App. 320, 16 S.E.2d 273 (1941).

Admitted as material facts. — Declarations as parts of the *res gestae*, made at the time of the transaction, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. *Jones v. State*, 62 Ga. App. 734, 9 S.E.2d 707 (1940).

Self-serving declarations. — Declarations made by a party in the party's own favor, to be admissible as part of the *res gestae*, must be such as are contemplated by statute. *Rutland v. Hathorn*, 36 Ga. 380 (1867) (see O.C.G.A. § 24-3-3).

Burden on person seeking to introduce *res gestae* evidence. — It is incumbent on a party seeking to introduce hearsay evidence, as part of the *res gestae* to prove that the declarations testified to were so nearly connected with the transaction under investigation, in point of time, as to be free from any suspicion of device or afterthought. *Taylor v. State*, 120 Ga. 857, 48 S.E. 361 (1904); *Pool v. Warren County*, 123 Ga. 205, 51 S.E. 328 (1905); *Smith v. State*, 10 Ga. App. 840, 74 S.E. 447 (1912).

Four current generally prevalent exceptions that used to fall under the label "*res gestae*" are declarations of present bodily condition, declarations of present mental state or emotion, excited utterances, and present sense impressions. *Collins v. Francis*, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

Denying defendant opportunity to impeach statements of child sodomy victim was harmless error since the child's declaration was not the sole evidence of the crime and the evidence did not show that the child had any measure of dealings with members of the community at large which would subject the child to the formation of public opinion about the child's veracity. *Brantley v. State*, 177 Ga. App. 13, 338 S.E.2d 694 (1985).

Cited in *Young v. Hall*, 4 Ga. 95 (1848); *McNabb v. Lockhart & Thomas*, 18 Ga. 495

(1855); *Dawson v. Callaway*, 18 Ga. 573 (1855); *Macon & W.R.R. v. Johnson*, 38 Ga. 409 (1868); *Fishel v. Lockard & Ireland*, 52 Ga. 632 (1874); *Brown v. Cantrell*, 62 Ga. 257 (1879); *Augusta & Summerville R.R. v. Randall*, 79 Ga. 304, 4 S.E. 674 (1887); *Perryman v. Pope*, 102 Ga. 502, 31 S.E. 37 (1897); *Cohen v. Parish*, 105 Ga. 339, 31 S.E. 205 (1898); *Cain v. State*, 39 Ga. App. 128, 146 S.E. 340 (1929); *Southern Ry. v. Pearce*, 40 Ga. App. 166, 149 S.E. 155 (1929); *White v. White*, 41 Ga. App. 394, 153 S.E. 203 (1930); *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Southern Ry. v. Bullock*, 42 Ga. App. 495, 156 S.E. 456 (1931); *Conoway v. State*, 49 Ga. App. 311, 175 S.E. 391 (1934); *Davis v. Metropolitan Life Ins. Co.*, 148 Ga. App. 179, 172 S.E. 467 (1934); *Jenkins v. Elliott*, 180 Ga. 303, 178 S.E. 702 (1935); *Creswell v. State*, 61 Ga. App. 828, 7 S.E.2d 788 (1940); *Worthy v. State*, 192 Ga. 620, 15 S.E.2d 854 (1941); *Barnes v. State*, 200 Ga. 402, 37 S.E.2d 141 (1946); *Robinson v. State*, 75 Ga. App. 246, 43 S.E.2d 111 (1947); *Petroleum Carrier Corp. v. Snyder*, 161 F.2d 323 (5th Cir. 1947); *Thornton v. King*, 81 Ga. App. 122, 58 S.E.2d 227 (1950); *Allgood v. Dalton Brick & Tile Corp.*, 81 Ga. App. 189, 58 S.E.2d 522 (1950); *Southern Gas Co. v. McAllum*, 95 Ga. App. 525, 98 S.E.2d 397 (1957); *Rodgers v. Styles*, 100 Ga. App. 124, 110 S.E.2d 582 (1959); *Fidelity & Cas. Co. v. Scott*, 215 Ga. 491, 111 S.E.2d 223 (1959); *Hooks v. State*, 215 Ga. 869, 114 S.E.2d 6 (1960); *Elkins v. State*, 222 Ga. 746, 152 S.E.2d 377 (1966); *Jones v. State*, 120 Ga. App. 295, 170 S.E.2d 305 (1969); *Sisk v. Carney*, 121 Ga. App. 560, 174 S.E.2d 456 (1970); *McKinney v. State*, 121 Ga. App. 815, 175 S.E.2d 893 (1970); *East Point Ford Co. v. Lingerfelt*, 123 Ga. App. 520, 181 S.E.2d 713 (1971); *Sheffield v. State*, 124 Ga. App. 295, 183 S.E.2d 525 (1971); *McDuffie County v. Rogers*, 124 Ga. App. 442, 184 S.E.2d 46 (1971); *Peterman v. McManus*, 125 Ga. App. 827, 189 S.E.2d 88 (1972); *Glaze v. Bailey*, 130 Ga. App. 189, 202 S.E.2d 708 (1973); *Robinson v. State*, 232 Ga. 123, 205 S.E.2d 210 (1974); *Scott v. State*, 131 Ga. App. 655, 206 S.E.2d 558 (1974); *Arnold v. State*, 133 Ga. App. 451, 211 S.E.2d 404 (1974); *Watson v. State*, 235 Ga. 461, 219 S.E.2d 763 (1975); *Whitley v. State*, 137 Ga. App. 68, 223 S.E.2d 17 (1975); *Peebles v. State*, 236 Ga. 93, 222 S.E.2d 376 (1976); *Larkin v. State*, 137 Ga.

App. 164, 223 S.E.2d 215 (1976); Joyner v. William J. Butler, Inc., 143 Ga. App. 219, 237 S.E.2d 685 (1977); Redwing Carriers, Inc. v. Knight, 243 Ga. App. 668, 239 S.E.2d 686 (1977); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Smith v. State, 144 Ga. App. 579, 241 S.E.2d 465 (1978); Guthrie v. State, 147 Ga. App. 351, 248 S.E.2d 714 (1978); Bush v. Wyche, 147 Ga. App. 807, 250 S.E.2d 553 (1978); Littles v. Balkcom, 245 Ga. 285, 264 S.E.2d 219 (1980); Kerr v. State, 154 Ga. App. 470, 268 S.E.2d 762 (1980); McAllister v. State, 246 Ga. 246, 271 S.E.2d 159 (1980); Momon v. State, 161 Ga. App. 629, 288 S.E.2d 767 (1982); Parker v. State, 162 Ga. App. 271, 290 S.E.2d 518 (1982); Williams v. State, 162 Ga. App. 415, 291 S.E.2d 732 (1982); Hagen v. State, 169 Ga. App. 259, 312 S.E.2d 357 (1983); Weathers v. Cowan, 175 Ga. App. 19, 333 S.E.2d 921 (1985); Taylor v. State, 176 Ga. App. 567, 336 S.E.2d 832 (1985); Stone v. State, 177 Ga. App. 750, 341 S.E.2d 280 (1986); Ingram v. State, 178 Ga. App. 292, 342 S.E.2d 765 (1986); Hicks v. State, 256 Ga. 715, 352 S.E.2d 762 (1987); Wolke v. State, 181 Ga. App. 635, 353 S.E.2d 827 (1987); In re J.B., 183 Ga. App. 229, 358 S.E.2d 620 (1987); Eaton v. State, 184 Ga. App. 645, 362 S.E.2d 375 (1987); Spivey v. State, 197 Ga. App. 11, 397 S.E.2d 588 (1990); Norman v. State, 197 Ga. App. 333, 398 S.E.2d 395 (1990); Miller v. State, 197 Ga. App. 691, 399 S.E.2d 281 (1990); Dean v. State, 198 Ga. App. 133, 401 S.E.2d 40 (1990); Lee v. Peacock, 199 Ga. App. 192, 404 S.E.2d 473 (1991); Brinson v. State, 208 Ga. App. 556, 430 S.E.2d 875 (1993); Barnett v. State, 211 Ga. App. 651, 440 S.E.2d 247 (1994); Jones v. State, 265 Ga. 138, 454 S.E.2d 482 (1995); Ortiz v. State, 222 Ga. App. 432, 474 S.E.2d 300 (1996); Denny v. State, 226 Ga. App. 432, 486 S.E.2d 417 (1997); Thomas v. State, 227 Ga. App. 469, 489 S.E.2d 561 (1997); Sims v. State, 234 Ga. App. 678, 507 S.E.2d 845 (1998); Downs v. State, 240 Ga. App. 740, 524 S.E.2d 786 (1999); Davison v. State, 241 Ga. App. 685, 527 S.E.2d 285 (1999); Daker v. State, 243 Ga. App. 848, 533 S.E.2d 393 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002); Woods v. State, 255 Ga. App. 265, 564 S.E.2d 853 (2002); Al-Amin v. State, 278 Ga. 74, 597 S.E.2d 332 (2004); Espy v. Massac, 443 F.3d 1362 (11th Cir. 2006); Johnson v. State, 284 Ga. App. 724,

644 S.E.2d 544 (2007); Delgado v. State, 287 Ga. App. 273, 651 S.E.2d 201 (2007); Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007); Jacobs v. State, 299 Ga. App. 368, 683 S.E.2d 64 (2009).

Res Gestae Defined

It is impossible to define res gestae so as to adequately cover all the various and different uses to which it is put. *Walker v. State*, 137 Ga. 398, 73 S.E. 368 (1912).

Idea of res gestae presupposes a main fact, or principal transaction. *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972).

What is res gestae of a given transaction must depend upon its own peculiarities of character and circumstances. *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1915); *Wallace v. State*, 151 Ga. App. 171, 259 S.E.2d 172 (1979).

Res gestae are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. *Jones v. State*, 62 Ga. App. 734, 9 S.E.2d 707 (1940).

Res gestae refers to oral declarations of a spontaneous nature which would otherwise be inadmissible hearsay evidence. *Fountain v. State*, 136 Ga. App. 229, 220 S.E.2d 705 (1975).

Witnesses' testimony regarding what the girls said defendant told the girls to do was not impermissible "double hearsay", as defendant's directions to the girls about what the defendant wanted the girls to do were an integral part of the defendant's offenses and were thus admissible as part of res gestae. *Gibby v. State*, 213 Ga. App. 20, 443 S.E.2d 852 (1994).

Res gestae is not limited to the codal restriction of "declarations." *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972).

It also includes circumstances and acts. — Acts and circumstances forming a part of the continuation of the main transaction are admissible as res gestae. *Floyd v. State*, 143 Ga. 286, 84 S.E. 971 (1915); *Black v. State*, 154 Ga. App. 441, 268 S.E.2d 724 (1980).

Circumstances, acts, and declarations growing out of main fact, and contemporaneous with the main fact, and which serve to illustrate its character, are part of res gestae.

Res Gestae Defined (Cont'd)

Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915); Waller v. State, 80 Ga. App. 488, 56 S.E.2d 491 (1949); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972).

Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records; moreover, the defendant was properly denied a mistrial as the trial court issued a curative instruction regarding the alleged improper character evidence admitted, and thereafter polled the jury to ensure that jurors would in fact disregard that evidence. Mitchell v. State, 287 Ga. App. 517, 651 S.E.2d 821 (2007).

Because the state was entitled to present evidence of the entire res gestae of the crime, other criminal acts committed by defendant on the same night as a robbery were relevant under O.C.G.A. § 24-3-3 to show defendant's frame of mind in the time period immediately preceding and following the crimes. Waters v. State, 294 Ga. App. 442, 669 S.E.2d 450 (2008).

Time Requirements

Verbal act doctrine. — Part of this statute which admits "declarations accompanying an act" in evidence as a part of the res gestae is but a codification of the principal of the "verbal act doctrine." Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799 (1949) (see O.C.G.A. § 24-3-3).

Statements must be part of occurrence. — Test of determining whether statements are a part of the res gestae is: were the declarations a part of the occurrence to which they relate, or were the declarations a mere narrative concerning something which had fully taken place, and had therefore become a thing of the past. Hunter v. State, 147 Ga. 823, 95 S.E. 668 (1918); Hodge v. American Mut. Liab. Ins. Co., 57 Ga. App. 403, 195 S.E. 765 (1938); Berry v. Dinsmore, 115 Ga. App. 256, 154 S.E.2d 653 (1967); Augusta Coach Co. v. Lee, 115 Ga. App. 511, 154 S.E.2d 680 (1967); Clark v. State, 142 Ga. App. 851, 237 S.E.2d 459 (1977); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172 (1979); Doughty v.

State, 175 Ga. App. 317, 333 S.E.2d 402 (1985).

Trial court did not err in admitting, pursuant to the res gestae exception to the hearsay rule, the testimony of a police officer about the victim's oral statement to the officer and the victim's written statement that the victim made a few moments after making the oral statement, as both statements by the victim were made at a time when the victim was still under the influence of defendant's kidnapping of the victim and the victim's children; indeed, at the time the victim made the statements, the victim was still visibly shaken, and the victim's face was red, puffy, and swollen. White v. State, 265 Ga. App. 117, 592 S.E.2d 905 (2004).

Res gestae must be contemporaneous with main transaction. — Declarations to be a part of the res gestae must be contemporaneous with the main fact the declarations are intended to explain. If the declarations are made after the transaction, and therefore not contemporaneous with it, such declarations are a mere narrative of the past occurrence. Thomas v. State, 67 Ga. 460 (1881); Sullivan v. State, 101 Ga. 800, 29 S.E. 16 (1897).

Res gestae of a transaction is what is done during the progress of the transaction, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with the transaction. Hall v. State, 48 Ga. 607 (1873); Lyles v. State, 130 Ga. 294, 60 S.E. 578 (1908); Walker v. State, 137 Ga. 398, 73 S.E. 368 (1912); Hunter v. State, 147 Ga. 823, 95 S.E. 668 (1918).

Testimony of a police officer regarding an eyewitness statement to the police at the scene that the defendant was driving in the left lane and that the plaintiff drove into the side of the truck after "not really stopping" in the median was admissible as part of the res gestae exception to the hearsay rule. Cleveland v. Bryant, 236 Ga. App. 459, 512 S.E.2d 360 (1999).

Res gestae need not be precisely concurrent in time. — Declarations, to be a part of the res gestae must be contemporaneous with the main fact, but to be contemporaneous, the declarations are not required to be precisely concurrent in point of time. Mitchum v. State, 11 Ga. 615 (1852).

Declarations to be part of the res gestae need not be precisely concurrent in point of

time, if the declarations spring out of the transaction and are made so near to it as to preclude reasonably the idea of deliberation. *Walker v. State*, 139 Ga. 398, 73 S.E. 368 (1912).

Declarations, to be a part of the *res gestae*, must be contemporaneous with the main fact but need not be precisely concurrent in point of time; it is sufficient if such declarations spring out of the transaction, if the declarations elucidate the transaction, if voluntary and if made at such time as reasonably to exclude the idea of design. *Brown v. City of Fitzgerald*, 177 Ga. App. 859, 341 S.E.2d 476 (1986).

Occurrence not necessarily limited in time. — Main fact or transaction from which the *res gestae* springs is not necessarily limited as to time; it may be a length of time in the action. *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972).

Admissible as part of continuous transaction. — Evidence relating to an attempted cocaine deal that failed to materialize was admissible since the attempted deal was part of a continuous transaction. *Brewer v. State*, 224 Ga. App. 656, 481 S.E.2d 608 (1997).

Narratives of past occurrences are not admissible. — Principal point to be observed in all cases is whether the declarations offered in proof were contemporaneous with the main fact under consideration; for if the declarations are merely the narrative of a past occurrence, the declarations cannot be received in evidence. *Bulter v. Stewart*, 112 Ga. App. 293, 145 S.E.2d 47 (1965).

No precise point of time can be fixed, a priori, when the *res gestae* ends. — Each case turns on its own circumstances. Indeed, the inquiry is rather into events, than into the precise time which has elapsed. *Hall v. State*, 48 Ga. 607 (1873); *Lyles v. State*, 130 Ga. 294, 60 S.E. 578 (1908); *Walker v. State*, 137 Ga. 398, 73 S.E. 368 (1912); *Hunter v. State*, 147 Ga. 823, 95 S.E. 668 (1918); *O'Neal v. State*, 172 Ga. 526, 158 S.E. 51 (1931); *Dye v. State*, 218 Ga. 330, 127 S.E.2d 674 (1962); *Bunn v. State*, 144 Ga. App. 879, 243 S.E.2d 105 (1978); *Wallace v. State*, 151 Ga. App. 171, 259 S.E.2d 172 (1979).

Mere question of lapse of time not controlling. — In determining whether declarations should be received as a part of the *res gestae* of an occurrence, the mere question

of the lapse of time is not controlling. *Berry v. Dinsmore*, 115 Ga. App. 256, 154 S.E.2d 653 (1967); *Augusta Coach Co. v. Lee*, 115 Ga. App. 511, 154 S.E.2d 689 (1967).

Ultimate test is spontaneity and logical relation to main event. — Ultimate test of whether a statement is part of the *res gestae* is the statement's spontaneity and logical relation to the main event, that is, if it is a natural and probable consequence from the act contemporaneous with the main fact, but it need not be precisely concurrent in point of time. *C.A.J. v. State*, 127 Ga. App. 813, 195 S.E.2d 225 (1973).

When declarations must be regarded as contemporaneous. — If the declarations appear to spring out of the transaction, if the declarations elucidate the transaction, if the declarations are voluntary and spontaneous, and if the declarations are made at a time so near to the transaction as reasonably to preclude the idea of deliberate design, then are the declarations to be regarded as contemporaneous. *Southern Ry. v. Brown*, 126 Ga. 1, 54 S.E. 911 (1906); *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1915); *Hodge v. American Mut. Liab. Ins. Co.*, 57 Ga. App. 403, 195 S.E. 765 (1938); *Aetna Life Ins. Co. v. Jones*, 80 Ga. App. 472, 56 S.E.2d 305 (1949); *Clark v. State*, 142 Ga. App. 851, 237 S.E.2d 459 (1977); *Wallace v. State*, 151 Ga. App. 171, 259 S.E.2d 172 (1979).

Statements made indefinite time after main fact are not *res gestae*. — Sayings are not admissible as a part of the *res gestae* if it appears from the evidence that the statements were uttered at an indefinite time after the happening of the thing to which the statements relate. *Sims v. Macon & W.R.R.*, 28 Ga. 93 (1859).

Trial court did not err by excluding testimony of a disabled child's mother that the child told the mother that a special education paraprofessional had sexually molested the child because the plaintiffs were unable to establish when the statements were made in relation to the alleged event. *Harper v. Patterson*, 270 Ga. App. 437, 606 S.E.2d 887 (2004).

Statements three-and-one-half hours after incident inadmissible. — Statements to a police officer by the victim in a prosecution for battery which were made three-and-one-half hours after the incident

Time Requirements (Cont'd)

and which bore no mark of spontaneity or other such state of mind undeniably free of conscious device or afterthought were not part of the *res gestae*; as pure hearsay, the statements were inadmissible since the state did not show "necessity," to wit, that the declarant was unavailable and that it made reasonable efforts to secure the presence of the declarant. *Wilbourne v. State*, 214 Ga. App. 371, 448 S.E.2d 37 (1994).

Statements hours after incident admissible. — Two statements made by defendant's wife, one four hours after the incident and the second four hours later, were part of the *res gestae* since the statements were made while she was still laboring under the excitement and strain of the event. *Park v. State*, 230 Ga. App. 274, 495 S.E.2d 886 (1998).

Statements at scene of arrest. — Statement made by the passenger in an automobile driven by defendant charged with driving under the influence of alcohol that defendant had consumed more alcohol than the passenger had, made after defendant was arrested and the police were inquiring about the passenger's ability to drive defendant's vehicle away from the scene, was not part of the *res gestae* of the act concerning which the statement was made. *Priebe v. State*, 250 Ga. App. 725, 553 S.E.2d 5 (2001).

Spontaneity

Spontaneous declaration doctrine. — That part of this statute which admits declarations so nearly connected with the act as to be free from all suspicion of device or afterthought in evidence is but a statement of the spontaneous declaration doctrine which is an exception to the rule against hearsay. *Glens Falls Indem. Co. v. Gottlieb*, 80 Ga. App. 634, 56 S.E.2d 799 (1949) (see O.C.G.A. § 24-3-3).

When the statement of a passenger in an accident victim's car was made almost immediately after the crash as a spontaneous reaction to a startling event, rather than as a result of reflective thought, the testifying as to that statement by a third party was precisely the kind of excited utterance contemplated by O.C.G.A. § 24-3-3, and was admissible as part of the *res gestae*. *Copeland v. State*, 235 Ga. App. 682, 510 S.E.2d 124 (1998).

Declarations must be free from suspicion of device or afterthought. — Proximity of time in which declarations were made to the main transaction is not the only test of their admissibility as part of the *res gestae*, but the declarations must also be free from all suspicion of device or afterthought. *Augusta & Summerville R.R. v. Randall*, 79 Ga. 304, 4 S.E. 674 (1887); *Savannah, Fla. & W. Ry. v. Holland*, 82 Ga. 257, 10 S.E. 200, 14 Am. St. R. 158 (1889); *Shapiro Packing Co. v. Landrum*, 109 Ga. App. 519, 136 S.E.2d 446 (1964).

Trial court did not err in admitting testimony about statements defendant and defendant's cousin made to a witness at the time of the theft as defendant's arguments that admission of such evidence should not have been allowed because the statements were not "free from all suspicion of device or afterthought" lacked merit since O.C.G.A. § 24-3-3 referred to the statement at the time it was made, and not to the witness's testimony relating what was said. *Wilson v. State*, 258 Ga. App. 166, 573 S.E.2d 432 (2002).

Narrative recollections inadmissible. — Only the spontaneous declarations which spring out of the event are admissible. Narrative statements of the history of the event, made after the declarant has had time to reflect on the occurrence, are not admissible. *Williams v. State*, 144 Ga. App. 130, 240 S.E.2d 890 (1977).

Victim's narrative statement given to a police officer at a police station did not qualify as *res gestae*. *Cartwright v. State*, 242 Ga. App. 825, 531 S.E.2d 399 (2000).

Narratives must be closely scrutinized. — When a statement is narrative rather than exclamatory, the circumstances must be closely scrutinized because a narrative is generally the result of afterthought. *Clark v. State*, 142 Ga. App. 851, 237 S.E.2d 459 (1977).

Mere fact that the statement was elicited by an inquiry does not necessarily deprive the statement of its spontaneity prerequisite for admission. *United Motor Freight Term. Co. v. Hixon*, 77 Ga. App. 506, 48 S.E.2d 769 (1948).

Although statements lacked spontaneity because the statements were made in answer to a question, this fact alone will not render the statements inadmissible as part of the *res*

gestae. *Thomas v. State*, 242 Ga. 712, 251 S.E.2d 294 (1978).

Excited utterance. — Witness's testimony that the brother of a juvenile defendant told the witness, "My brother just shot someone," was not inadmissible hearsay; as the brother testified that the brother had not made such a statement, the testimony was admissible as an inconsistent statement, and it was also admissible as an excited utterance, as the statement was made by the brother after receiving a startling text message. In the Interest of B.S., 284 Ga. App. 680, 644 S.E.2d 527 (2007).

Statements by bystanders that a defendant threw something as the defendant fled from the police were admissible under the excited utterance/res gestae exception to the hearsay rule as the statements were made during a sufficiently startling event—the defendant running by the defendant as the police were in pursuit—and the statements were made without premeditation or afterthought but with sufficient personal knowledge. *Williams v. State*, 292 Ga. App. 892, 666 S.E.2d 18 (2008).

Declarant

Declarant need not be party to suit. — It is not required that the res gestae statement be excluded solely because the declarant is not a party to the suit or because the declaration was not made between a witness and a party. *Piedmont Life Ins. Co. v. Lea*, 140 Ga. App. 400, 231 S.E.2d 147 (1976).

Former Code 1933, §§ 38-305 and 38-414 (see O.C.G.A. §§ 24-3-3 and 24-3-52) were applicable only when there was testimony by a third party as to a declaration, admission, or confession of a conspirator and had no application when no such testimony was offered, but the accomplice merely testified against the defendant on the trial of the case. *Banks v. State*, 113 Ga. App. 661, 149 S.E.2d 415 (1966).

No unavailability requirement. — Trial court did not err in admitting the victim's oral statement to a police officer, through the police officer's testimony, or the victim's written statement made a few moments after the victim made the oral statement to the police officer pursuant to the res gestae exception to the hearsay rule as the statements were made while the victim was still under the influence of defendant's criminal

act; also, the state was not required to show that the declarant was unavailable before the statements could be admitted. *White v. State*, 265 Ga. App. 117, 592 S.E.2d 905 (2004).

Death of the person making the statements which form a part of the res gestae is no ground for the statements exclusion from evidence. *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. R. 838 (1884); *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972).

Declarant not in control of faculties. — It is not error to admit the declarations of a victim who is not a person in control of the victim's faculties, even when such declarations and the victim's accompanying physical actions display severe disorientation, as well as confusion as to where the victim was, what was happening, and who was around the victim. *Andrews v. State*, 249 Ga. 223, 290 S.E.2d 71 (1982).

Discretion of Court

Admission is discretionary because no rule applicable in all cases. — No definition of res gestae can be found so comprehensive as to embrace all cases. Hence, it is left to the sound discretion of the courts what the court shall admit to the jury along with the main facts as part of the res gestae. *Mitchum v. State*, 11 Ga. 615 (1852); *Augusta & Summerville R.R. v. Randall*, 79 Ga. 304, 4 S.E. 674 (1887); *Southern Ry. v. Brown*, 126 Ga. 1, 54 S.E. 911 (1906); *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1915); *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972); *Henry v. State*, 176 Ga. App. 462, 336 S.E.2d 588 (1985).

Admissibility of declarations as res gestae testimony does not depend upon any arbitrary time or general rule for all cases, but is left to the sound discretion of court in determining from the time, circumstances, and statements in question, whether declarations meet requirements of being free from all suspicion of device or afterthought. *Aetna Life Ins. Co. v. Jones*, 80 Ga. App. 472, 56 S.E.2d 305 (1949); *Wallace v. State*, 151 Ga. App. 171, 259 S.E.2d 172 (1979); *South Ga. Brokers, Inc. v. Fidelity Bankers Life Ins. Co.*, 153 Ga. App. 503, 265 S.E.2d 815 (1980).

Admissibility of declarations as part of the res gestae is left to the sound discretion of the trial court, considering the time, circumstances, and statements in question. *Ward v.*

Discretion of Court (Cont'd)

State, 186 Ga. App. 503, 368 S.E.2d 139 (1988); *Shortes v. State*, 193 Ga. App. 859, 389 S.E.2d 354 (1989), cert. denied, 193 Ga. App. 911, 389 S.E.2d 354 (1989).

Statute concerns merely the admissibility of evidence, which is a question for the court, the weight to be given which is for the jury. *Tiller v. State*, 196 Ga. 508, 26 S.E.2d 883 (1943); *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (see O.C.G.A. § 24-3-3).

Whether statements claimed to be a part of the res gestae are really such is a question of law to be determined by the court. *Shapiro Packing Co. v. Landrum*, 109 Ga. App. 519, 136 S.E.2d 446 (1964).

Determination of res gestae within court's sound discretion. — Question of a given declaration's being a part of the res gestae is for the determination of the trial court and within the court's sound discretion. *Augusta Coach Co. v. Lee*, 115 Ga. App. 511, 154 S.E.2d 689 (1967); *Thomas v. State*, 242 Ga. 712, 251 S.E.2d 294 (1978).

In a wrongful interference with business relations and slander suit, a trial court properly excluded evidence sought to be introduced by the suing insurance company that customers canceled policies because of misrepresentations made by the defending insurance company since the suing company and one of the company's agents failed to show, inter alia, that any purported statement by one of many policyholders located in 23 states over an extended period of time was contemporaneous with a main fact, which in the case, would have been any alleged tortious statement by an agent of the defending insurance company. *Am. Southern Ins. Group, Inc. v. Goldstein*, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, 2008 Ga. LEXIS 680 (Ga. 2008).

With regard to defendant's conviction for armed robbery and other crimes, the trial court properly allowed an officer to testify to what an adult in an apartment kitchen saw as the immediacy and urgency of the statement by the upset adult, who had just witnessed several men enter another apartment, made to the officer approaching the scene within minutes of the emergency call, authorized the trial court in the court's discretion to admit the statement as res gestae. *Jennings v.*

State, 292 Ga. App. 149, 664 S.E.2d 248 (2008).

Courts must be allowed some latitude. — What is the res gestae of a given transaction must depend upon the transaction's own peculiarities of character and circumstances; courts must be allowed some latitude in this matter. *Aetna Life Ins. Co. v. Jones*, 80 Ga. App. 472, 56 S.E.2d 305 (1949).

Trial judge's determination not disturbed unless clearly erroneous. — Trial judge's determination that evidence is admissible as part of the res gestae will not be disturbed unless the determination is clearly erroneous. *Robinson v. State*, 197 Ga. App. 600, 399 S.E.2d 94 (1990).

Burglary conviction was upheld on appeal as: (1) sufficient evidence was presented that the defendant entered the victim's home without permission with the intent to commit a theft therein; and (2) the state properly presented res gestae evidence, even if such improperly placed the defendant's character in evidence. *Meyers v. State*, 281 Ga. App. 670, 637 S.E.2d 78 (2006).

Application and Examples**1. Accounts**

Settlements of accounts. — What parties say at the time of making up a settlement of accounts between the parties, as to the amount due from the one to the other, is a part of the res gestae, and admissible in evidence. *Buttram v. Jackson*, 32 Ga. 409 (1861).

2. Agents

Statements of agent are admissible against the agent's principal. — Statements of the defendant's agent to the plaintiff in the course of a business transaction are admissible in behalf of the defendant as a part of the res gestae. *Jones v. Norris N. Smith Co.*, 31 Ga. App. 383, 120 S.E. 804 (1923).

Agency must be established independently. — Where extraneous circumstances, independently of and without regard to the declarations of the alleged agent personally, clearly tend to establish the fact of agency, the agent's declarations may be admitted and considered as a part of the res gestae of the transaction; but the declarations of an alleged agent, when standing alone, are

never admissible to prove agency. *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

3. Assignments

Declarations of an assignor, made after the execution of the deed of assignment, were inadmissible for the purpose of annulling the assignment or of recovering property embraced in the deed because such declarations did not accompany the making of the deed, or were so nearly connected therewith as to form part of the *res gestae*. *Wright v. Zeigler Bros.*, 70 Ga. 501 (1883).

4. Bystanders

An exclamation of a bystander which merely expresses an opinion or conclusion is inadmissible as *res gestae*. *South Ga. Broker, Inc. v. Fidelity Bankers Life Ins. Co.*, 153 Ga. App. 503, 265 S.E.2d 815 (1980).

Accident witness's statement admissible. — Statement of unidentified declarant fell within *res gestae* exception since three witnesses to an accident overheard the declarant state within 15 minutes of the event, that defendant was involved and was wearing a flowered shirt because the declaration was the natural result of the incident and clarified the incident, was voluntary and spontaneous and was made at a time so close to the incident that the idea of any deliberate design was reasonably precluded. *Williams v. Melton*, 733 F.2d 1492 (11th Cir.), cert. denied, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984).

Statement a witness heard bystander make at the scene of the crime, after the crime occurred, is not part of the *res gestae*. *Jones v. State*, 167 Ga. App. 847, 307 S.E.2d 735 (1983).

Statements of bystanders held admissible as *res gestae* in the following cases. — See *New Winder Lumber Co. v. Payne*, 40 Ga. App. 188, 149 S.E. 85 (1929); *Bridges v. State*, 242 Ga. 251, 248 S.E.2d 647 (1978); *Ewald v. State*, 156 Ga. App. 68, 274 S.E.2d 31 (1980); *Super Disc. Mkts., Inc. v. Coney*, 210 Ga. App. 659, 436 S.E.2d 803 (1993); *Gilbert v. State*, 241 Ga. App. 57, 526 S.E.2d 88 (1999); *Espy v. State*, 246 Ga. App. 1, 539 S.E.2d 513 (2000); *Couch v. State*, 246 Ga. App. 106, 539 S.E.2d 609 (2000).

In a speeding and eluding prosecution,

under the *res gestae* exception to the hearsay rule, O.C.G.A. § 24-3-3, an officer was properly allowed to testify that a bystander had asked the officer whether the officer was searching for a blue sports car and then pointed to a direction. Since no testimonial statement was involved, the defendant's rights to confrontation as interpreted by *Crawford v. Washington*, 541 U.S. 36 (2004), were not violated. *Segel v. State*, 293 Ga. App. 506, 667 S.E.2d 670 (2008).

Statement of witness to murder properly admitted. — Hearsay statement of a witness to a murder was properly admitted as an excited utterance under circumstances in which, when police arrived at the crime scene police saw the witness standing over the victim, sufficiently upset that the witness could not speak, and minutes later, the witness, who was described as still visibly distraught, upset, cursing, crying, almost like the witness was in shock, told an investigator the witness was in the witness's kitchen when the witness saw the two defendants outside with the victim with the victim's hands up in the air, heard gunshots and fell to the ground, and when the witness stood up, the witness saw the defendants running around the building; the witness's aunt, the victim's girlfriend, testified that when she arrived at the crime scene shortly after the shootings she saw the witness standing near the victim crying profusely, and, when she asked the witness what happened, the witness identified the defendants as the shooters and said that the defendants ran to the apartment of an individual associated with the defendants. *Daniel v. State*, 285 Ga. 406, 677 S.E.2d 120 (2009).

Statements by bystanders held inadmissible as *res gestae* in the following cases. — See *Everready Cab Co. v. Wilhite*, 66 Ga. App. 815, 19 S.E.2d 343 (1942) (statement made prior to accident); *Camp v. Ledford*, 103 Ga. App. 197, 119 S.E.2d 54 (1961) (unidentified doctor at scene of accident).

9-1-1 call by victim's child. — Admission of a 9-1-1 call placed by the child of a battery victim was proper because, among other reasons, the call was placed moments after the child had witnessed the attack, and was thus part of the *res gestae*. *Kuykendoll v. State*, 278 Ga. App. 369, 629 S.E.2d 32 (2006).

Recording of 9-1-1 call made by another driver. — In a trial for driving under the

Application and Examples (Cont'd)

4. Bystanders (Cont'd)

influence of alcohol to the extent of being a less safe driver in violation of O.C.G.A. § 40-6-391(a)(1), admission of a recording of a 9-1-1 call made by a caller who was following the defendant's vehicle was proper. Admission of the call did not violate the confrontation clause of the sixth amendment because the call's primary purpose was to prevent immediate harm to the public, not to establish evidentiary facts for a future prosecution, and the call was admissible under O.C.G.A. § 24-3-3 because the caller had not deliberated about the statement and had personal knowledge of what the caller described to the 9-1-1 operator. *Key v. State*, 289 Ga. App. 317, 657 S.E.2d 273 (2008).

9-1-1 calls by bystanders admissible. — Allowing a jury to hear an audiotape of two 9-1-1 calls made by bystanders to report a shooting was proper because, *inter alia*, the calls were placed within a short time after the shooting, and the callers had no opportunity to deliberate about their statements or be influenced by others; thus, the evidence was admissible under the O.C.G.A. § 24-3-3 *res gestae* exception to the hearsay rule. *Glover v. State*, 285 Ga. 461, 678 S.E.2d 476 (2009).

5. Children

Child's statements admissible though not competent witness. — Even though a child may be too young to be a competent witness this does not preclude admission of the child's declaration as part of the *res gestae*, if otherwise admissible. *Williams v. State*, 144 Ga. App. 130, 240 S.E.2d 890 (1977).

Standing alone, the fact that a declarant is a child of tender years cannot be said to free the statements from the suspicion of device or afterthought. *Hight v. Butler*, 230 Ga. 533, 198 S.E.2d 169 (1973); *Stamper v. State*, 235 Ga. 165, 219 S.E.2d 140 (1975).

Age may be taken into consideration. — Fact that the declarant is a child of tender years may be taken into consideration in determining whether, under the *res gestae* rule, the declarant's declarations are so free from the suspicion of afterthought as to be admissible in evidence. *Berry v. State*, 9 Ga. App. 868, 72 S.E. 433 (1911).

Child victim's responses to medical questions admissible. — Testimony of a doctor who related a child victim's responses to medical questions for purposes of diagnosis and treatment was admissible under the exception to the hearsay rule provided by O.C.G.A. § 24-3-3 since where the responses were given within a matter of minutes after the patient was taken to the hospital. *Allen v. State*, 174 Ga. App. 206, 329 S.E.2d 586 (1985).

Statements made several days after incident not admissible. — When statements by a victim of cruelty to children were made several days after the incident and the child had several opportunities to report the incidents outside the presence of the child's parents and the reports were made over a period of several days in response to specific questions and there was no medically acceptable testimony that the child was laboring under some disability and the statements were narrative in form rather than spontaneously given, such statements lacked contemporaneity and spontaneity to such a degree as to be extremely suspect and therefore in violation of the *res gestae* exception to the hearsay rule. *Allen v. State*, 174 Ga. App. 206, 329 S.E.2d 586 (1985).

Statements to parent in evening after afternoon molestation admissible. — When eight-year-old victim, who was allegedly molested in the afternoon, did not return to the victim's own home until that evening, after the victim's parent had returned from a doctor's appointment, and reported the act of molestation to the victim's parent at that time, which was the victim's first opportunity to do so since leaving the custody of defendant, the parent's testimony concerning the child's statements was admissible under the *res gestae* exception to the hearsay rule. *Moseley v. State*, 179 Ga. App. 698, 347 S.E.2d 686 (1986).

Statements by child to parent nearly twenty-four hours after molestation were admissible. *Millwood v. State*, 174 Ga. App. 113, 329 S.E.2d 273 (1985).

Statement by child to police approximately one year after the alleged molestation was not contemporaneous, was not spontaneous, but was in response to questioning of the police, and thus not a part of the *res gestae*. *Lynn v. State*, 181 Ga. App. 461, 352 S.E.2d 602 (1986).

Statements by children held admissible as res gestae in the following cases. — See *Ferguson v. Columbus & Rome Ry.*, 75 Ga. 637 (1885) (cause of injury); *Johnson v. State*, 142 Ga. App. 560, 236 S.E.2d 552 (1977) (relating details of child molestation).

In the sexual molestation case, the trial court did not err in allowing into evidence the out-of-court statements of the sexual abuse victim's younger sibling who witnessed the molestation; the sibling's statements to the parent were made almost immediately after the defendant molested the victim and were made without premeditation or afterthought pursuant to O.C.G.A. § 24-3-3. *Mikell v. State*, 281 Ga. App. 739, 637 S.E.2d 142 (2006).

6. Criminal Law — Defendants

All circumstances of crime making up res gestae may be proved. *Duffy v. State*, 146 Ga. App. 400, 246 S.E.2d 420 (1978).

Statement must be connected with crime. — Statement made by the accused was not admissible as part of the res gestae since while the statement was made "soon" after the shooting but it did not appear that it was so nearly connected with the homicide as to be "free from all suspicion of device or afterthought." *Ingram v. State*, 43 Ga. App. 218, 158 S.E. 529 (1931).

Testimony should not have been admitted as part of the res gestae in a charge of two counts of aggravated assault arising from an altercation with the owners of a towing business since the testimony encompassed defendant's behavior during the receipt of medical treatment at some unspecified time after the commission of the charged crimes and did not involve any statements defendant made concerning the assault or any continuation of the defendant's actions at the scene of the crime. *Heflin v. State*, 204 Ga. App. 161, 418 S.E.2d 770 (1992).

Remark made by one perpetrator to the other as the perpetrators fled from the liquor store where one of the perpetrators had shot the store owner to the van the perpetrators were going to steal to make the perpetrators' getaway was admissible as part of the res gestae. *Tesfaye v. State*, 275 Ga. 439, 569 S.E.2d 849 (2002).

Evidence that a witness taught defendant how to make methamphetamine was prop-

erly admitted at defendant's trial for possession and trafficking the drug because the evidence was part of the main transaction of conspiracy to manufacture methamphetamine and was admitted as part of the res gestae; therefore, there was no error on the part of the trial court by not requiring the state to have complied with the notice and hearing requirements of Ga. Unif. Super. Ct. R. 31.1 and Ga. Unif. Super. Ct. R. 31.3. *Goldsby v. State*, 273 Ga. App. 523, 615 S.E.2d 592 (2005).

Defendant did not receive ineffective assistance of counsel as: (1) a hearsay objection to statements the defendant made during an argument and to testimony that the defendant stated that the defendant should have killed the other witnesses would have been futile as the statements were not offered for the truth of the matter asserted; (2) a hearsay objection to a witness's testimony as to the defendant's statements during a van ride would also have been futile as the statements were admissible under O.C.G.A. § 24-3-3; and (3) counsel's strategic decision to attack certain testimony through cross-examination was not ineffective assistance of counsel. *Johnson v. State*, 281 Ga. 229, 637 S.E.2d 393 (2006).

Trial court properly held that the events leading up to the assault on the victim served to illustrate the defendant's motive in participating with a cohort to steal money from the victim; moreover, even if the defendant reiterated an objection at trial, the statements uttered by the defendant were so connected with the commission of the offense to be admissible. *White v. State*, 282 Ga. App. 286, 638 S.E.2d 426 (2006).

Coconspirator's statements admissible. — Coconspirator's statements implicating defendant in a conspiracy to kill defendant's spouse were admissible as part of res gestae where made while the coconspirator was exercising control over the victims, and thus during the enterprise. *Walker v. State*, 213 Ga. App. 407, 444 S.E.2d 824 (1994).

Bruton objection was properly overruled as the codefendant's statement that the codefendant would check with defendant regarding the victim's participation was part of the res gestae, rather than a confession or a statement. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Informant's comments. — Comments which an informant made on tape shortly

Application and Examples (Cont'd)**6. Criminal Law — Defendants (Cont'd)**

after defendant sold drugs to the informant and left the informant's car were part of the *res gestae*, and the trial court did not abuse the court's discretion by admitting the comments during defendant's trial on charges that defendant sold cocaine. *Lyons v. State*, 266 Ga. App. 89, 596 S.E.2d 226 (2004).

Declaration held not admissible in favor of accused. — Declaration of another person that the person alone committed the crime for which the defendant was on trial, the declarant not naming the person whom declarant had killed, and it not being shown whether the declarant's declaration was made before or after the crime was committed, or, if after, how long after, was not admissible in evidence in favor of the accused, and as a part of the *res gestae*. *Johnson v. State*, 188 Ga. 662, 4 S.E.2d 813 (1939).

Admission of absent codefendant disallowed. — Informant was not allowed to relate what a codefendant said during the course of the crime, nor could the defendant offer testimony regarding what the defendant's absent codefendant told others about the defendant's role in the crime because admission of such declarations would allow a person to subvert the ends of justice by admitting the crime to others and then absenting oneself from the jurisdiction of the court. *Roberts v. State*, 208 Ga. App. 64, 430 S.E.2d 175 (1993).

Admission of victim's recollection of attacker's statements. — Rape victim's testimony that her attacker stated he was running from the law, had been drinking, was on drugs really bad, and needed money for gas was not impermissible character evidence and was admissible as *res gestae*. *Hardegee v. State*, 230 Ga. App. 111, 495 S.E.2d 347 (1998).

Third party overheard on 9-1-1 call. — Because no evidence existed by which the trial court could assess the personal knowledge of the speaker overheard on a 9-1-1 call, who was not the caller, or the reliability of the statement generally, and the evidence against the defendant was less than overwhelming, the trial court's decision to admit the statement under the *res gestae* exception was clearly erroneous; moreover, given that

the jury sent a note to the trial court requesting to hear the recording again, stating that it was "vital" to their deliberations, it was clear that what was said on the recording figured importantly in the jury's deliberations. *Orr v. State*, 281 Ga. 112, 636 S.E.2d 505 (2006).

Statements by defendants held admissible as *res gestae* in the following cases. — See *Thomas v. State*, 27 Ga. 287 (1859) (declaration that shooting was in self-defense); *Caito v. State*, 130 Ga. App. 831, 204 S.E.2d 765 (1974) (statement that "you got me"); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979), vacated, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980) (bragging of participation in murder).

Defendant could not raise an objection to the admission of defendant's spontaneous statement to police officers executing a search warrant that "you've got me" for the first time on appeal absent plain error. There was no plain error in admitting the statement because: (1) defendant was being detained under O.C.G.A. § 17-5-28, and was not under arrest; (2) defendant was not being interrogated, making *Miranda* warnings not required; (3) defense counsel cross-examined the officers on the statement; (4) the statement was admissible as a spontaneous statement; and (5) the statement was admissible under O.C.G.A. § 24-3-3 as a part of the *res gestae*. *Zackery v. State*, 262 Ga. App. 646, 586 S.E.2d 346 (2003).

Evidence that the defendant was a drug dealer and gave the police a false name when questioned after the alleged crime was committed was admissible as relevant and part of the *res gestae* as the former was incidental to and followed directly from the defendant's participation in the sale of marijuana to the victim, and the latter was part of what transpired shortly after the commission of the victim's murder; moreover, this was true even if the defendant's character was incidentally placed in issue. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

In a defendant's prosecution for, *inter alia*, felony murder, the introduction of a second inmate's statement that the defendant and the second inmate did not mean to kill a third inmate did not violate the defendant's sixth amendment confrontation rights because the voluntary statement,

which was made shortly after the third inmate was found in the defendant's cell, was admissible pursuant to the *res gestae* exception to the rule against hearsay under O.C.G.A. § 24-3-3. *Butler v. State*, 284 Ga. 620, 669 S.E.2d 118 (2008).

Witness statements about another's cry for help admissible. — Evidence was properly admitted by the trial court in defendant's trial for aggravated assault in violation of O.C.G.A. § 16-5-21 since statements of a witness that another screamed for help when the witness saw the victim and defendant fighting were part of the *res gestae* exception to hearsay pursuant to O.C.G.A. § 24-3-3. Statements by a witness that defendant was ordered to leave the premises were not hearsay under O.C.G.A. § 24-3-1 because the statements were used to explain defendant's motive and conduct of remaining on the premises and waiting for the victim pursuant to O.C.G.A. § 24-3-2, and statements regarding information from a police report which was not admitted into evidence were deemed harmless as cumulative. Regardless, there was sufficient evidence without the disputed evidentiary rulings to support defendant's conviction based on observations of several witnesses and the cuts on the victim's face and body. *Kelley v. State*, 260 Ga. App. 238, 581 S.E.2d 584 (2003).

Statement by defendant to father was narrative. — Defendant's statements to law enforcement and to a college intern shortly after the shooting were properly excluded by the trial court. Defendant's statements in the patrol car were not free from all suspicion of device or afterthought because defendant advised a female caller that the defendant could not talk because the defendant was in the back of a patrol car, and asked the caller not to call the defendant back, and defendant's recounting of recent events to the defendant's father was a narrative and not part of the *res gestae*. *Crane v. State*, 300 Ga. App. 450, 685 S.E.2d 314 (2009).

Surveillance videotape reflecting circumstances leading up to defendant's arrest was admissible as *res gestae*. — Because a department store videotape of defendant's spouse stealing items of merchandise from the store was made contemporaneously to the charged crime, which involved defendant leaving the store with merchandise in

the defendant's cart for which the defendant had not paid, and because it provided context for the circumstances surrounding defendant's arrest, it was admissible as part of the *res gestae* of the crime under O.C.G.A. § 24-3-3. *Wright v. State*, 301 Ga. App. 178, 687 S.E.2d 195 (2009).

7. Criminal Law — Investigating Officers

Statements made about a fight. — Statements made to a magistrate about a fight by one of the participants on the same day of the fight, and a short distance from the scene, were held to be not admissible as a part of the *res gestae*. *Cherry v. McCall*, 23 Ga. 193 (1857).

Admission of police officer's testimony regarding the substance of what someone told the officer who had moved out of town at the time of trial and was not called as a witness was in error, since this testimony was hearsay and came under no exception to the hearsay rule. *Liu's Enters. Corp. v. Li*, 204 Ga. App. 397, 419 S.E.2d 511 (1992).

Statement made to an officer after an arrest concerning a course of conduct by the person arrested is not a part of the *res gestae* but a narrative of events. *Jones v. State*, 62 Ga. App. 734, 9 S.E.2d 707 (1940).

Statement made to officer at time of arrest. — When the stipulated facts showed the trustworthiness of statement made at time of arrest in that defendant's nephew informed officer that defendant had been operating a motorcycle soon after the occurrence of the contested driving offense; the statement was sufficiently contemporaneous to be a part of the *res gestae* and was therefore admissible. *Jarrett v. State*, 265 Ga. 28, 453 S.E.2d 461 (1995).

Statements taken at scene of accident. — Statements made to an investigating officer not more than 20 to 30 minutes after an automobile collision may be allowed as testimony. *Land v. McClure*, 135 Ga. App. 243, 217 S.E.2d 600 (1975).

Trial court did not err in overruling the defendant's hearsay objections to the testimony of a co-indictee's girlfriend that he told her by phone that the defendant was shooting at the victim and to the testimony of the responding police officer and another person that the victim's fiancée, right after the shooting while she was upset and crying, identified the defendant as the shooter be-

Application and Examples (Cont'd)**7. Criminal Law — Investigating Officers (Cont'd)**

cause the statements were admissible as part of the *res gestae* of the crime; both of the declarants testified at trial and were subject to questioning by the defense, and the declarants made the statements either during the shooting or immediately thereafter when crying and upset. *McIlwain v. State*, No. S10A0068, 2010 Ga. LEXIS 318 (Apr. 19, 2010).

Observations by officer held admissible.

— Testimony of an officer that the officer noticed bruises on the rape victim's neck is admissible. *Zilinmon v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

Telephone calls received by officer.

— With regard to a defendant's conviction for possessing cocaine, the trial court did not err by admitting evidence of telephone conversations between a deputy and unknown callers which occurred during the time the deputy was serving a temporary protective order and warrant for a probation violation on the defendant at the defendant's apartment because the telephone conversations occurred contemporaneously with the seizure of the drugs found in the apartment and tended to indicate that the drugs had not been brought to the apartment by a casual guest, but belonged to someone who was receiving calls about the drugs at the apartment. *Stewart v. State*, 285 Ga. App. 760, 647 S.E.2d 411 (2007).

Statement admissible despite misidentification. — Statement given to a police officer shortly after a stabbing incident was admissible, and the fact that the witness may have misidentified the suspect did not render the statement inadmissible. *Taylor v. State*, 226 Ga. App. 339, 486 S.E.2d 601 (1997).

Statement by victim to officer minutes after crime. — Trial court did not improperly rely on hearsay in determining whether reasonable suspicions existed to detain defendant as the burglary victim's description of the perpetrator of the burglary to the police officer did not go to the issue of whether defendant was guilty or innocent, but instead went to whether reasonable suspicion existed to perform a Terry detention;

moreover, the burglary victim's description given on the scene to the officer only minutes after the perpetrator fled was admissible under the *res gestae* exception to the hearsay rule. *Spear v. State*, 259 Ga. App. 803, 578 S.E.2d 504 (2003).

Witness's out-of-court statement to officer admissible. — Police officer's testimony as to out-of-court statements made by a witness that the witness had hidden in a closet while defendant fired shots through the wall and closet door was admissible as part of the *res gestae*. *Morris v. State*, 228 Ga. App. 90, 491 S.E.2d 190 (1997).

8. Criminal Law — Other Crimes

Evidence of other crimes is admissible when the extraneous crime forms a part of the *res gestae*. *Bradley v. State*, 154 Ga. App. 333, 268 S.E.2d 388 (1980); *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980).

Generally, in the prosecution for a particular offense, evidence of another distinct crime, wholly independent from that which the accused is on trial, is inadmissible, but if the allegedly separate offense was a part of the same incident for which the accused is being tried and forms a part of the *res gestae*, the evidence is admissible, and the fact that such part of the *res gestae* incidentally placed defendant's character in issue does not render the evidence inadmissible. *Yarbrough v. State*, 186 Ga. App. 845, 368 S.E.2d 802 (1988).

Fact that relevant evidence may indicate a crime or incidentally place a defendant's character in issue does not render the evidence inadmissible. *Martin v. State*, 219 Ga. App. 277, 464 S.E.2d 872 (1995); *Larkin v. State*, 230 Ga. App. 129, 495 S.E.2d 605 (1998).

Prosecutor's reference to other crime proper. — Trial court's denial of defendant's motion for mistrial for an argument made during an opening statement to the jury that the prosecutor expected the evidence to show "defendant was asking for cocaine, said, 'Where is the cocaine ...,'" was not error although the defendant had not been charged with any offense involving drugs as the state is entitled to inform the jury of all the circumstances surrounding the commission of the crime or crimes charged, even though it may have incidentally placed the

defendant's character in evidence. *Houston v. State*, 187 Ga. App. 335, 370 S.E.2d 178 (1988).

Statements are a part of the res gestae and are admissible as such, notwithstanding the fact the statements may show other criminal conduct on the part of the one who made the statement. *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989); *Lord v. State*, 156 Ga. App. 492, 274 S.E.2d 641 (1980), rev'd on other grounds, *Potts v. Zant*, 734 F.2d 526 (11th Cir. 1984).

Trial court did not err in denying the defendant's motion in limine to exclude evidence of the defendant's probation status, and the underlying probation offense, as that evidence was properly admitted as part of the res gestae since the conduct of the officer flowed very directly from the statements made during the consensual encounter. *Hampton v. State*, 287 Ga. App. 896, 652 S.E.2d 915 (2007).

Statement was admissible as part of res gestae, even if statement incidentally placed defendant's character in evidence. — Defendant's claim that defendant's character was impermissibly placed in issue when a similar transaction witness testified that immediately after defendant had raped the witness, the defendant lay beside the victim and told the victim that "he had done that to five other women" was rejected as defendant failed to object to the testimony until after the jury was charged; moreover, had defendant raised a timely objection, the testimony still would have been admissible as part of the res gestae, even if the testimony incidentally placed defendant's character in evidence. *Harden v. State*, 272 Ga. App. 559, 612 S.E.2d 877 (2005).

Uncharged crimes that occurred at same time as charged offenses. — Victim's testimony about seeing the defendant and the codefendant rob another person was admissible under O.C.G.A. § 24-3-3 as part of the res gestae of the armed robbery and aggravated assault against the victim as the other act occurred in the same place and during the same time that the defendant and codefendant were committing the crimes against the victim. *Herieia v. State*, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

Offenses independent from prosecution. — Generally, in the prosecution for a partic-

ular offense, evidence of another offense wholly independent from the one being prosecuted is inadmissible. But, if the statement by the defendant forms a part of the same transaction of the one being prosecuted, it is a part of the res gestae and is admissible. The fact that it shows another crime and incidentally places the defendant's character in issue does not render the statement inadmissible. *Mosley v. State*, 150 Ga. App. 802, 258 S.E.2d 608 (1979).

Because facts surrounding the defendant's commission of a prior crime were similar enough to the charged crimes evidence of the prior crime was properly admitted despite the defendant's hearsay claim since, the state established that it was introducing the evidence for an appropriate purpose, there was sufficient similarity between the independent offense and the crime charged, and proof of the former tended to show the latter. *Kimbrough v. State*, 281 Ga. 885, 644 S.E.2d 125 (2007).

9. Criminal Law — Victims

Declarations as natural consequence of crime are admissible. — Victim's declarations, made shortly after the commission of the crime and as a natural consequence thereof, were admissible in evidence as part of the res gestae. *Horn v. State*, 140 Ga. App. 592, 231 S.E.2d 414 (1976).

Statements made during rape. — In a rape prosecution, statements the victim made to defendant and defendant's codefendant while the crime was in progress were admissible because the statements were part of the res gestae of the crime. *Cole v. State*, 279 Ga. App. 219, 630 S.E.2d 817 (2006).

Statements within minutes of crime. — Testimony as to statements of a victim of armed robbery made within a few minutes after the incident was admissible. *Perkins v. State*, 226 Ga. App. 613, 487 S.E.2d 365 (1997).

Absent victim's statements to the officer who first responded to the emergency call and the victim's first conversation with a detective at the hospital shortly after commission of the crime were admissible as part of the res gestae. *Jay v. State*, 232 Ga. App. 661, 503 S.E.2d 563 (1998).

Trial court did not err in admitting the statements the domestic violence victim made to the police officer at the crime scene

Application and Examples (Cont'd)
9. Criminal Law — Victims (Cont'd)

as the statements were made an hour or less after the officer arrived at the scene and while the victim was still under the effects of the crimes; accordingly, the statements were admissible as part of *res gestae*. *Mize v. State*, 262 Ga. App. 486, 585 S.E.2d 913 (2003).

Trial counsel's failure to object to admission of the victim's statement to the witness that victim and defendant had just had sex, in a case in which defendant was being prosecuted for child molestation and statutory rape did not amount to ineffective assistance of counsel, as the victim made the statement to the witness moments after the sex occurred, and, thus, the statement was admissible as *res gestae* evidence. *Drummond v. State*, 275 Ga. App. 86, 619 S.E.2d 784 (2005).

Victim's statement made within minutes of a crime to an officer was admissible as part of the *res gestae*, under O.C.G.A. § 24-3-3, including the fact that the victim recognized one of the perpetrators of the crime as the defendant. *Inman v. State*, 281 Ga. 67, 635 S.E.2d 125 (2006), cert. denied, U.S. , 128 S. Ct. 42; 169 L. Ed. 2d 40 (2007).

Murder victim's statements to neighbors, paramedics, and an officer identifying the defendant as the shooter were nontestimonial as the statements were made while the incident was still ongoing and the perpetrator was at large. Thus, the confrontation clause was not implicated, and the admission of the statements under O.C.G.A. § 24-3-3, the *res gestae* exception to the hearsay rule, did not violate the defendant's sixth amendment rights. *Thomas v. State*, 284 Ga. 540, 668 S.E.2d 711 (2008).

An armed robbery defendant's counsel was not ineffective in failing to object to the testimony of the detective as to what the victim and a witness said when the detective arrived at the bank, seven minutes after the robbery. There was no showing that the statements were made as the result of any afterthought; they were therefore admissible as *res gestae* under O.C.G.A. § 24-3-3. *Collier v. State*, No. A09A1764, 2010 Ga. App. LEXIS 292 (Mar. 23, 2010).

Statement shortly after crime occurred. — Trial court was not clearly erroneous in admitting testimony as to a statement made

by an earlier victim as to a sexual assault by defendant under the *res gestae* exception; the statement was made shortly after the crime occurred when the victim was still upset and shaking. *Leaptrot v. State*, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Defendant's claim that trial counsel was ineffective for allowing the prosecutor to "elicit extensive hearsay" regarding what the victim told a friend about the rape was rejected as counsel made a hearsay objection to the testimony which was sustained in part; the trial court permitted the victim's outcry witness to testify about what the victim said because those statements were made immediately after the rape and, therefore, constituted admissible *res gestae* evidence. *Powell v. State*, 272 Ga. App. 628, 612 S.E.2d 916 (2005).

Trial court properly admitted the excited utterances of an armed robbery victim as part of the *res gestae* free from all suspicion of device or afterthought; moreover, *Crawford* did not apply as the statements were not made to a police officer during a subsequent investigation of the crime, nor were the statements made to an officer or 9-1-1 operator for the purpose of proving a fact regarding some past event. *Fields v. State*, 283 Ga. App. 208, 641 S.E.2d 218 (2007).

Statements within hours of crime. — Evidence showed that the victim's statements were all consistent and delivered within a few hours of the time the victim said the victim escaped captivity; trial court did not err in concluding that the statements were free from suspicion of device or afterthought so as to allow the statements' admission as an exception to the hearsay exclusion. *Underwood v. State*, 250 Ga. App. 764, 552 S.E.2d 915 (2001).

Statements made by a child victim within hours of an alleged sexual assault were made at a time so nearly connected with the incident so as to be free from all suspicion, device, or afterthought, and hence, were admissible as part of *res gestae*. *Freeman v. State*, 282 Ga. App. 185, 638 S.E.2d 358 (2006).

Victim's on-the-scene description admissible. — There was no error in allowing the investigating officer to relate for the jury the distraught victim's on-the-scene description of the attack upon the victim, including the

victim's description of the assailant, even though this evidence was more narrative than exclamatory. *McKinney v. State*, 218 Ga. App. 633, 463 S.E.2d 136 (1995); *Basu v. State*, 228 Ga. App. 591, 492 S.E.2d 329 (1997).

When an outcry is communicated to witnesses immediately after a victim locates the witnesses, which is within one hour after the offense, these declarations, made so shortly after the commission of the crime, constitute part of the *res gestae*. *Tucker v. State*, 243 Ga. 683, 256 S.E.2d 365 (1979).

Robbery victim's statements to the arresting officer and emergency room physician identifying the victim's assailant as the victim's great grandson were so closely connected to the offense as to be inherently reliable, particularly in light of the victim's refusal to testify once the victim realized the penal consequences to the defendant. *Jenkins v. State*, 232 Ga. App. 395, 501 S.E.2d 891 (1998).

Conversations before crime not part of *res gestae*. — Testimony concerning a conversation between deceased victim and a murder suspect occurring some hours before the murder was not part of the *res gestae* because it did not lead to the murder, and was in no way connected with the murder. *Mitchell v. State*, 71 Ga. 128 (1883).

Statements preceding crime. — Statement from deceased child declarant that there was no need for the child's mother to call the school and confirm that the child arrived safely on the day the child disappeared was not part of the *res gestae* as it was not made contemporaneously with, or in relation to, the commission of the crimes for which defendant was being tried; appellate court believed that the statement was merely intended to demonstrate the child's nature and trusting disposition. *Head v. State*, 276 Ga. 131, 575 S.E.2d 883 (2003).

Audiotape of 9-1-1 calls. — In a prosecution for rape, kidnapping, assault, and sodomy, it was not error to allow the state to play a 9-1-1 audiotape of calls made by the victim and witnesses during the attack. *Moore v. State*, 217 Ga. App. 207, 456 S.E.2d 708 (1995).

When defendant kidnapped the victim in front of the victim's children, the victim and the children were part of *res gestae* since the victim's statements were made while the

incident was in progress, one of the children was on the telephone with the 9-1-1 operator recounting the altercation as the altercation occurred, and a policeman found the children distraught and holding makeshift weapons; as the statements sprang out of the incident, the statements were admissible. *Jackson v. State*, 255 Ga. App. 279, 564 S.E.2d 865 (2002).

When a tape of a 9-1-1 call was made contemporaneous with the call, the content of the call showed that the call was contemporaneous with the burglary at issue, the 9-1-1 operator testified that the tape was a fair and accurate depiction of the actual conversation, the caller's statements were made while the incident was actually in progress, and the statements were made without premeditation or afterthought, a trial court correctly allowed admission of the tape as part of the *res gestae* of the burglary. *Sweney v. State*, 265 Ga. App. 21, 593 S.E.2d 12 (2003).

Defendant's motion in limine to exclude evidence of a 9-1-1 call and the defendant's motion for a directed verdict were properly denied as the 9-1-1 call was not testimonial since the call was not premeditated and was made to prevent or stop a crime; under Georgia law, the 9-1-1 statements were admissible as part of the *res gestae* or as an excited utterance and the confrontation clause and *Crawford v. Washington*, 541 U. S. 36 (2004), were inapplicable. *Kimbrell v. State*, 280 Ga. App. 867, 635 S.E.2d 237 (2006).

Recording of victim's radio transmission. — Recorded radio voice transmission of the deceased victim made while proceeding to the scene of the homicide is admissible as forming part of the *res gestae*. The victim's voice transmission made while proceeding to the scene together with the events occurring there only moments later constituted the transaction under investigation. The death of the person making such statement is no ground for the statement's exclusion. *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972).

Victim's taped interview. — Absent victim's taped interview made 18 or 19 hours after the incident was not part of the *res gestae* but, because it was cumulative of other testimony, admission of the statement was not reversible error. *Jay v. State*, 232 Ga. App. 661, 503 S.E.2d 563 (1998).

Application and Examples (Cont'd)
9. Criminal Law — Victims (Cont'd)

Statements by assault victims held admissible as res gestae in the following cases. — See *Life & Cas. Ins. Co. v. Lingerfelt*, 100 Ga. App. 482, 111 S.E.2d 730 (1959) (statement made within 10 minutes of assault); *Barker v. State*, 144 Ga. App. 339, 241 S.E.2d 11 (1977) (statement shortly after assault); *Nasworthy v. State*, 169 Ga. App. 603, 314 S.E.2d 446 (1984) (testimony of ex-spouse and child); *Robinson v. State*, 197 Ga. App. 600, 399 S.E.2d 94 (1990) (victim's identification of attacker to adult child).

Evidence that the victim heard an unidentified female voice scream defendant's name, tell the defendant "don't do it," and tell defendant that the defendant was going to kill the victim, as a gun was cocked and fired at the victim, was admissible under the res gestae exception to the hearsay rule. *Sharif v. State*, 272 Ga. App. 660, 613 S.E.2d 176 (2005).

Nurse's testimony that a victim told the nurse that the victim was attacked by the victim's roommate while the victims was sleeping was admissible under O.C.G.A. § 24-3-3 because of the victim's physical and emotional condition when the victim made the statements and because the statements were made immediately after the attack; further, the correctional officers had testified that defendant was the aggressor in the affray and that the victim appeared to have been asleep at the inception of the incident, so the hearsay testimony given by the nurse was cumulative of other evidence. *Brown v. State*, 273 Ga. App. 88, 614 S.E.2d 187 (2005).

Statements by child molestation victim. — Testimony by two witnesses regarding statements made by one of the victims about seeing the defendants engaged in sex was admissible as res gestae evidence. *Grimsley v. State*, 233 Ga. App. 781, 505 S.E.2d 522 (1998).

Statements by child molestation victim made to mother several hours after event admissible. — See *Kilgore v. State*, 177 Ga. App. 656, 340 S.E.2d 640 (1986).

Statements by victim of child molestation made to teacher some hours after the event was admissible. *Samples v. State*, 169 Ga. App. 605, 314 S.E.2d 448 (1984).

Statements by child molestation victim about battery on grandmother. — Trial court did not err in denying defendant's motion for mistrial after one of the child victims testified that defendant battered the child's grandmother shortly after the grandmother stumbled upon defendant molesting that child as the evidence supported a finding that this battering was part of the res gestae of the child molestation crime. *Prather v. State*, 279 Ga. App. 552, 631 S.E.2d 758 (2006).

Witness's testimony concerning victim's recital to the witness of facts of an alleged rape some 12 hours after the offense was not admissible as an outcry — i.e., as part of the res gestae — but was admissible for the purpose of establishing that the prosecutor had complained that a rape had occurred. *Barnes v. State*, 171 Ga. App. 478, 320 S.E.2d 597 (1984).

Victim's parent's testimony about phone call following rape. — Victim's parent's testimony as to the daughter's telephone call to the parent after the rape was admissible as res gestae. *Howard v. State*, 228 Ga. App. 784, 492 S.E.2d 759 (1997).

Victim's statement following phone call. — Victim's statement following a phone conversation with defendant that the victim had to "get" defendant because defendant told the victim the defendant was going to kill the victim, considered in the context in which it was made, was an excited utterance. *Walthour v. State*, 269 Ga. 396, 497 S.E.2d 799 (1998).

Testimony of police officer that victim told the officer that defendant forced the victim's car off the road was within the "excited utterance" hearsay exception and admissible as part of the res gestae. *T.G. & Y. Stores Co. v. Waters*, 175 Ga. App. 884, 334 S.E.2d 910 (1985).

Testimony by victim on witness's statements to victim. — Trial court did not err by allowing a burglary victim to testify that the victim's neighbor, an eyewitness, told the victim that the witness saw someone running from the victim's house or as to the neighbor's description of the perpetrator when such declarations were made in a phone call to the victim substantially contemporaneously with the burglary and soon thereafter when the victim returned home. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Statements by victims identifying their murderers admissible as res gestae in the following cases. — See *Jordan v. State*, 180 Ga. 871, 181 S.E. 151 (1935); *Gates v. State*, 120 Ga. App. 518, 171 S.E.2d 375 (1969).

Defendant's threatening words and behavior made defendant's angry telephone message and act of hunting for the victim's hotel room a startling event that, in all probability, impeded the victim's normal thought processes, and the victim's comment to the victim's friend that defendant was going to kill the victim appears to have been spontaneous and not the result of reasoned deliberation. Testimony such as the friend's, that the declarant appeared nervous and upset, combined with a reasonable basis for emotional upset, will usually suffice for admission under the excited utterance exception of O.C.G.A. § 24-3-3. *Demons v. State*, 277 Ga. 724, 595 S.E.2d 76 (2004).

Firmly rooted hearsay exceptions, such as res gestae, the excited utterance exception of O.C.G.A. § 24-3-3, are generally not a sufficient substitute for a prior opportunity for cross-examination in order to admit testimonial hearsay in a criminal case. However, when a deceased victim's statements were not "testimonial," the statements were not precluded from admission under Georgia's res gestae exception to the hearsay rule. *Demons v. State*, 277 Ga. 724, 595 S.E.2d 76 (2004).

Rape and kidnapping part of one transaction. — Because the evidence showed that a victim's kidnapping and rape were part of one criminal transaction, the trial court did not abuse the court's discretion in admitting evidence of the rape, as it formed a part of the res gestae. *Garrett v. State*, 285 Ga. App. 282, 645 S.E.2d 718 (2007).

Statement by victim to police officer. — Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under O.C.G.A. § 24-9-83, was properly admitted as part of the res gestae under O.C.G.A. § 24-3-3 because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence. *Stubbs v. State*, 293 Ga. App. 692, 667 S.E.2d 905 (2008).

10. Donors

Statements by donor of gift. — Declarations of the donor, made on the evening of the same day on which an alleged gift was made, but after the gift was made, going to show that there was a gift, and the manner of the gift, are not admissible as parts of the res gestae. *Carter v. Buchannon*, 3 Ga. 513 (1847).

11. Employees

Statement made by the store manager in a slip and fall action pertaining to the identity of the slippery substance which allegedly caused the fall was admissible as an admission against interest or under the res gestae exception and was sufficient to raise a question of fact precluding summary judgment in favor of the store. *Brown v. Piggly Wiggly S., Inc.*, 210 Ga. App. 459, 436 S.E.2d 513 (1993).

Employee's statement held admissible. — Statement made just after plaintiff's fall by an unknown employee in the presence of the store manager that "if this floor had been mopped or kept mopped this wouldn't happen" was admissible as part of the res gestae and might also have been an admission against defendant store's interest. *Sutton v. Winn Dixie Stores, Inc.*, 233 Ga. App. 424, 504 S.E.2d 245 (1998).

Employee's statement held not admissible. — Extrajudicial admission of employee, who was not a party to the indemnity contract, nor a party to the suit was not admissible as a part of the res gestae of the larceny for which the employer was seeking indemnification, nor as an admission by a stranger to the suit bearing upon a collateral issue essential to the adjudication, as the admission was not collateral to the main issue involved, but bore directly upon it. *Glens Falls Indem. Co. v. Gottlieb*, 80 Ga. App. 634, 56 S.E.2d 799 (1949).

In an action for injuries sustained after falling on a wet floor, testimony of the injured customer that a store employee came up to the customer after the customer fell and stated that a child had thrown up on the floor was not admissible as part of the res gestae. The testimony did not create a triable

Application and Examples (Cont'd)

11. Employees (Cont'd)

issue of fact as to the store owner's knowledge of a dangerous condition. *Hagan v. Goody's Family Clothing, Inc.*, 227 Ga. App. 585, 490 S.E.2d 107 (1997).

As a witness's hearsay statement to an investigator was made 13 days after the fire at issue in the litigation, it could not be said to have been voluntary or free of all suspicion or afterthought, and hence was not admissible under the *res gestae* exception. *HCP III Woodstock, Inc. v. Healthcare Servs. Group, Inc.*, 254 Ga. App. 242, 562 S.E.2d 225 (2002).

12. Opinions

An opinion or conclusion is admissible as *res gestae* evidence if it is spontaneous or reflective rather than a reasoned one arrived at deliberately after thoughtful consideration. *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974).

13. Personal Injuries

Statements by injured persons held admissible in the following cases. — See *Charleston & W. Carolina Ry. v. Burckhalter*, 141 Ga. 127, 80 S.E. 278 (1913) (statement to doctor); *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1915) (statement to spouse); *Aetna Life Ins. Co. v. Jones*, 80 Ga. App. 472, 56 S.E.2d 305 (1949) (statement to stepson); *Gilbert Corp. of Del., Inc. v. Yetman*, 219 Ga. App. 320, 464 S.E.2d 822 (1995) (officer's testimony about decedent's statements).

Statements held inadmissible. — Statements by an injured party to a hospital surgeon were held inadmissible. *Hunter v. State*, 147 Ga. 823, 95 S.E. 668 (1918).

Excluded testimony of two witnesses that a patient told the witnesses that the patient had pointed out a bump on the patient's breast to a doctor and that the doctor told the patient not to be concerned about the bump was not admissible under the *res gestae* exception as it was unclear how much time elapsed between the office visit and the patient's statements to the witnesses; moreover, the patient did not testify that the patient told the witnesses about the office

visit and there was no way to establish the exact sequence of events that occurred between the office visit and the discussions about that visit or to determine the circumstances surrounding the making of the statements. *Davis v. Reid*, 272 Ga. App. 312, 612 S.E.2d 112 (2005).

14. Principal and Surety

Statements during transaction for which surety is bound held admissible. — If the admissions of a principal are made during the transaction of the business for which the surety is bound, the admissions become a part of the *res gestae* and are admissible; otherwise, the admissions are not. *Dobbs v. Justices of Inferior Court*, 17 Ga. 624 (1855).

15. Sales

Agreement of sale. — Declarations of a vendor of property, as to the vendor's motive for the sale, made at the time and during the progress of the sale, and even so soon thereafter as to be free from all suspicion of afterthought, are admissible evidence on a trial as to the validity of the sale. *McLean v. Clark*, 47 Ga. 24 (1872).

16. Transcripts

Testimonial conclusions contained in an incident report prepared by store's security personnel that a customer of the store had been struck in the abdomen by shopping carts steered by an employee of the store were admissible under the *res gestae* exception to the hearsay rule. *Super Disc. Mkts., Inc. v. Coney*, 210 Ga. App. 659, 436 S.E.2d 803 (1993).

Photostatic copy of log made by the operator on duty representing radio communication of officers engaged in high speed chase with defendant was admissible as part of the *res gestae*. *Waller v. State*, 80 Ga. App. 488, 56 S.E.2d 491 (1949).

17. Wills

Any acts or declarations by the principal legatee, who procures the will under which one claims to be written, may be given in evidence as a part of the *res gestae*. *Morris v. Stokes*, 21 Ga. 552 (1857), *aff'd*, 27 Ga. 239 (1859).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 874.

C.J.S. — 31A C.J.S., Evidence, §§ 310, 311, 342, 548 et seq.

ALR. — Extrajudicial admissions by principal as evidence against surety, 60 ALR 1500.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 ALR 170; 150 ALR 623.

Admissibility of telephone conversations in evidence, 71 ALR 5; 105 ALR 326.

Admissibility of declarations of testator on issue of undue influence, 79 ALR 1447; 148 ALR 1225.

Admissibility of declarations by testator on issue of revocation of will, 79 ALR 1493; 172 ALR 354.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 ALR 825.

Admissibility of dying declarations in cases other than prosecution for homicide, 91 ALR 560.

Admissibility in favor of beneficiary of life or accident insurance of statements or declarations made by insured outside of his application, 93 ALR 413.

Admissibility and weight of evidence of defendant's attempt to secure release by bribing officer, 93 ALR 810.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Admissibility as *res gestae* of declaration by nonparticipant as affected by evidence or lack of evidence that he actually observed the act or fact, 127 ALR 1030.

Admissibility of statements by one who claimed to have met with an accident, as evidence of fact of accident, 130 ALR 291.

Admissibility, on issue of negligence or contributory negligence, of statement or comment in respect of conduct of driver of car, or other person, shortly afterwards involved in an accident, 140 ALR 874.

Statute which disqualified one person as a witness because of death of another, as applicable to testimony as to statements or acts of deceased, offered as part of *res gestae* or to show mental condition ("verbal act" theory), 146 ALR 250.

Res gestae utterances in actions founded on accidents, 163 ALR 15.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death, 1 ALR2d 365.

Inability of person making utterance to recollect and narrate facts to which it relates as affecting its admissibility as part of *res gestae*, 7 ALR2d 1324.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased, 34 ALR2d 451.

Admissibility of declarations of grantor on issue of delivery of deed, 34 ALR2d 588.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 ALR2d 817.

Admissibility of dying declaration in civil case, 47 ALR2d 526.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245.

Spontaneity of declaration sought to be admitted as part of *res gestae* as question for court or ultimately for jury, 56 ALR2d 372.

Admissibility, in action on employee fidelity bond or policy, of confessions or declarations of such employee no longer available as witness, 65 ALR2d 631.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 ALR2d 806.

Admissibility in criminal case, as part of the *res gestae*, of statements or utterances of bystanders made at time of arrest, 78 ALR2d 300.

Declarant's age as affecting admissibility as *res gestae*, 83 ALR2d 1368; 15 ALR4th 1043.

Admissibility of homicide victim's statements exculpating the accused, 95 ALR2d 637.

Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149.

Admissibility, as *res gestae*, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114.

Admissibility, as part of *res gestae*, of spontaneous utterances of unidentified bystander testified to by an interested party, 50 ALR3d 716.

Admissibility, as *res gestae*, of accusatory utterances made by homicide victim before the act, 74 ALR3d 963.

Fact that rape victim's complaint or statement was made in response to questions as affecting *res gestae* character, 80 ALR3d 369.

Time element as affecting admissibility of statement or complaint made by victim of sex crime as *res gestae*, spontaneous exclamation, or excited utterance, 89 ALR3d 102.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under *res gestae* or excited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act, 38 ALR4th 1237.

When is hearsay statement made to 9-1-1 operator admissible as "present sense impression" under Uniform Rules of Evidence 803(1) or similar state rule, 125 ALR5th 357.

24-3-4. Statements made for medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence. (Code 1933, § 38-315, enacted by Ga. L. 1977, p. 226, § 1.)

Law reviews. — For article, "An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception," see 33 Ga. L. Rev. 353 (1999). For article, "Evidence," see 53 Mercer L. Rev. 281 (2001). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

For comment on *Argonaut Ins. Co. v. Allen*, 123 Ga. App. 741, 182 S.E.2d 508 (1971), upholding admission of psychiatric opinion based on subjective declarations of patient, see 8 Ga. St. B.J. 554 (1972).

JUDICIAL DECISIONS

This statute relates only to factual matters which would be within the immediate knowledge of the patient personally, and statements of medical opinion are not included. *Dunn v. McIntyre*, 146 Ga. App. 362, 246 S.E.2d 398 (1978) (see O.C.G.A. § 24-3-4).

This statute does not encompass statements of medical opinion made by one physician to another but instead refers only to statements made by or on behalf of the patient when seeking medical care. *Dunn v. McIntyre*, 146 Ga. App. 362, 246 S.E.2d 398 (1978) (see O.C.G.A. § 24-3-4).

O.C.G.A. § 24-3-4 does not cover statements of medical opinion made by one physician to another, much less a second-hand recitation of what the witness was told by another person concerning the injured

plaintiff's condition. *Pirkle v. Hawley*, 199 Ga. App. 371, 405 S.E.2d 71, cert. denied, 199 Ga. App. 906, 405 S.E.2d 71 (1991).

Responses to medical questions of patient taken to hospital admissible. — Testimony of a doctor who related a patient's responses to medical questions for purposes of diagnosis and treatment was admissible under the exception to the hearsay rule provided by O.C.G.A. § 24-3-4 since where the responses were given within a matter of minutes after the patient was taken to the hospital. *Allen v. State*, 174 Ga. App. 206, 329 S.E.2d 586 (1985).

Statements made by child to nurse several months after sexual abuse. — Testimony of nurse, who prepared child for examination by physician, as to statements made to the

nurse by the child was admissible in prosecution for child molestation, even though the statements were made several months after the sexual abuse occurred, since the statements were made for the purpose of medical diagnosis and treatment and did not identify or in any way refer to the defendant. *Sparks v. State*, 172 Ga. App. 891, 324 S.E.2d 824 (1984).

Statements to psychologist as to grief. — When a psychologist, in a deposition which was introduced into evidence at trial, stated several times that plaintiffs were suffering from great pain, grief, and stress when the psychologist met with them approximately one year after the death of their son, the statements made to the psychologist during the psychologist's evaluation were exceptions to the hearsay rule under O.C.G.A. § 24-3-4. *Southern Ry. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987).

Testimony from psychologist on schizophrenia. — In a proceeding on termination of parental rights, the trial court did not err in allowing a clinical psychologist to testify as to the possible effects schizophrenia may have on caring for children based upon the psychologist's psychological evaluations of the mother. *In re M.D.*, 244 Ga. App. 156, 534 S.E.2d 889 (2000).

Failure to assert admissibility is waiver. — Failure of the plaintiff to assert that a statement made by a therapist at a deposition was admissible under O.C.G.A. § 24-3-4 as a statement made for medical diagnosis or treatment at trial when the trial court asked for the plaintiff's response to a hearsay objection precluded the appellate court from considering the issue for the first time on appeal. *Bryant v. Food Giant, Inc.*, 184 Ga. App. 155, 361 S.E.2d 38 (1987).

Past recollections within medical record inadmissible. — When the original of the medical record itself is admissible but diagnostic opinions and conclusions therein are inadmissible, past recollection recorded by a doctor of a patient's medical history contained in a medical record, which included a diagnostic opinion of another doctor, would be inadmissible. *Stoneridge Properties, Inc. v. Kuper*, 178 Ga. App. 409, 343 S.E.2d 424 (1986).

Physical description of a victim's assailant is not reasonably pertinent to the diagnosis and treatment of the victim and the exclu-

sion of a hospital report containing such a description is proper. *Arnold v. State*, 166 Ga. App. 313, 304 S.E.2d 118 (1983).

Testimony pertinent to diagnosis and treatment of victim. — See *Davis v. State*, 168 Ga. App. 272, 308 S.E.2d 602 (1983).

Testimony by a doctor that the doctor received a report that a mixture of hot bleach was thrown in the victim's face was properly admitted as the testimony related to the cause of the victim's injuries and was made for the purpose of the victim's diagnosis and treatment. *Payne v. State*, 273 Ga. App. 483, 615 S.E.2d 564 (2005).

Trial court properly admitted testimony of an emergency medical technician who arrived on the scene of a vehicle accident caused by defendant as the technician's questions to defendant were pertinent to defendant's medical treatment, and defendant's response that defendant had been drinking alcohol and smoking marijuana all night was properly admitted pursuant to O.C.G.A. § 24-3-4. *Ellis v. State*, 275 Ga. App. 881, 622 S.E.2d 89 (2005).

Trial court did not err in permitting a challenged state expert, who examined the victim, to testify as to what the victim stated during an emergency room examination as the victim corroborated the expert's testimony and the expert based the testimony on personal knowledge, not hearsay; moreover, the expert's testimony did not improperly bolster that of the victim, but merely repeated the information that the victim provided, which the expert used to examine the victim and draw medical conclusions. *Scott v. State*, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

With regard to a defendant's trial and conviction for aggravated sodomy and simple battery involving the sexual assault of an inmate upon an inmate, the trial court did not violate the defendant's rights under the confrontation clause by admitting the statements made by the victim to the physician and the nurse who treated the victim for the injuries received because the statements were admissible under O.C.G.A. § 24-3-4, the medical diagnosis or treatment exception, and did not fall within any class of testimonial statement. In particular, no objective witness would reasonably conclude that the statements were made under such circumstances that the statement would be

available for use at a later trial. *Thomas v. State*, 288 Ga. App. 602, 654 S.E.2d 682 (2007), cert. denied, 2008 Ga. LEXIS 471 (Ga. 2008).

With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to hearsay testimony of the emergency room physician who treated the victim did not amount to ineffective assistance of counsel as the physician's testimony was admissible under the hearsay exception set forth in O.C.G.A. § 24-3-4 since the challenged statements related to the cause of the victim's injuries and were made for the purpose of the victim's diagnosis and treatment. As a result, the trial court did not err in admitting the statements and, therefore, since the statements were admissible, there was no merit to the defendant's contention that the defendant's trial counsel's failure to object to the hearsay testimony was ineffective assistance. *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

Medical history and records admissible. — In a personal injury action, plaintiff's alleged statements made to plaintiff's medical providers regarding medical history during plaintiff's diagnosis and treatment were not inadmissible hearsay. *Barone v. Law*, 242 Ga. App. 102, 527 S.E.2d 898 (2000).

Testimony held not within rule. — When a physician's testimony includes the victim's out-of-court statements to the physician that intercourse with the victim's father (the defendant) had taken place, admission of that portion of the statement was error; the identity of the defendant contained in the out-of-court statements was unnecessary to any legitimate purpose addressed in this statute. *Johnson v. State*, 149 Ga. App. 544, 254 S.E.2d 757 (1979) (see O.C.G.A. § 24-3-4).

Admission of an emergency room physician's testimony that the patient told the physician she had been raped by a black man named "Miller" was error; however, since the evidence was cumulative, the admission was not prejudicial to defendant. *Miller v. State*, 194 Ga. App. 533, 390 S.E.2d 901 (1990).

Admission of a shooting victim's statements to a physician regarding the circumstances and activity prior to the shooting,

which did not fall within the statutory exception because they were not reasonably pertinent to the physician's diagnosis or treatment, was harmless error since it was highly probable that the error did not contribute to the judgment. *Howard v. State*, 261 Ga. 251, 403 S.E.2d 204 (1991).

Doctor's testimony that a child abuse victim's father told the doctor that defendant abused the child was not admissible as an out-of-court statement made for the purpose of describing medical history reasonably pertinent to diagnosis or treatment. *Cupe v. State*, 253 Ga. App. 851, 560 S.E.2d 700 (2002).

Nurse's testimony that a victim told the nurse that the victim was attacked by the victim's roommate while the victim was sleeping was not admissible under O.C.G.A. § 24-3-4 as the statements were not reasonably pertinent to the nurse's diagnosis or treatment of the victim. *Brown v. State*, 273 Ga. App. 88, 614 S.E.2d 187 (2005).

Testimony admissible. — Trial court did not err in admitting the medical record from the doctor as an exception to the hearsay rule. *Central of Ga. R.R. v. Carter*, 212 Ga. App. 528, 442 S.E.2d 269 (1994).

In a negligence action seeking compensatory damages for a disabling injury, because an emergency room report was prepared prior to performance of the surgery on plaintiff's foot so that the statement was made before medical treatment was rendered, the trial court did not err in allowing admission as such under O.C.G.A. § 24-3-4. *Imm v. Chaney*, 287 Ga. App. 606, 651 S.E.2d 855 (2007).

Trial court did not abuse its discretion when it admitted the testimony of the nurse who performed the initial examination of the victim because, even assuming that the victim's identification of the defendant as the victim's attacker was not reasonably pertinent to the diagnosis or treatment, that identification was cumulative of other evidence as to the defendant's identity. *McGill v. State*, 302 Ga. App. 378, 690 S.E.2d 648 (2010).

Nurse practitioner's testimony which identified child molestation victim's father as the molester was cumulative of that of other witnesses, including the victim personally, and therefore harmless. *Hyde v. State*, 189 Ga. App. 727, 377 S.E.2d 187, cert. denied, 189 Ga. App. 912, 377 S.E.2d 187 (1988).

Impeachment of declarant. — Party must be given the opportunity to impeach the credibility of a declarant whose statement is admitted under the medical diagnosis or treatment exception to the hearsay rule. *Allen v. State*, 247 Ga. App. 10, 543 S.E.2d 45 (2000).

Information given to a licensed professional counselor is admissible under this exception to the hearsay rule. *Allen v. State*, 247 Ga. App. 10, 543 S.E.2d 45 (2000).

Cited in *Banks v. State*, 144 Ga. App. 471, 241 S.E.2d 587 (1978); *Harper v. Department of Human Resources*, 159 Ga. App. 758, 285 S.E.2d 220 (1981); *Myers v. State*, 160 Ga. App. 685, 288 S.E.2d 27 (1981); *Lewis v. State*, 161 Ga. App. 209, 288 S.E.2d 278 (1982); *Jones v. State*, 161 Ga. App. 610, 288 S.E.2d 788 (1982); *Kirby v. State*, 174 Ga. App. 58, 329 S.E.2d 228 (1985); *Sanders v. Southern Farm Bureau Life Ins. Co.*, 174 Ga.

App. 888, 332 S.E.2d 33 (1985); *Greene v. Fulton-DeKalb Hosp. Auth.*, 177 Ga. App. 499, 339 S.E.2d 770 (1986); *Keri v. State*, 179 Ga. App. 664, 347 S.E.2d 236 (1986); *State v. Butler*, 256 Ga. 448, 349 S.E.2d 684 (1986); *Thompson v. State*, 187 Ga. App. 152, 369 S.E.2d 523 (1988); *Metropolitan Atlanta Rapid Transit Auth. v. Allen*, 188 Ga. App. 902, 374 S.E.2d 761 (1988); *Gilbert v. State*, 191 Ga. App. 574, 382 S.E.2d 630 (1989); *Dean v. State*, 198 Ga. App. 133, 401 S.E.2d 40 (1990); *T & M Invs., Inc. v. Jackson*, 206 Ga. App. 218, 425 S.E.2d 300 (1992); *Height v. State*, 214 Ga. App. 570, 448 S.E.2d 726 (1994); *Williams v. Memorial Medical Ctr., Inc.*, 218 Ga. App. 107, 460 S.E.2d 558 (1995); *Lane v. Tift County Hosp. Auth.*, 228 Ga. App. 554, 492 S.E.2d 317 (1997); *Chauncey v. State*, 283 Ga. App. 217, 641 S.E.2d 229 (2007); *Opio v. State*, 283 Ga. App. 894, 642 S.E.2d 906 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 881.

C.J.S. — 31A C.J.S., Evidence, §§ 345, 346, 349.

ALR. — Illness after partaking of food or drink as evidence of negligence on part of one who prepared or sold it, 49 ALR 592.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 65 ALR 1217; 51 ALR2d 1051.

Admissibility of hospital chart or other hospital record, 75 ALR 378; 120 ALR 1124.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or is incompetent to testify because of age or other reason, 157 ALR 1359.

Proof of identity of person or thing where object, specimen, or part is taken from a

human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 ALR2d 1216.

Admissibility of hospital record relating to cause or circumstances of accident or incident in which patient sustained injury, 44 ALR2d 553.

Necessity of expert evidence to support action against hospital for injury to or death of patient, 40 ALR3d 515.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital records, 55 ALR3d 551.

Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442; 77 ALR4th 927.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Uniform Rules of Evidence, 38 ALR5th 433.

24-3-5. Declarations of conspirators.

After the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all. (Orig. Code 1863, § 3698; Code 1868, § 3722; Code 1873, § 3775; Code 1882, § 3775; Penal Code 1895, § 999; Penal Code 1910, § 1025; Code 1933, § 38-306.)

Law reviews. — For article, “An Analysis of Georgia’s Proposed Rules of Evidence,” see 26 Ga. St. B.J. 173 (1990). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009).

For comment on *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), and Georgia’s coconspirator exception to the hearsay rule, see 22 Mercer L. Rev. 791 (1971).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSTITUTIONALITY

APPLICATION

CONSTRUCTION WITH § 24-3-52

CONSPIRACY DEFINED

1. IN GENERAL

2. PROOF OF CONSPIRACY

PENDENCY OF CRIMINAL PROJECT

1. IN GENERAL

2. TERMINATION OF CONSPIRACY

PROCEDURE

1. ORDER OF PROOF

2. DUTY OF JURY

3. INSTRUCTIONS

4. UNAVAILABILITY OF DECLARANT

General Consideration

Coconspirator’s exception to the hearsay rule is codified at O.C.G.A. § 24-3-5. *Hunter v. State*, 179 Ga. App. 368, 347 S.E.2d 2 (1986).

Defendant responsible for incidental, but unanticipated, acts. — When there is evidence that two or more individuals have conspired to accomplish a common design and one or more of the conspirators has done an act which is an incidental and probable consequence of the original design and which the acting conspirator(s) deems to be expedient to the accomplishment of the common design, the intent and act of the acting conspirator(s) may be imputed to the other active conspirators even though the act may not have been a part of the original design. Therefore, when the common design was to burglarize the victim’s house, that the defendant may not have anticipated defendant’s coconspirators committing the burglary on the day in question did not remove defendant from the conspiracy, nor did it relieve defendant from responsibility for the incidental and probable

acts that defendant’s coconspirators felt were expedient to the accomplishment of the common design. Thus, it was not error to present evidence concerning acts of murder committed by the coconspirators that occurred after the coconspirators entered the victim’s home. *Bruce v. State*, 263 Ga. 273, 430 S.E.2d 745 (1993).

Statement must be that of defendant. — If a hearsay statement was not made by the defendant and could not be imputed to defendant, it could not be admitted to show defendant’s motive or intent. *Hart v. State*, 174 Ga. App. 134, 329 S.E.2d 178 (1985).

Use of translator. — Use of a translator between the defendant and a witness did not render the witness’s testimony about the substance of the translation inadmissible, pursuant to the language conduit rule, as no evidence was presented to the trial court to show that the translator had a motive to distort the translation; moreover, since the translator was a coconspirator, to the extent statements were made directly to the witness in English to further the conspiracy, the witness could testify regarding those statements under the coconspirator exception to

the hearsay rule, O.C.G.A. § 24-3-5. *Lopez v. State*, 281 Ga. App. 623, 636 S.E.2d 770 (2006).

Intercepted conversation between coconspirators in the back seat of a patrol car was admissible in the trial of one of the coconspirators because the other took the stand and was subject to cross-examination, and because the conversation took place when the coconspirators were actively attempting concealment. *Burgeson v. State*, 267 Ga. 102, 475 S.E.2d 580 (1996).

Coconspirator not available for cross-examination. — Testimony by an undercover police officer as to a statement made by a coconspirator during the pendency of the criminal project was not inadmissible simply because the coconspirator was not available for cross-examination since, after the fact of conspiracy is proved, the declarations of any one of the conspirators during the pendency of the project is admissible against all. *Clark v. State*, 236 Ga. App. 153, 510 S.E.2d 907 (1999).

Cited in *Ethridge v. State*, 163 Ga. 186, 136 S.E. 72 (1926); *Lance v. State*, 166 Ga. 15, 142 S.E. 105 (1928); *Farmers & Traders Bank v. Davis*, 39 Ga. App. 74, 146 S.E. 793 (1928); *Brandon v. State*, 169 Ga. 808, 151 S.E. 493 (1930); *Sanders v. State*, 46 Ga. App. 175, 167 S.E. 207 (1932); *Smith v. State*, 52 Ga. App. 88, 182 S.E. 816 (1935); *Walker v. State*, 57 Ga. App. 868, 197 S.E. 67 (1938); *Johnson v. State*, 188 Ga. 771, 4 S.E.2d 639 (1939); *National Ben Franklin Fire Ins. Co. v. Purvis*, 61 Ga. App. 674, 7 S.E.2d 296 (1940); *Hodges v. State*, 64 Ga. App. 328, 13 S.E.2d 90 (1941); *Mitchell v. State*, 202 Ga. 247, 42 S.E.2d 767 (1947); *Pressley v. State*, 205 Ga. 197, 53 S.E.2d 106 (1949); *Robinson v. State*, 207 Ga. 337, 61 S.E.2d 475 (1950); *Spradlin v. State*, 90 Ga. App. 97, 82 S.E.2d 238 (1954); *McDougald v. State*, 109 Ga. App. 681, 137 S.E.2d 383 (1964); *Pinion v. State*, 225 Ga. 36, 165 S.E.2d 708 (1969); *Lindsey v. State*, 227 Ga. 48, 178 S.E.2d 848 (1970); *Nance v. State*, 123 Ga. App. 410, 181 S.E.2d 295 (1971); *C.A.J. v. State*, 127 Ga. App. 813, 195 S.E.2d 225 (1973); *Luke v. State*, 131 Ga. App. 799, 207 S.E.2d 213 (1974); *Jones v. State*, 133 Ga. App. 63, 209 S.E.2d 727 (1974); *Johnson v. State*, 136 Ga. App. 719, 222 S.E.2d 181 (1975); *Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61 (1976); *Fleming v. State*, 236 Ga. 434, 224 S.E.2d 15

(1976); *Coachman v. State*, 236 Ga. 473, 224 S.E.2d 36 (1976); *Reed v. State*, 238 Ga. 457, 233 S.E.2d 369 (1977); *Chesser v. State*, 141 Ga. App. 657, 234 S.E.2d 121 (1977); *Moore v. State*, 240 Ga. 210, 240 S.E.2d 68 (1977); *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978); *Sprouse v. State*, 242 Ga. 831, 252 S.E.2d 173 (1979); *Anglin v. State*, 243 Ga. 720, 256 S.E.2d 455 (1979); *Florence v. State*, 243 Ga. 738, 256 S.E.2d 467 (1979); *Sewell v. State*, 153 Ga. App. 177, 264 S.E.2d 708 (1980); *Knowles v. State*, 246 Ga. 378, 271 S.E.2d 615 (1980); *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981); *Roberts v. State*, 160 Ga. App. 717, 288 S.E.2d 31 (1981); *Henderson v. State*, 161 Ga. App. 211, 288 S.E.2d 284 (1982); *Beaman v. State*, 161 Ga. App. 129, 291 S.E.2d 244 (1982); *Wilcoxon v. State*, 162 Ga. App. 800, 292 S.E.2d 905 (1982); *Leiphart Chevrolet, Inc. v. Ewing*, 163 Ga. App. 416, 295 S.E.2d 128 (1982); *Robinson v. State*, 164 Ga. App. 652, 297 S.E.2d 751 (1982); *Mulkey v. State*, 250 Ga. 444, 298 S.E.2d 487 (1983); *Hendrixson v. State*, 167 Ga. App. 517, 306 S.E.2d 350 (1983); *Christmas v. State*, 171 Ga. App. 4, 318 S.E.2d 682 (1984); *A Child's World, Inc. v. Lane*, 171 Ga. App. 438, 319 S.E.2d 898 (1984); *Blackston v. State*, 172 Ga. App. 172, 322 S.E.2d 300 (1984); *Baker v. State*, 172 Ga. App. 877, 324 S.E.2d 818 (1984); *Duren v. State*, 177 Ga. App. 421, 339 S.E.2d 394 (1986); *Chase v. State*, 179 Ga. App. 71, 345 S.E.2d 149 (1986); *Hughes v. State*, 257 Ga. 200, 357 S.E.2d 80 (1987); *Mayne v. State*, 258 Ga. 36, 365 S.E.2d 270 (1988); *Hicks v. State*, 262 Ga. 756, 425 S.E.2d 877 (1993); *Guerra v. State*, 210 Ga. App. 102, 435 S.E.2d 476 (1993); *Huey v. State*, 263 Ga. 840, 439 S.E.2d 656 (1994); *Copeland v. State*, 266 Ga. 664, 469 S.E.2d 672 (1996); *Roberts v. State*, 221 Ga. App. 196, 471 S.E.2d 27 (1996); *Sterling v. State*, 267 Ga. 209, 477 S.E.2d 807 (1996); *Ottis v. State*, 269 Ga. 151, 496 S.E.2d 264 (1998); *Quintanilla v. State*, 273 Ga. 20, 537 S.E.2d 352 (2000); *Rogers v. State*, 247 Ga. App. 219, 543 S.E.2d 81 (2000); *Anderson v. State*, 261 Ga. App. 456, 582 S.E.2d 575 (2003).

Constitutionality

Statute does not violate the sixth amendment confrontation clause. *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428

Constitutionality (Cont'd)

U.S. 910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976).

Application of statute is not subject to objection as a denial of confrontation. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979), cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Statute not unconstitutional in application. — Statute has many applications consistent with the confrontation clause, and does not violate the Constitution. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), for comment, see 22 Mercer L. Rev. 791 (1971); (see O.C.G.A. § 24-3-5).

Evidentiary rule applied by this statute does not violate the Constitution merely because it does not exactly coincide with the hearsay exception applicable in a federal prosecution for the substantive offense of conspiracy. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), for comment, see 22 Mercer L. Rev. 791 (1971).

Statute applied consistently with the confrontation clause and the due process clause, even though the alleged accomplice did not appear as a witness at the defendant's trial. *Spivey v. State*, 138 Ga. App. 298, 226 S.E.2d 104, cert. denied, 429 U.S. 921, 97 S. Ct. 317, 50 L. Ed. 2d 288 (1976).

Defendant not deprived of right to confrontation when conspiracy shown. — When two witnesses were permitted, over a hearsay objection, to testify as to the statements made to the witnesses by deceased gasoline station operator, defendant was not deprived of defendant's constitutional rights to confrontation under U.S. Const., amend. 6 since the state's evidence was sufficient to show prima facie a conspiracy between the operator and defendant to commit arson in the third degree, and since statements made by the operator were made during the concealment stage of the conspiracy. *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

Admission of the defendants' hearsay statements as statements made by coconspirators under O.C.G.A. § 24-3-5 did not violate the confrontation clause of U.S. Const., amend. 6 since the statements were reliable, and the statements were not testimonial in nature; each statement corroborated the other statements and the physical evidence,

and each of the defendants implicated himself or herself in their statement. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Admission of coconspirator's declaration does not violate confrontation clause. — In cases involving a coconspirator exception to the hearsay rule, the admission of the statement of a coconspirator does not violate the confrontation clause if the statement and the circumstances surrounding the statement contain sufficient "indicia of reliability." *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210; *Hunter v. State*, 179 Ga. App. 368, 347 S.E.2d 2 (1986), cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984).

Factors indicating reliability of declarations. — United States Supreme Court has identified at least four factors indicative of reliability: (1) the declarations contained no assertion of a past fact, and consequently carried a warning to the jury against giving it undue weight; (2) the declarant had personal knowledge of the identity and role of participants in the crime; (3) the possibility that the declarant was relying on faulty recollection was remote; and (4) the circumstances under which the statements were made did not provide reason to believe that the declarant had misrepresented the defendant's involvement in the crime. When all of these factors are present, the defendant's sixth amendment rights are not violated by introduction of a coconspirator's declarations. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210; *Hunter v. State*, 179 Ga. App. 368, 347 S.E.2d 2 (1986).

When the four factors indicative of reliability identified by the United States Supreme Court are present in the case, a demonstration of the unavailability of the coconspirator is not required and the defendant's sixth amendment confrontation rights are not violated by introduction of testimony regarding the coconspirator's declarations. *Hunter v. State*, 179 Ga. App. 368, 347 S.E.2d 2 (1986).

Application

Statute is applicable in civil as well as criminal cases. *Hames v. Shaver*, 229 Ga. 412, 191 S.E.2d 861 (1972).

Statute does not render a conspirator incompetent to testify as to facts until the fact of the conspiracy be proved by independent evidence; it simply prohibits a conspirator from testifying as to declarations made by one conspirator outside the presence of, and upon the trial of, another conspirator. *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976); *Ramsey v. State*, 165 Ga. App. 854, 303 S.E.2d 32 (1983); *Whitton v. State*, 178 Ga. App. 862, 344 S.E.2d 703 (1986).

O.C.G.A. § 24-3-5 does not exclude the testimony of a coconspirator, only the admission of coconspirator's declarations to third persons. *Ramsey v. State*, 165 Ga. App. 854, 303 S.E.2d 32 (1983).

Declarations of coconspirator admissible. — When codefendant's incriminating statements were made shortly after the crime occurred, were made prior to arrest, and were noncustodial statements made to acquaintances of codefendant and defendant rather than to police officers, under these circumstances, codefendant's statements can be characterized as the declaration of a conspirator rather than as a confession and would be admissible against defendant when the requirements of O.C.G.A. § 24-3-5 have been met. *Brown v. State*, 262 Ga. 223, 416 S.E.2d 508 (1992).

Testimony by officers regarding an incriminating statement made by one of three coconspirators was admissible even though the officers could not identify the speaker and the admission of the statement did not mandate severance of the parties for trial nor a limiting instruction to the jury that such a "confession" by one codefendant could not be considered against the others. *Reid v. State*, 210 Ga. App. 783, 437 S.E.2d 646 (1993).

Coconspirator's statement's were admissible against defendant since circumstantial evidence established a conspiracy to kill defendant's wife. *Walker v. State*, 213 Ga. App. 407, 444 S.E.2d 824 (1994).

Even though a coconspirator may have terminated participation in the conspiracy when, at the request of the police, the coconspirator voluntarily placed a recorded call to another coconspirator, statements made by the latter implicating the defendant in murder and armed robbery were admissi-

ble since the second coconspirator was still conspiring to conceal the crime, and statements of the former, offered for the limited purpose of putting the second coconspirator's responses in context, were admissible as original evidence under O.C.G.A. § 24-3-2. *Bundrage v. State*, 265 Ga. 813, 462 S.E.2d 719 (1995).

After finding that the evidence was sufficient to establish a prima facie case of conspiracy, the trial court properly ruled that a coconspirator's statements were admissible against defendant. *Robertson v. State*, 268 Ga. 772, 493 S.E.2d 697 (1997), cert. denied, 523 U.S. 1140, 118 S. Ct. 1845, 140 L. Ed. 2d 1095 (1998).

When the evidence established a prima facie case of conspiracy, codefendant's surreptitiously recorded statements, in which the codefendant implicated defendant in the charged offenses, were admissible. *Avery v. State*, 269 Ga. 584, 502 S.E.2d 230 (1998).

Statements made by the codefendant to an informant in a recorded call were admissible under O.C.G.A. § 24-3-5 because at the time of the call the conspiracy was still pending between defendant and the coconspirator to commit the trafficking offense for which they were eventually arrested. *Perez v. State*, 254 Ga. App. 872, 564 S.E.2d 208 (2002).

Coconspirator's statements were admissible under O.C.G.A. § 24-3-5 as the statements contained sufficient indicia of reliability to ensure that defendant's sixth amendment rights were not violated and afforded the jury a satisfactory basis for evaluating the truth of the statements. *Duckett v. State*, 259 Ga. App. 814, 578 S.E.2d 524 (2003).

When defendant and the codefendant were charged with murder and related offenses, the denial of defendant's motion to sever defendant's trial from that of the codefendant was not an abuse of discretion because, inter alia, incriminating statements that the codefendant made to police would have been admissible against defendant in a separate trial as the statements of a coconspirator under O.C.G.A. § 24-3-5. *Styles v. State*, 279 Ga. 134, 610 S.E.2d 23 (2005).

Witness's statement regarding conversations between defendant and an accomplice were admissible as a conspiracy between defendant and the accomplice because: (1)

Application (Cont'd)

two masked bandits committed three armed robberies; (2) defendant and the accomplice attempted to use the credit and debit cards obtained in the robberies immediately after the robberies; (3) masks and a gun used in the robberies were found in defendant's car; and (4) defendant told defendant's half-sister that the defendant and the accomplice had committed the robberies. *Dillard v. State*, 272 Ga. App. 523, 612 S.E.2d 804 (2005).

Denial of defendant's severance motion was not an abuse of discretion because there was no likelihood of confusion as the defendant and the codefendant acted in concert and their defenses were not antagonistic, substantially similar evidence was presented against them, and the codefendant's statements would have been admissible in a separate trial as statements of a coconspirator. *Shelton v. State*, 279 Ga. 161, 611 S.E.2d 11 (2005).

After defendant and defendant's brother agreed on a plan to murder a victim, and after the crime occurred but before defendant's arrest, the brother told a girlfriend that the brother had "taken care" of the victim, the statement was properly admitted as a declaration of a coconspirator, rather than as a confession. *Copprue v. State*, 279 Ga. 771, 621 S.E.2d 457 (2005).

Because a codefendant's statements were non-custodial and were made in furtherance of a conspiracy, the trial court did not abuse the court's discretion in finding that the statements were admissible under O.C.G.A. § 24-3-5 and did not violate Bruton; consequently, defendant failed to demonstrate that counsel's failure to request a severance constituted ineffective assistance. *Hankerson v. State*, 275 Ga. App. 545, 621 S.E.2d 772 (2005).

Court of Appeals of Georgia held that the coconspirators' testimony was properly allowed by the trial court as most of the testimony at issue was admissible on grounds other than as declarations of coconspirators, and the state made a prima facie showing of the existence of a conspiracy without relying on the coconspirators' declarations. *English v. State*, 288 Ga. App. 436, 654 S.E.2d 150 (2007).

Trial court did not err in denying the

defendant's motion to exclude testimony recounting the out-of-court statements of the codefendant, which were made to friends during the concealment phase of the conspiracy between the defendant and the codefendant, because, on balance, the statements bore sufficient indicia of reliability to be admissible; although the trial court erred by applying a presumption of reliability, its decision to admit the statements was not erroneous because the statements were admissible since they were not testimonial in nature, many of the statements were made in the defendant's presence, and none of the statements sought to deny the codefendant's guilt. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010).

Recorded statement of coconspirator properly admitted. — Trial court did not err by allowing the state to introduce a coconspirator's recorded statement against a defendant, which the defendant claimed incriminated the defendant, as the coconspirator testified and was subject to cross-examination. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

When the state is proceeding on a theory of conspiracy, acts and statements of one conspirator in furtherance of the conspiracy are admissible against all other conspirators. *Knowles v. State*, 159 Ga. App. 239, 283 S.E.2d 51 (1981).

Qualification of rule. — Statutory rule is qualified by the fact that each is responsible for the acts of the others only insofar as such acts are naturally or necessarily done pursuant to or in furtherance of the conspiracy. *Handley v. State*, 115 Ga. 584, 41 S.E. 992 (1902); *Hill v. Reynolds*, 19 Ga. App. 334, 91 S.E. 434 (1917).

Exculpatory evidence of conspirator not admissible. — Under O.C.G.A. § 24-3-5, the declaration of a coconspirator during the pendency of a criminal project is admissible against all coconspirators; however, it may only be used against a conspirator and is not a means by which a conspirator may introduce exculpatory evidence. *Dunbar v. State*, 205 Ga. App. 867, 424 S.E.2d 43, cert. denied, 205 Ga. App. 899, 424 S.E.2d 43 (1992).

Statements made during concealment phase of conspiracy admissible. — State-

ments made by a coconspirator to police were admissible as made during the concealment phase of the conspiracy, even though made before evidence establishing conspiracy had been introduced. *Morgan v. State*, 206 Ga. App. 132, 424 S.E.2d 92 (1992).

Properly authenticated letters written by one of the three defendants charged in a conspiracy involving an armed robbery and related offense were properly admitted under the exception to the rule against hearsay evidence that statements made by a coconspirator during the concealment phase of the conspiracy were admissible against all other coconspirators. *Williamson v. State*, 285 Ga. App. 779, 648 S.E.2d 118 (2007).

Applies to acts. — Statute applies to the acts of the conspirators as well as to the conspirators' declarations. *Thompson v. State*, 58 Ga. App. 593, 199 S.E. 568 (1938).

Agency theory. — Conspirator's declaration in furtherance of the conspiracy may be used against another conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both. *Park v. Huff*, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975).

Not applicable to direct testimony. — It is the declarations of coconspirators related by another witness that are dealt with in statute, and not the direct testimony of an alleged coconspirator on the trial. *Sutton v. State*, 237 Ga. 423, 228 S.E.2d 820 (1976).

Indictment not required. — Statute does not include any condition precedent of indictment of a coconspirator before the statute becomes applicable. *Baker v. State*, 17 Ga. App. 279, 86 S.E. 530 (1915); *Cook v. State*, 22 Ga. App. 770, 97 S.E.2d 264 (1918); *Porterfield v. State*, 137 Ga. App. 449, 224 S.E.2d 94 (1976); *Baughner v. State*, 212 Ga. App. 7, 440 S.E.2d 768 (1994).

Membership in conspiratorial unit required. — When the statements of a defendant were recounted to a third person by an individual who was part of the conspiratorial unit, the statements were admissible. *Mullins v. State*, 147 Ga. App. 337, 248 S.E.2d 706 (1978), aff'd, 249 Ga. 411, 290 S.E.2d 472 (1982); *Knox v. State*, 156 Ga. App. 777, 275 S.E.2d 371 (1980).

Undisclosed conspirators. — Acts and declarations of undisclosed conspirators,

looking to the concealment of identity and the suppression of evidence, are admissible against other conspirators. *Mitchell v. State*, 86 Ga. App. 292, 71 S.E.2d 756 (1952).

Statements out of defendant's presence. — Conversation overheard between coincitees out of the presence of the defendant is admissible. *Hutchins v. State*, 229 Ga. 804, 194 S.E.2d 442 (1972).

Once some evidence of a joint criminal undertaking has been presented, the out-of-court statements of one wrongdoer, are admissible against the other even though that other is separately tried, and even though the statements were made outside the other's presence. *Davis v. State*, 129 Ga. App. 796, 201 S.E.2d 345 (1973).

Indicia of reliability required for admissibility are that the statements be non-narrative, that the declarant is shown by the evidence to know whereof the declarant speaks, that the witness is not apt to be proceeding on faulty recollection, and that the circumstances show that the declarant had no apparent reason to lie to the witness; it is not required that all of the indicia be present for the statement to be admissible. *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

When statement inadmissible. — Statement is inadmissible under O.C.G.A. § 24-3-5 when the statement implicates the defendant and when the statement is not accompanied by an indicia of reliability such as the spontaneity of the statement and the fact that the statement was against the speaker's penal interest to make the statement. *Boswell v. State*, 158 Ga. App. 727, 282 S.E.2d 196 (1981).

Admission of a coconspirator's hearsay statement that defendant was the "triggerman" in a robbery violated the confrontation clause, and could not be deemed harmless error since the hearsay lacked sufficient indicia of reliability; the statement was not *res gestae*, was not given under oath, was not against penal interest, and was exculpatory. *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992).

Statement made five months before crime. — Witness's testimony as to coconspirator's statement offering money for the killing of coconspirator's ex-husband made some five months prior to the killing was

Application (Cont'd)

admissible even though witness/coconspirator expressed disinterest in the offer at that time. *Blalock v. State*, 250 Ga. 441, 298 S.E.2d 477 (1983).

Wire tap conversations of other conspirators to which appellants had not been parties were admissible under O.C.G.A. § 24-3-5. *Gilstrap v. State*, 162 Ga. App. 841, 292 S.E.2d 495 (1982).

Tapes and transcripts admissible when testimony admissible. — Trial court did not err in admitting in evidence two tapes of a coconspirator's conversations with defendants and the transcripts thereof because the transcripts were the result of a confession made by the coconspirator, after one coconspirator heard defendants' statements and could have testified to what they said. The coconspirator's voluntary participation in the recording of the conversations does not alter their basic admissibility as the lawful electronic interception of the conversations only created a recording of what the coconspirator could have related as a witness. *Ramsey v. State*, 165 Ga. App. 854, 303 S.E.2d 32 (1983).

Statements attributable to coconspirator who refused to testify properly admitted as declarations of coconspirator during course of conspiracy. *Owens v. State*, 251 Ga. 313, 305 S.E.2d 102 (1983).

Separate trials. — Statutory rule is true even though the person against whom the declaration is introduced is being tried separately from the person making the declaration. *Coleman v. State*, 141 Ga. 731, 82 S.E. 228 (1914); *Tate v. State*, 41 Ga. App. 300, 152 S.E. 609 (1930); *Driggers v. State*, 51 Ga. App. 370, 180 S.E. 619 (1935); *Wortham v. State*, 184 Ga. 674, 192 S.E. 720 (1937); *West v. State*, 85 Ga. App. 220, 68 S.E.2d 611 (1952).

Testimony admissible as coconspirator's statement made during pendency of conspiracy. *Lawrence v. State*, 187 Ga. App. 211, 369 S.E.2d 531 (1988).

When objected-to statements were made during the pendency of and in furtherance of a conspiracy, they were not admitted as similar transactions or for the sole purpose of showing bad character, but were relevant and material to the issues in the case. *Kitchens v. State*, 235 Ga. App. 349, 509 S.E.2d 391 (1998).

Declarations were properly admitted in the following cases. — See *Campbell v. State*, 202 Ga. 705, 44 S.E.2d 903 (1947); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Gay v. State*, 249 Ga. 747, 294 S.E.2d 476 (1982); *Manuel v. State*, 245 Ga. App. 565, 538 S.E.2d 472 (2000).

Note-passing inmate was properly permitted to relate to the jury statements made by other inmates when the inmates were discussing what to do about the possibility the victim was going to tell the authorities about their effort to escape as the coconspiratorial statements were made during the pendency of the conspiracy and the statements were presumed to be sufficiently reliable to satisfy the confrontation clause's requirement of trustworthiness; the admission of the statements was not at odds with *Crawford v. Washington*, 541 U.S. 36 (2004), because statements admissible pursuant to the hearsay exception permitting the use of statements made in furtherance of a conspiracy were not testimonial. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Trial court did not err by admitting the recorded statement of a witness under circumstances in which, at trial, the witness recanted the statement, claiming the statement was fabricated under pressure from police; in the statement, the witness stated that the defendant bragged about the crime, reporting that the defendant shot the victim and predicting that the eyewitnesses were too intoxicated to be able to identify them. The statement corroborated other details, related to the witness by the codefendants regarding the crime itself and the subsequent attempts to dispose of instrumentalities of the crime, and the statement was properly admitted as evidence of statements made by coconspirators during the pendency of the criminal project. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

Writings were admissible. — See *Bragg v. State*, 52 Ga. App. 69, 182 S.E. 403 (1935) (letter written by one coconspirator to other relating to crime); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979) (written directions to witness from coconspirator); *Farley v. State*, 155 Ga. App. 188, 270 S.E.2d 361 (1980) (trial transcript).

Error to allow into deliberations. — All writings introduced in evidence in lieu of testimony from the witness stand, such as

interrogatories, depositions, dying declarations, and confessions of guilt of a defendant or of an alleged coconspirator, which depend entirely for their value on the credibility of the maker, should not be in the possession of the jury during their deliberations, thus, when defendants' and alleged coconspirators' signed statements are delivered to the jury, over timely objections, a new trial must be granted. *Royals v. State*, 208 Ga. 78, 65 S.E.2d 158 (1951).

No ineffective counsel since statements by coconspirator admissible. — Defendant failed to show that trial counsel was ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, as statements made by a coconspirator were admissible under O.C.G.A. § 24-3-5, and the failure of counsel to raise a non-meritorious hearsay objection did not constitute ineffective legal representation. *Jones v. State*, 279 Ga. 854, 622 S.E.2d 1 (2005).

No ineffective assistance of counsel. — Defendant did not receive ineffective assistance of counsel due to counsel's failure to object to hearsay testimony of a note-passing inmate as the hearsay statements fell within the exception permitting hearsay statements made by coconspirators during the pendency of the conspiracy; the failure to object did not constitute deficient performance. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Construction with § 24-3-52

Former Code 1933, § 38-414 (see O.C.G.A. § 24-3-52) was a limitation upon former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5). *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975).

Allowance of hearsay evidence by former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5) was restricted by former Code 1933, § 38-414 (see O.C.G.A. § 24-3-52). *Price v. State*, 239 Ga. 439, 238 S.E.2d 24 (1977).

Former Code 1933, §§ 38-306 and 38-414 (see O.C.G.A. §§ 24-3-5 and 24-3-52) were mutually exclusive so a conspirator's statement was made either "during" or "after" the conspiracy. *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976).

Both former Code 1933, §§ 38-306 and 38-414 (see O.C.G.A. §§ 24-3-5 and 24-3-52) clearly contemplate a point in time in certain cases when the conspiracy, including its

concealment stage, was at an end so as to render a subsequent confession by an alleged coconspirator inadmissible in the trial of a defendant who continued to deny guilt. *Hill v. State*, 232 Ga. 800, 209 S.E.2d 153 (1974).

An incriminatory declaration made by one conspirator was either made "during the pendency of the criminal project," and was thus admissible against the other conspirators under former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5), or was made "after the enterprise is ended," and was thus inadmissible against the other conspirators under former Code 1933, § 38-414 (see O.C.G.A. § 24-3-52). *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Conspiracy Defined

1. In General

Conspiracy consists in a corrupt agreement between two or more persons to do an unlawful act, the existence of which agreement may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. *Kennemore v. State*, 222 Ga. 362, 149 S.E.2d 791 (1966).

Conspiracy is a corrupt agreement between two or more persons to do an unlawful act. *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968).

To have a conspiracy, there must be an agreement between two or more persons to commit a crime. *Kilgore v. State*, 251 Ga. 291, 305 S.E.2d 82 (1983).

Motive to commit crime. — Criminal project referred to in statute includes the creation of the original motive to commit the crime, the plan to commit the crime and the carrying out of the plan. The motive and the plan could be created first in the mind of only one of the coconspirators and prior to the formation of the conspiracy itself. *Knight v. State*, 239 Ga. 594, 238 S.E.2d 390 (1977).

Common design. — Common design which is the essence of conspiracy may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different

Conspiracy Defined (Cont'd)

1. In General (Cont'd)

means, ever leading to the same unlawful result. *Park v. Huff*, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975).

2. Proof of Conspiracy

Conspiracy may be proved by circumstantial as well as by direct evidence. *Darden v. State*, 172 Ga. 590, 158 S.E. 414 (1931); *Wortham v. State*, 184 Ga. 674, 192 S.E. 720 (1937); *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968); *Sentell v. State*, 227 Ga. 153, 179 S.E.2d 234 (1971).

Existence of a conspiracy may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968); *Weatherington v. State*, 139 Ga. App. 795, 229 S.E.2d 676 (1976).

Existence of a common design or purpose between two or more persons to commit an unlawful act may be shown by direct or circumstantial evidence. *Harris v. State*, 255 Ga. 500, 340 S.E.2d 4 (1986).

State must make a prima facie showing of a conspiracy by aliunde proof. *Weatherington v. State*, 139 Ga. App. 795, 229 S.E.2d 676 (1976).

Conspiracy itself must be proved by evidence aliunde such declarations, and the declarations are not admissible unless the conspiracy is prima facie shown by such aliunde evidence. *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968); *Sentell v. State*, 227 Ga. 153, 179 S.E.2d 234 (1971); *Park v. Huff*, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975).

In order to establish a conspiracy it is not necessary that the aliunde proof shall itself warrant a verdict, slight evidence connecting the defendant with the crime will be sufficient. *Weatherington v. State*, 139 Ga. App. 795, 229 S.E.2d 676 (1976).

And prove existence beyond a reasonable doubt. — In order to properly admit the

declaration of an alleged coconspirator made during a criminal project, there must be sufficient evidence aliunde the declaration to establish the conspiracy at least prima facie and prove the declaration's existence beyond a reasonable doubt. *Wortham v. State*, 184 Ga. 674, 192 S.E. 720 (1937); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

While the rule is well established that the conspiracy itself cannot be shown from the acts and declarations of one coconspirator in the absence of the others (this rule being necessary to prevent the finding of the fact of the conspiracy from such acts and declarations alone), yet the acts and declarations made in carrying out the conspiracy are relevant. *Bragg v. State*, 52 Ga. App. 69, 182 S.E. 403 (1935).

Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. *Park v. Huff*, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975).

Declarations of coconspirator admissible. — State had to make a prima facie showing of the existence of a conspiracy, without regard to the declarations of the coconspirators, in order to admit their out-of-court declarations; trial judge could admit testimony by coconspirators before the conspiracy had been proved, provided the conspiracy's existence was ultimately shown at trial. *Belmar v. State*, 252 Ga. App. 264, 555 S.E.2d 902 (2001).

Hearsay statements made by each defendant implicating their coconspirators in the crimes were properly admitted against all the defendants as coconspirator's statements under O.C.G.A. § 24-3-5; a conspiracy among the defendants was shown to have existed, as the evidence indicated that the victim's house was a drug house, that the first defendant's car was seen on the scene around the time of the murder, and that the second defendant later possessed drugs and money in a hotel room shortly after the crimes, and although the defendants all made incriminating statements in jail, the statements were made during the concealment phase as the defendants were still hiding their identities from the police. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Trial court did not err by permitting a witness to testify regarding a conversation the witness participated in which took place on the day after the crime in which the defendant and the codefendants made certain admissions concerning the crimes at issue; hearsay statements of coconspirators were admissible when the state at some point before the close of evidence established a prima facie case of conspiracy independent of the coconspirator statement. The state presented ample evidence in the form of testimony from two witnesses present with the defendant and the codefendants in the hours immediately prior to the crimes that the three, together with one of the witnesses, planned to commit a robbery that night, and the statement was clearly within the concealment phase of the conspiracy. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

Statements made by defendant's nephew during the time the nephew, defendant, and another man conspired to traffic in cocaine were admissible against the defendant in defendant's trial for trafficking in cocaine as the state first proved the existence of the conspiracy and defendant's involvement in the conspiracy. *Smith v. State*, 253 Ga. App. 131, 558 S.E.2d 455 (2001).

When evidence independent of the testimony of the coconspirators is not sufficient to show a conspiracy, it was error to admit in evidence testimony as to declarations of the alleged conspirators to charge the jury upon the subject of conspiracy and to overrule the grounds of those motions for new trial involving conspiracy. *Caldwell v. State*, 227 Ga. 703, 182 S.E.2d 789 (1971).

Evidence insufficient. — Evidence of conspiracy between the defendant and a codefendant was not sufficient to render admissible against the former evidence of declarations by the latter. *Johnson v. State*, 186 Ga. 324, 197 S.E. 786 (1938).

Trial court did not err by denying a defendant's motion for a new trial with regard to the defendant's convictions for armed robbery and possession of a firearm based on the trial court erroneously admitting the testimony of a witness, who was a long-time acquaintance of the co-indictee that the co-indictee had bragged about committing the robbery with the defendant as, although the state failed to establish a prima facie case of conspiracy, the admission was harmless in

view of the victims' consistent eyewitness testimony implicating the defendant in the robbery and defendant's admission of the intention to rob the store. *Fisher v. State*, 295 Ga. App. 501, 672 S.E.2d 476 (2009).

Evidence was sufficient to show conspiracy in the following cases. — See *Patterson v. State*, 199 Ga. 773, 35 S.E.2d 504 (1945); *Cowart v. State*, 92 Ga. App. 253, 88 S.E.2d 208 (1955); *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210, *cert. denied*, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984); *Dalton v. State*, 237 Ga. App. 217, 513 S.E.2d 745 (1999); *Freeman v. State*, 273 Ga. 137, 539 S.E.2d 127 (2000).

Because the state proved that two masked bandits committed three armed robberies, that defendant and an accomplice attempted to use the credit and debit cards obtained in the robberies immediately after the robberies, that masks and a gun used in the robberies were found in defendant's car, and that defendant told defendant's half-sister that defendant and the accomplice had committed the robberies, the evidence was sufficient to establish the fact of a conspiracy between defendant and the accomplice sufficient to admit declarations by the accomplice at defendant's criminal trial. *Dillard v. State*, 272 Ga. App. 523, 612 S.E.2d 804 (2005).

Testimony of two witnesses as to statements made by coconspirators was evidence independent of statements made to an inmate witness, and was sufficient to support a jury's finding of a conspiracy; therefore, a trial court did not err in allowing the inmate witness to testify as to statements made by one of the perpetrators of the crime to the inmate witness while both were incarcerated. *Dickerson v. State*, 280 Ga. App. 29, 633 S.E.2d 367 (2006).

Pendency of Criminal Project

1. In General

Though crime previously committed. — Statement by the defendant coconspirator made after the actual commission of the crime, but while the conspiracy continued is admissible. *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240, *cert. denied*, 385 U.S. 953, 87 S. Ct. 336, 17 L. Ed. 2d 231 (1966); *Scott v.*

Pendency of Criminal Project (Cont'd)
1. In General (Cont'd)

State, 151 Ga. App. 495, 260 S.E.2d 401 (1979).

Conspiracy must not have ended. — “Acts, doings and sayings of the coconspirators” made before or after the crime are admissible as original evidence against all defendants so long as they are made before the evidence shows that the conspiracy has ended. *Price v. State*, 239 Ga. 439, 238 S.E.2d 24 (1977).

Pendency of the criminal project includes the accomplishment of the crime itself plus concealment of the crime or the identity of the perpetrators. *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *Welch v. State*, 237 Ga. 665, 229 S.E.2d 390 (1976); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979); *Scott v. State*, 151 Ga. App. 495, 260 S.E.2d 401 (1979); *Smith v. State*, 244 Ga. 814, 262 S.E.2d 116 (1979).

Rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other. *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240, cert. denied, 385 U.S. 953, 87 S. Ct. 336, 17 L. Ed. 2d 231 (1966); *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970); *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975); *Mills v. State*, 236 Ga. 365, 223 S.E.2d 725 (1976); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209, vacated, 449 U.S. 988, 101 S. Ct. 523, 66 L. Ed. 2d 285 (1980) (remanded for further consideration in light of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980)).

Declarations during concealment admissible. — So long as the concealment phase of the conspiracy continues, declarations of either of the conspirators are admissible against the other. *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

Statements made by the person with whom the defendant conspired to commit murder, made during the concealment phase of that conspiracy, were admissible

against the defendant. *Cromer v. State*, 253 Ga. 352, 320 S.E.2d 751 (1984).

Agreement not to discuss case ever again. — Conspiracy continues during the concealment phase, after crime has been committed, and when evidence was presented that defendants agreed not to discuss case ever again and crime went unsolved for over two years, concealment phase lasted throughout that time. *Fortner v. State*, 248 Ga. 107, 281 S.E.2d 533 (1981).

Declarations made during conspiracy, including concealment stage, admissible. — Under O.C.G.A. § 24-3-5, the declarations of a conspirator, made during the course of a conspiracy, including the concealment stage, are admissible against coconspirators. *Wilbanks v. State*, 251 Ga. App. 248, 554 S.E.2d 248 (2001).

Statements by defendant's coconspirator to a third person regarding defendant's actions during the criminal project and during the concealment phase bore sufficient indicia of reliability to be admissible in defendant's criminal trial, pursuant to O.C.G.A. § 24-3-5, and any objection on the grounds of the confrontation clause under U.S. Const., amend. 6 or on hearsay grounds would have lacked merit; accordingly, defendant's counsel was not ineffective for failing to object to the admission thereof. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

Indicia of reliability which are determinative of whether a statement may be placed before the jury require that the statement by the declarant be non-narrative; that the declarant is shown by the evidence to know whereof the declarant speaks; that the witness is not apt to be proceeding on faulty recollection; and that the circumstances show that the declarant had no apparent reason to lie to the witness. Not all of the indicia need be present to support admissibility of the statement. *Waters v. State*, 174 Ga. App. 916, 331 S.E.2d 893 (1985).

Coconspirator's offer to share theft proceeds. — Trial court properly admitted the testimony of coconspirator's sister recounting another coconspirator's offer to share the theft proceeds with her if she would keep silent about the matter. *Truitt v. State*, 174 Ga. App. 687, 331 S.E.2d 64 (1985).

Accomplices. — Acts, sayings, and conduct of one accomplice during the pendency of a conspiracy, not alone in its perpetration

but also in its subsequent concealment, are admissible against another accomplice. *Carter v. State*, 106 Ga. 372, 32 S.E. 345, 71 Am. St. R. 262 (1899); *Bragg v. State*, 52 Ga. App. 69, 182 S.E. 403 (1935); *Thompson v. State*, 58 Ga. App. 593, 199 S.E. 568 (1938); *Mitchell v. State*, 86 Ga. App. 292, 71 S.E.2d 756 (1952); *Hutchins v. State*, 229 Ga. 804, 194 S.E.2d 442 (1972).

2. Termination of Conspiracy

Only the admissions made pending the conspiracy or fraudulent scheme should be considered, and not those made after the conspiracy was terminated or the fraudulent scheme executed. *Turner v. State*, 43 Ga. App. 799, 160 S.E. 509 (1931).

Whether conspiracy ended crucial question. — Crucial question in determining whether the statement of one conspirator may be used as evidence of guilt against another conspirator is whether the conspiracy had ended at the time the statement was made. *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975).

Conspiracy deemed continuing until ultimate purpose accomplished. — If the conspiracy contemplates actions beyond an initial criminal act such as concealment, the conspiracy is deemed in progress until its ultimate purpose is accomplished, and admissions made by one conspirator while attempting to conceal the case may be admissible against the other conspirators. *Knight v. State*, 239 Ga. 594, 238 S.E.2d 390 (1977).

In legal contemplation, the enterprise may not be at an end so long as the concealment of the crime or the identity of all the conspirators has not been disclosed. *Mitchell v. State*, 86 Ga. App. 292, 71 S.E.2d 756 (1952).

Arrest alone does not necessarily end. — Conspiracy or the concealment phase of the conspiracy does not necessarily end just because one or more participants have been arrested and jailed. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Conspiracy does not necessarily end simply because one or more of the conspirators have been arrested. *Chews v. State*, 187 Ga. App. 600, 371 S.E.2d 124 (1988).

Even though one codefendant had been arrested when a tape recording of a conversation between that codefendant and an-

other was made, the tape was admissible since the arrest did not end the conspiracy and the substance of the recorded conversation indicated that the concealment phase of the conspiracy was ongoing. *Cromwell v. State*, 218 Ga. App. 481, 462 S.E.2d 388 (1995).

Evidence admissible from concealment phase. — As the conspiracy between the two brothers to conceal their roles in two murders had not terminated when one brother wrote a letter incriminating the other, that letter was clearly admissible against the second brother because the letter concerned the murders and was written during the concealment phase of their conspiracy as to those crimes. *Arevalo v. State*, 275 Ga. 392, 567 S.E.2d 303 (2002), cert. denied, 538 U.S. 962, 123 S. Ct. 1749, 155 L. Ed. 2d 515 (2003).

Statements made by a defendant's accomplice that implicated the defendant in crimes that included a murder and an armed robbery were admissible against the defendant under the coconspirator exception to the hearsay rule because the statements were made during the concealment phase of the conspiracy prior to the accomplice making a confession that the accomplice had committed the murder. *Jackson v. State*, 292 Ga. App. 312, 665 S.E.2d 20 (2008).

Incriminating statements to police end conspiracy. — Statement made to police by a conspirator, whether inculpatory or exculpatory as to the declarant, which statement incriminates the other conspirator as a party to the crime, constitutes termination of the conspiracy. Thus, such statement by a conspirator is not made during the pendency of the criminal project and is not admissible. *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *Hannah v. State*, 144 Ga. App. 677, 242 S.E.2d 334 (1978).

When first defendant made a statement to police and implicated second defendant, defendants' conspiracy ended and the statement was only admissible against first defendant; thus, the statement's admission as against a second defendant constituted a Bruton violation and under the circumstances warranted a reversal of the second defendant's convictions. *Meadows v. State*, 264 Ga. App. 160, 590 S.E.2d 173 (2003).

Statement to an investigator by the defen-

Pendency of Criminal Project (Cont'd)
2. Termination of Conspiracy (Cont'd)

dant's alleged coconspirator that the coconspirator drove the defendant to a restaurant that the defendant robbed was not admissible against the defendant under O.C.G.A. § 24-3-5, as it was not made during the pendency of the conspiracy, but in fact constituted a termination of the conspiracy. *Verdree v. State*, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

Confession made to police by a conspirator, in which other conspirators were identified and their participation was described, was not made during the pendency of the criminal project but was made after the enterprise was ended. Such confession therefore was not admissible under former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5) and was inadmissible at the trial of conspirator under former Code 1933, § 38-414 (see O.C.G.A. § 24-3-52). *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *Welch v. State*, 237 Ga. 665, 229 S.E.2d 390 (1976); *Corson v. State*, 144 Ga. App. 559, 241 S.E.2d 454 (1978); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979); *Livingston v. State*, 268 Ga. 205, 486 S.E.2d 845 (1997).

Statements after conspiracy terminated admissible only against declarant. — Declarations or conduct of one joint conspirator, made after the enterprise is ended, are inadmissible except against the person making them, and against others must be rejected as narrative merely of past occurrence. *Hicks v. State*, 11 Ga. App. 265, 75 S.E. 12 (1912); *Wall v. State*, 153 Ga. 309, 112 S.E. 142 (1922).

Evidence as to admissions of guilt involving the defendant, made by a coconspirator after the termination of the conspiracy, was admissible since it appeared that the admissions were made in the presence of the defendant personally and were then freely and voluntarily declared by the defendant to be true. *Gunter v. State*, 19 Ga. App. 772, 92 S.E. 314 (1917).

Conspiracy was found to be terminated in the following case. — See *Green v. State*, 115 Ga. App. 685, 155 S.E.2d 655 (1967) (arrest).

Admission of codefendant's statement to investigator was reversible error because the statement was not made during the pen-

dency of the criminal project, the conspiracy terminated when the statement was made to the investigator and thus, the statement was inadmissible as an exception to the hearsay rule. *Sharber v. State*, 268 Ga. App. 365, 601 S.E.2d 732 (2004).

Procedure

1. Order of Proof

Conspiracy must be proved first. — Only after the fact of the conspiracy has been proven may the declarations by any one of the conspirators during the pendency of the criminal project be admissible against all. *Stinson v. State*, 151 Ga. App. 533, 260 S.E.2d 407 (1979).

When there was sufficient evidence introduced prior to disputed testimony to make out prima facie case of conspiracy, court did not err in admitting declarations of coconspirator. *Salmon v. State*, 249 Ga. 785, 294 S.E.2d 500 (1982); *Blue v. State*, 212 Ga. App. 847, 433 S.E.2d 635 (1994).

But rule not inflexible. — While it may generally be the better practice to require a prima facie case of conspiracy first to be made, before admitting evidence of the acts and declarations of one of the alleged conspirators, there is no inflexible rule to that effect. *Coleman v. State*, 141 Ga. 731, 82 S.E. 228 (1914); *Hutchins v. State*, 229 Ga. 804, 194 S.E.2d 442 (1972); *Fallings v. State*, 232 Ga. 798, 209 S.E.2d 151 (1974).

Coconspirator's statement allowed into evidence, notwithstanding the contention that the fact of conspiracy was not proved before the admission of the statement, since the evidence adduced at trial, independent of the coconspirator's statement, was sufficient to prove a conspiracy. *Isaac v. State*, 269 Ga. 875, 505 S.E.2d 480 (1998).

Evidence admitted conditioned on proof of conspiracy. — Incriminating statements of coconspirator were properly admitted since it was allowed on the condition that a conspiracy be shown by all of the evidence, since order of proof is in the discretion of the judge and there is no error in admitting such declarations if a prima facie case of conspiracy is proved by the state. *Blalock v. State*, 250 Ga. 441, 298 S.E.2d 477 (1983).

Evidence becomes competent after showing of conspiracy. — Though evidence is objectionable because conspiracy was not

proved, if it be afterwards shown, it renders the evidence competent. *Barrow v. State*, 121 Ga. 187, 48 S.E. 905 (1904); *Tate v. State*, 41 Ga. App. 300, 152 S.E. 609 (1930).

Hearsay evidence admissible. — Admission of hearsay testimony by coconspirators was proper based on the prosecutor's representation that the state would introduce defendant's statement, which had been ruled admissible and which revealed that coindictes were together prior to and participated in the murder. The statement satisfied the requirement of a *prima facie* case without regard to the hearsay testimony itself. *Waldrip v. State*, 267 Ga. 739, 482 S.E.2d 299 (1997), cert. denied, 522 U.S. 917, 118 S. Ct. 305, 139 L. Ed. 2d 235 (1997).

It is within the discretion of the trial judge to allow the admission of testimony by coconspirators before the existence of the conspiracy is disclosed, provided that such existence is afterwards shown during the trial. *Tate v. State*, 41 Ga. App. 300, 152 S.E. 609 (1930); *Jenkins v. State*, 73 Ga. App. 515, 37 S.E.2d 230 (1946); *Denison v. State*, 258 Ga. 690, 373 S.E.2d 503 (1988).

Trial judge has sound discretion as to the order of proof, and if a *prima facie* case of conspiracy is shown from the whole evidence, the admitting of a declaration by an alleged coconspirator is not error. *Wortham v. State*, 184 Ga. 674, 192 S.E. 720 (1937); *Hutchins v. State*, 229 Ga. 804, 194 S.E.2d 442 (1972); *Fallings v. State*, 232 Ga. 798, 209 S.E.2d 151 (1974); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Error is harmless. — While it is error to admit declarations of coconspirators before the fact of conspiracy is proved, the error becomes harmless when subsequently during the trial the conspiracy is clearly established by the direct and circumstantial evidence adduced. *Driggers v. State*, 51 Ga. App. 370, 180 S.E. 619 (1935).

Early admission of declarations not grounds for new trial. — While it is the better practice to require proof of the conspiracy before admitting such declarations, the admission of the evidence in a different order will not be ground for a new trial. *McDaniel v. State*, 103 Ga. 268, 30 S.E. 29 (1898); *Tate v. State*, 41 Ga. App. 300, 152 S.E. 609 (1930).

No error shown by reference to conspiracy during opening statement. — With re-

gard to a defendant's trial and conviction for malice murder arising from the severe physical abuse of the defendant's five-year-old nephew, the defendant failed to meet the burden of proving that trial counsel was ineffective for failing to object to the comments made by the state during open statements with regard to the defendant and the defendant's mother beating the victim all the time and that the pair carried out the actions together. *Peterson v. State*, 282 Ga. 286, 647 S.E.2d 592 (2007).

2. Duty of Jury

Determination of conspiracy. — It is for the jury to determine from the whole evidence whether a conspiracy has been shown, and if they find that none has been established, it is their duty not to consider the acts and declarations of the supposed coconspirator. *Coleman v. State*, 141 Ga. 731, 82 S.E. 228 (1914); *Nelson v. State*, 51 Ga. App. 207, 180 S.E. 16 (1935); *Wortham v. State*, 184 Ga. 674, 192 S.E. 720 (1937); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Question of existence of a conspiracy is ultimately for the jury to determine. *Harris v. State*, 255 Ga. 500, 340 S.E.2d 4 (1986).

Necessary findings. — Before the jury can consider such declaration, it must find (1) that a conspiracy was in existence (2) when the statement was made. *Parker v. State*, 145 Ga. App. 205, 243 S.E.2d 580 (1978).

3. Instructions

Erroneous instructions. — It was error, likely to have been very prejudicial, to charge a jury in effect that the state's contention of conspiracy would be established if the jury believed beyond a reasonable doubt that there was a conspiracy or common purpose between "any two" of the three defendants, not necessarily including the defendant on trial. *Wortham v. State*, 184 Ga. 674, 192 S.E. 720 (1937).

Proper instruction. — Trial court did not err when the court gave the instruction to the jury that informed the jury of the circumstances under which the alleged declarations of an alleged coconspirator made out of the presence of the defendant are to be disregarded, and the instruction immediately followed the trial court's instruction that any admissions made by one or more of

Procedure (Cont'd)**3. Instructions** (Cont'd)

the conspirators during and in furtherance of the alleged conspiracy could be considered by the jury against all the conspirators if the existence of the conspiracy had been shown beyond a reasonable doubt by evidence other than the declarations of alleged coconspirators; the instruction correctly stated the law and did not impermissibly shift the burden of proof to the defendant by failing to include "not" in the pattern charge, so as to read "not satisfied beyond a reasonable doubt that a conspiracy exists." *Castillo v. State*, 281 Ga. 579, 642 S.E.2d 8 (2007).

Trial court properly refused to give the defendant's request to charge that, in determining whether a conspiracy existed, the jury could not consider the declarations of the alleged accomplice. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983).

4. Unavailability of Declarant

State need not prove declarant's unavailability as a prerequisite to admission of the

declarant's declarations made during pendency of criminal project. *Gay v. State*, 249 Ga. 747, 294 S.E.2d 476 (1982).

Non-testifying codefendant's admission properly admitted. — Admission of incriminating statements made by the defendant's coconspirator to an informant to the effect that defendant agreed to sell methamphetamine to the informant, and arranging details of the transaction, was proper, despite the fact that the coconspirator did not appear at trial and was not available for cross-examination, because the statements were made during the pendency of the criminal project, the coconspirator was not asserting past facts and had personal knowledge of the identities and roles of the participants, the possibility that the statements were founded on faulty memory was decidedly remote in that the referenced occurrences were taking place almost simultaneously with the statements, and, believing that the coconspirator was setting up a lucrative drug deal with a sympathetic customer, the coconspirator had no reason to lie about the defendant's involvement in the crime. *Bowden v. State*, 279 Ga. App. 173, 630 S.E.2d 792 (2006).

RESEARCH REFERENCES

C.J.S. — 31A C.J.S., Evidence, § 476.

ALR. — Admissions of partner as to past transactions or events as evidence against firm or other partner, 73 ALR 447.

Admissibility of inculpatory statements made in the presence of accused, and not denied or contradicted by him, 80 ALR 1235; 115 ALR 1510.

Extrajudicial declaration of commission of criminal act as admissible in evidence where

declarant is a witness or available to testify, 167 ALR 394.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators, 46 ALR3d 1148.

24-3-6. Dying declarations.

Declarations by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, shall be admissible in evidence in a prosecution for the homicide. (Orig. Code 1863, § 3704; Code 1868, § 3728; Code 1873, § 3781; Code 1882, § 3781; Penal Code 1895, § 1000; Penal Code 1910, § 1026; Code 1933, § 38-307.)

Law reviews. — For article surveying developments in Georgia evidence law, see 33 Mercer L. Rev. 129 (1981). For article, "An

Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For comment on *Etheridge v. State*, 187

Ga. 30, 199 S.E. 185 (1938), see 1 Ga. B.J. 49 (1939).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DECLARATIONS

1. COMPLETENESS
2. FACTUAL REQUIREMENTS
3. SCOPE OF DECLARATIONS
4. IDENTITY OF ASSAILANT
5. ELICITED BY QUESTIONS

CONSCIOUS OF CONDITION

TIME REQUIREMENTS

PROCEDURE

1. EVIDENTIARY FOUNDATION
2. WITNESSES
3. IMPEACHMENT
4. INSTRUCTIONS
5. DUTY OF JURY

General Consideration

Constitutionality. — Admission of dying declarations does not contravene that provision of the Constitution of the United States which provides that the accused shall be confronted with the witnesses against the accused. *Jones v. State*, 130 Ga. 274, 60 S.E. 840 (1908). See *Campbell v. State*, 11 Ga. 353 (1852).

If the declarant does not die, the statement is not admissible as a dying declaration. *Stembridge v. Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

Must be in prosecution for homicide of deceased. — Declarations made by a person in extremis are not admissible as dying declarations except where the defendant is on trial for killing declarant. *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456 (1869); *Miliken v. State*, 8 Ga. App. 478, 69 S.E. 915 (1910).

Declarations, though made by a person in extremis, are not admissible as dying declaration in a homicide case since the defendant is not on trial for killing the declarant, though the declarant may have been killed in the transaction to which the trial relates. *Westberry v. State*, 175 Ga. 115, 164 S.E. 905 (1932).

Dying declarations can be used by the accused for the purpose of showing the accused's innocence. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Credibility of declarations. — Even though all the conditions be satisfied still the declarations should be received with great caution. *Carter v. State*, 2 Ga. App. 254, 58 S.E. 532 (1907); *Smith v. State*, 9 Ga. App. 403, 71 S.E. 606 (1911).

Evidence of a dying declaration should be received with great caution because, first, the declarant is not under oath, second, because the declarant is not subject to cross-examination, third, because of the likelihood of its being misquoted, and fourth, because although it is of a species of proof spoken of as an anomaly, and contrary to all the general rules of evidence, yet it has, where it is received, the greatest weight with juries. *Hardy v. State*, 76 Ga. App. 488, 46 S.E.2d 536 (1948).

Ambiguous statements. — When a statement is susceptible of two constructions, one that the declarant realized the declarant was in a dying condition and the other that the declarant might recover, and when the other circumstances are sufficient to show prima facie that the declarant was in the article of death and conscious of the declarant's condition, a declaration as to the cause of the declarant's death and the person who killed the declarant is not to be excluded because of such ambiguity. *Parker v. State*, 197 Ga. 340, 29 S.E.2d 61 (1944).

Subsequent affirmations. — Declarations not admissible because, at the time of mak-

General Consideration (Cont'd)

ing, the declarant did not believe declarant was going to die, may become admissible by subsequent affirmation since the declarations were referred to and affirmed as to their truth at the time when the declarant was conscious the declarant was dying. *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936).

When victim makes same statement before and after awareness of impending death. — There was no error in permitting the state's witnesses to testify about the victim's statement, made prior to the time that the victim was aware of the victim's impending death, about who had beaten the victim, since there was evidence that the victim later made the same statement while fully aware of the victim's impending death. *Wright v. State*, 254 Ga. 484, 330 S.E.2d 358 (1985).

Cited in *Smith v. State*, 9 Ga. App. 403, 71 S.E. 606 (1911); *Westberry v. State*, 175 Ga. 115, 164 S.E. 905 (1932); *Davis v. Metropolitan Life Ins. Co.*, 148 Ga. App. 179, 172 S.E. 467 (1934); *Cobb v. State*, 185 Ga. 462, 195 S.E. 758 (1938); *Morakes v. State*, 201 Ga. 425, 40 S.E.2d 120 (1946); *Hardy v. State*, 76 Ga. App. 488, 46 S.E.2d 536 (1948); *Duke v. State*, 205 Ga. 106, 52 S.E.2d 455 (1949); *Cobb v. State*, 219 Ga. 388, 133 S.E.2d 596 (1963); *Life Ins. Co. of Ga. v. Williams*, 109 Ga. App. 264, 135 S.E.2d 925 (1964); *Francis v. State*, 121 Ga. App. 256, 173 S.E.2d 710 (1970); *Thrash v. State*, 227 Ga. 775, 183 S.E.2d 376 (1971); *Carter v. Witherspoon*, 228 Ga. 485, 186 S.E.2d 534 (1971); *Lloyd v. State*, 257 Ga. 108, 355 S.E.2d 423 (1987); *Richie v. State*, 258 Ga. 361, 369 S.E.2d 740 (1988).

Declarations

1. Completeness

Exclusion as fragmentary and incomplete. — Dying declaration which was uncompleted because the declarant' became unconscious before finishing the declarant's statement is not thereby rendered inadmissible. But if it appears that the statement was intended by the declarant to be connected with and qualified by other statements which from any cause the declarant was prevented from making, the statement should be excluded as fragmentary and incomplete. *Kalb v. State*, 195 Ga. 544, 25 S.E.2d 24 (1943),

overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

Telling of less than full knowledge. — If a dying person finishes the statement the person wishes to make, it is no objection to the statement's admissibility as a dying declaration that the person told only a portion of what the person might have been able to tell. A distinct statement of facts meets the requirement of completeness. *Kalb v. State*, 195 Ga. 544, 25 S.E.2d 24 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

Failure to use full name. — Dying declarations sought to be admitted were not objectionable because the full name of the defendant was not stated, there being other evidence to show that the name used by the deceased referred to the accused. *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

Fact that the deceased in the deceased's dying declaration did not call the full name of the defendant does not render this evidence inadmissible when taken in connection with the other evidence that there was no other person present at the time of the homicide with such name. *Patterson v. State*, 199 Ga. 773, 35 S.E.2d 504 (1945).

Since the victim's dying declaration referred to a woman at the scene of a crime, and since the state established that the defendant was the only woman present when the victim was killed, the victim's failure to use her name does not render the victim's statement inadmissible. *Dixon v. State*, 243 Ga. 46, 252 S.E.2d 431 (1979).

2. Factual Requirements

Reason for admission is based on the fact that a man in a dying condition would not misrepresent a fact. *Hill v. State*, 41 Ga. 484 (1871); *Solomon v. State*, 2 Ga. App. 92, 58 S.E. 381 (1907).

Must be certain and definite. — All vague and indefinite expressions, all language that does not distinctly point to the cause of death, and death's attending circumstances, but requires to be aided by supposition or inference in order to establish facts tending to criminate the respondent should be held inadmissible. *Mitchell v. State*, 71 Ga. 128

(1883); *Odom v. State*, 13 Ga. App. 687, 79 S.E. 858 (1913).

Must be as to facts. — Dying declarations are competent, provided the declarations do not amount to the mere expression of an opinion by the deceased as to the cause and manner of the declarant's death. The rule of law is that a dying declaration to be admissible must consist of a statement of a matter of fact, and a declaration which amounts to the mere expression of an opinion by the person making it should not be received in evidence. *White v. State*, 100 Ga. 659, 28 S.E. 423 (1897).

Presumption of personal knowledge. — When want of knowledge does not appear either from the statement itself or from other evidence in the case, it must be presumed that the declarant stated a fact within the declarant's knowledge. In these circumstances, it was a question for the jury whether the declaration represented the primary knowledge of the deceased or merely the deceased's opinion. *Strickland v. State*, 167 Ga. 452, 145 S.E. 879 (1928); *Hawkins v. State*, 213 Ga. 749, 101 S.E.2d 710 (1959).

3. Scope of Declarations

Declarations should be limited to the cause of death and the person who killed the victim. *Harris v. State*, 142 Ga. 627, 83 S.E. 514 (1914).

But not strictly limited. — Dying declaration is not strictly limited to the physical cause of death and the identity of the killer but may include the *res gestae* of the homicide as part of the cause of death. *McAllister v. State*, 246 Ga. 246, 271 S.E.2d 159 (1980).

Dying declarations admissible to prove any relevant fact embraced in the *res gestae* of the killing. *Wilkerson v. State*, 91 Ga. 729, 17 S.E. 990, 44 Am. St. R. 63 (1893). See *Bush v. State*, 109 Ga. 120, 34 S.E. 298 (1899); *Rozier v. State*, 197 Ga. 420, 29 S.E.2d 602 (1944).

Relation required. — Dying declarations must relate to the cause of death or the person who killed the deceased in order to be admissible. *Rozier v. State*, 197 Ga. 420, 29 S.E.2d 602 (1944).

Proper parts of *res gestae*. — Every fact or circumstance shedding light upon the transaction, including such conversation and conduct of the parties as are properly parts of the *res gestae* of the homicide, may lawfully

go to the jury in a dying declaration made by the deceased. *Taylor v. State*, 120 Ga. 857, 48 S.E. 361 (1904); *Harris v. State*, 142 Ga. 627, 83 S.E. 514 (1914); *Rozier v. State*, 197 Ga. 420, 29 S.E.2d 602 (1944).

4. Identity of Assailant

Mere expression of opinion as to who assailant was, where it was manifestly impossible that the deceased could have seen the assailant or known certainly who the assailant was, is not admissible as a dying declaration. *Strickland v. State*, 167 Ga. 452, 145 S.E. 879 (1928).

Conclusions based on appearances. — When a declaration by the declarant's terms, taken in connection with the circumstances, merely expresses the declarant's belief as to the identity of the guilty person, it should be excluded; however, if the declarant sees the declarant's assailant or assailants, and from appearances which the declarant may describe the declarant draws a conclusion as to the assailant's identity, it is admissible. *Hawkins v. State*, 213 Ga. 749, 101 S.E.2d 710 (1958).

Question of fact. — When the evidence did not show that it was impossible for the deceased to have seen the person who shot the deceased, it was a question of fact for the jury to determine whether the deceased had personal knowledge of the assailant's identity. *Hawkins v. State*, 213 Ga. 749, 101 S.E.2d 710 (1958).

5. Elicited by Questions

Admissibility is not affected by the fact that the statements may have been elicited in response to questions put to deceased by bystanders. *Brinson v. State*, 22 Ga. App. 649, 97 S.E. 102 (1918); *Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948).

Not rebuttal of other evidence. — If preliminary statement made by the deceased as to the deceased's condition, in answer to questions, could be construed as lacking definiteness as a statement that the deceased was conscious of the fact that the deceased was going to die, this would not necessarily rebut the other evidence and circumstances from which it could have been inferred that the deceased believed the deceased would die. *Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948).

Conscious of Condition

Must be conscious of condition. — It must appear to the court that there was a probability that the deceased was conscious of the deceased's impending death at the time of making the dying declarations. *Walton v. State*, 79 Ga. 446, 5 S.E. 203 (1887); *Young v. State*, 114 Ga. 849, 40 S.E. 1000 (1902); *Crews v. State*, 44 Ga. App. 546, 162 S.E. 146 (1932); *Gibbs v. State*, 190 Ga. 207, 9 S.E.2d 248 (1940); *Freeman v. State*, 233 Ga. 745, 213 S.E.2d 643 (1975).

Means unimportant. — It does not matter how or by what means the deceased becomes conscious that the deceased is dying. *Smith v. State*, 9 Ga. App. 403, 71 S.E. 606 (1911).

Declarations of a person since deceased are admissible to show that the person was conscious of the person's dying condition. *Jenkins v. State*, 190 Ga. 556, 9 S.E.2d 909 (1940).

Statement of recovery hopes most common. — Most common way to determine whether or not the deceased was conscious of impending death at the time of making the declaration is to look at the deceased's statement concerning the deceased's hope of recovery. *Wallace v. State*, 90 Ga. 117, 15 S.E. 700 (1892).

Consciousness may be inferred. — Consciousness on the part of the deceased that the deceased was dying and was actually in extremis may be inferred, not only from the deceased's statements, but also from the nature of the wound and other circumstances. *Smith v. State*, 110 Ga. 255, 34 S.E. 204 (1899); *Young v. State*, 114 Ga. 849, 40 S.E. 1000 (1902); *Jefferson v. State*, 137 Ga. 382, 73 S.E. 499 (1912); *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930); *Crews v. State*, 44 Ga. App. 546, 162 S.E. 146 (1932); *Keith v. State*, 175 Ga. 385, 165 S.E. 262 (1932); *McCullough v. State*, 177 Ga. 315, 170 S.E. 220 (1933); *Simmons v. State*, 181 Ga. 761, 184 S.E. 291 (1936); *Rouse v. State*, 183 Ga. 551, 188 S.E. 904 (1936); *Etheridge v. State*, 187 Ga. 30, 199 S.E. 185 (1938), for comment, see 1 Ga. B.J. 49 (1939); *Satterfield v. State*, 68 Ga. App. 7, 21 S.E.2d 861 (1942); *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976); *Patterson v. State*, 199 Ga. 773, 35 S.E.2d 504 (1945); *Hardy v. State*, 76 Ga.

App. 488, 46 S.E.2d 536 (1948); *Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948); *Stembridge v. State*, 82 Ga. App. 214, 60 S.E.2d 491 (1950); *Norris v. State*, 258 Ga. 889, 376 S.E.2d 653 (1989).

With regard to a defendant's conviction for malice murder, the trial court did not err by admitting into evidence statements that the victim made to friends who found the victim wounded that the same person who had accused the victim of committing a robbery earlier in the day (the defendant) was the same person who shot the victim. The victim had lost consciousness after no longer being able to walk after having suffered a gunshot wound to the chest and was found several hours later fully knowing of the need of immediate medical attention; therefore, a prima facie showing for the admission of the victim's statements as dying declarations was established. *Ventura v. State*, 284 Ga. 215, 663 S.E.2d 149 (2008).

Identification testimony of murder victim who had suffered third-degree burns over 95 percent of the victim's body, and was aware of the victim's impending death at the time the identification was made, was properly admitted. *Norris v. State*, 258 Ga. 889, 376 S.E.2d 653 (1989).

Consciousness of impending death may be inferred from the declarant's statements, the nature of declarant's wounds, and other circumstances. *Early v. State*, 170 Ga. App. 158, 316 S.E.2d 527 (1984).

Asking for physician. — Fact that the deceased whose last statements were sought to be admitted, might have asked for a doctor does not establish, and might not of itself be taken in the mind of the jury as in any way indicating that the deceased was unaware of the deceased's dying condition, since it is but natural that even a dying man could wish to be attended by a physician. *Patterson v. State*, 199 Ga. 773, 35 S.E.2d 504 (1945).

Notwithstanding that a physician informed the declarant that there was a chance for the declarant to recover, declarations were held admissible. *Bryant v. State*, 80 Ga. 272, 4 S.E. 853 (1887).

Officer's reassurance to victim did not preclude admission. — Fact that victim asked whether the victim was going to die, the victim's knowledge of the serious gunshot wound, the occurrence of the victim's

death within a matter of hours, and the victim's great pain established a prima facie case that the victim realized that death was impending and, therefore, the ultimate determination was for the jury; the police officer's reassurance of the victim did not preclude admission of the dying declaration. *Morgan v. State*, 275 Ga. 222, 564 S.E.2d 192 (2002).

Time Requirements

Dying declaration need not be made at the time of the transaction or immediately thereafter. *McAllister v. State*, 246 Ga. 246, 271 S.E.2d 159 (1980).

Although life may have continued longer than was expected despair of dying may exist and be sufficiently proved. *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

Actual period of survival after making the declarations is not controlling. The necessary element is the declarant's expectation; and the subsequent duration of life, whatever it may turn out to be, has no relation to the declarant's state of mind when the declarant made the declaration. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930); *Crews v. State*, 44 Ga. App. 546, 162 S.E. 146 (1932); *Rouse v. State*, 183 Ga. 551, 188 S.E. 904 (1936); *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976); *Kalb v. State*, 195 Ga. 544, 25 S.E.2d 24 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976); *Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948); *Stembridge v. State*, 82 Ga. App. 214, 60 S.E.2d 491 (1950); *Ayers v. State*, 215 Ga. 325, 110 S.E.2d 669 (1959); *Ward v. State*, 226 Ga. 724, 177 S.E.2d 378 (1970).

Declarations were held admissible despite length of survival in the following cases. — See *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930) (survived three weeks after declaration); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936) (survived several days after declaration which was made 11 months after shooting); *Miles v. State*, 182 Ga. 75, 185 S.E. 286 (1936) (survived 33 or 34 days after declaration); *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S.

Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

Long intervals evidence of state of mind.

— Fact that death does not immediately follow the declaration will not render evidence of the declaration inadmissible as a matter of law; although, if the interval is long, this fact may be some evidence that the declarant had not despaired of recovery. *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

Lapse of time between the declaration and the time of death may be some evidence that the declarant has not despaired of recovery, but it is not controlling. *Early v. State*, 170 Ga. App. 158, 316 S.E.2d 527 (1984).

Fact that victim survived 54 days following the victim's declaration did not make declaration inadmissible. *Early v. State*, 170 Ga. App. 158, 316 S.E.2d 527 (1984).

Procedure

1. Evidentiary Foundation

Affirmative proof not required. — It is not, in order to render dying declarations admissible in evidence upon a trial for murder, essential for the state to show that the declarant affirmatively said the declarant was in a dying condition or used language of like import. *Gibson v. State*, 52 Ga. App. 297, 183 S.E. 83 (1935); *Parker v. State*, 197 Ga. 340, 29 S.E.2d 61 (1944); *Ayers v. State*, 215 Ga. 325, 110 S.E.2d 669 (1959).

Only prima facie evidence needed. — In order to submit a dying declaration to the jury it is only necessary for the state to submit facts which prima facie prove that the deceased was in the article of death at the time of the statement and that the deceased was conscious of impending death. *Dumas v. State*, 62 Ga. 58 (1878); *Mitchell v. State*, 71 Ga. 128 (1883); *Walton v. State*, 79 Ga. 446, 5 S.E. 203 (1887); *Bird v. State*, 128 Ga. 253, 57 S.E. 320 (1907); *Moody v. State*, 1 Ga. App. 772, 58 S.E. 262 (1907); *Hawkins v. State*, 141 Ga. 212, 80 S.E. 711 (1914); *Green v. State*, 154 Ga. 117, 113 S.E. 536 (1922); *Faulkner v. State*, 166 Ga. 645, 144 S.E. 193 (1928); *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930); *Gibbs v. State*, 41 Ga. App. 574, 153 S.E. 613 (1930); *Crews v. State*, 44

Procedure (Cont'd)**1. Evidentiary Foundation (Cont'd)**

Ga. App. 546, 162 S.E. 146 (1932); *Rounds v. State*, 174 Ga. 308, 162 S.E. 696 (1932); *McCullough v. State*, 177 Ga. 315, 170 S.E. 220 (1933); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936); *Sisk v. State*, 182 Ga. 448, 185 S.E. 777 (1936); *Etheridge v. State*, 187 Ga. 30, 199 S.E. 185 (1938), for comment, see 1 Ga. B.J. 49 (1939); *Simmons v. State*, 181 Ga. 761, 184 S.E. 291 (1939); *Satterfield v. State*, 68 Ga. App. 7, 21 S.E.2d 861 (1942); *Parker v. State*, 197 Ga. 340, 29 S.E.2d 61 (1944); *Stembridge v. State*, 82 Ga. App. 214, 60 S.E.2d 491 (1950); *Carter v. State*, 227 Ga. 788, 183 S.E.2d 392 (1971).

Decedent's declarations admissible as foundation. — While testimony of decedent's spouse as to decedent's declarations to the spouse did not indicate the cause of the decedent's death or the person who killed the decedent, but strongly tended to show that the decedent was in a dying condition and was conscious thereof, they were admissible to support other declarations made by the decedent to other persons in which the decedent had indicated, not only consciousness of the decedent's dying condition, but facts going to show the cause of the decedent's death and the person who killed the decedent. *Gibbs v. State*, 190 Ga. 207, 9 S.E.2d 248 (1940).

Evidence was sufficient to authorize admission of statements as dying declarations in the following cases. — *White v. State*, 100 Ga. 659, 28 S.E. 423 (1897); *Lee v. State*, 2 Ga. App. 481, 58 S.E. 676 (1907); *Faulkner v. State*, 166 Ga. 645, 144 S.E. 193 (1928); *Etheridge v. State*, 187 Ga. 30, 199 S.E. 185 (1938); *Jenkins v. State*, 190 Ga. 556, 9 S.E.2d 909 (1940); *Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948); *Hubbard v. State*, 208 Ga. 472, 67 S.E.2d 562 (1951); *Lee v. State*, 211 Ga. 170, 84 S.E.2d 353 (1954); *Phillips v. State*, 260 Ga. 742, 399 S.E.2d 202 (1991).

Declarations were erroneously admitted in the following cases. — See *Lyens v. State*, 133 Ga. 587, 66 S.E. 792 (1909); *Howard v. State*, 144 Ga. 169, 86 S.E. 540 (1915).

2. Witnesses

All evidence from same witness not required. — It is not necessary that the testimony relating to declarations by the de-

ceased as to the cause of the deceased's death, the person who killed the deceased, the deceased's dying condition, and the deceased's consciousness of such fact at the time the declarations were made, should come from the same witness. *Gibbs v. State*, 190 Ga. 207, 9 S.E.2d 248 (1940).

Individual testimony requirements. — It was not necessary that the testimony of each witness should disclose that the deceased was in a dying condition and conscious thereof, in order for such testimony to be admissible, but it was permissible to lay the foundation by other witnesses. *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

3. Impeachment

Bad character of deceased. — On a trial for murder, when dying declarations of the deceased have been introduced against the accused, it is competent for the latter to impeach these declarations by showing that the deceased, because of general bad character, was unworthy of belief. *Redd v. State*, 99 Ga. 210, 25 S.E. 268 (1896); *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Conflicting statements. — Statements of the deceased in conflict with proved dying declarations, if any have been made, are admissible. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930); *Keith v. State*, 175 Ga. 385, 165 S.E. 262 (1932).

4. Instructions

Contents of instructions. — Better practice when charging on the question of dying declarations to charge substantially in the language of the statute, without explaining to the jury why such declarations are admitted. *Hubbard v. State*, 208 Ga. 472, 67 S.E.2d 562 (1951).

Decedent's condition. — Jury should be instructed that the statements attributed to the deceased should be received and considered with great caution, and should have no weight unless the jury is satisfied from the evidence that such statements were made by the deceased at a time when the deceased was in a dying condition, and that the deceased was at that time conscious that the deceased was dying. *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936).

When defendant made no objection to the admission of testimony as to statements of murder victim on the ground that it was not shown that such declarations of the deceased were conscious utterances in the apprehension and immediate prospect of death, and the witness who testified to the statement also testified that victim was in a dying condition and knew that the victim was, court did not err in refusing a new trial merely because the court made no reference in the court's charge to dying declarations, and did not charge the jury that the alleged dying statement was admitted by the court *prima facie* and that before the jury could receive it and act upon the declaration they must believe that the declaration was made by the deceased in the article of death and when the deceased was conscious of the deceased's condition. *Allen v. State*, 187 Ga. 178, 200 S.E. 109 (1938).

Credibility. — While the testimony of a witness, whose evidence goes to the jury through the medium of dying declarations, is to be considered under the same rules that govern them in determining the credibility of other witnesses who testify from the stand, the failure of the judge to charge upon the subject of such rules will not be a sufficient reason for granting a new trial, in the absence of an appropriate and timely written request asking instructions upon the subject. *Carter v. State*, 227 Ga. 788, 183 S.E.2d 392 (1971).

Admission over objection. — When testimony relating to a dying declaration of the decedent is received in evidence and no objection is made thereto, it is not error for the court to give in charge to the jury the legal principles applicable to dying declarations. *Craig v. State*, 55 Ga. App. 207, 189 S.E. 727 (1937).

Proof beyond reasonable doubt. — It was error for the court, when the defendant personally introduced dying declarations as an affirmative defense, to instruct the jury in effect that the jury would have to be satisfied beyond a reasonable doubt that the deceased was, at the time the deceased made such declarations, in the article of death and conscious of the deceased's condition. *Poole v. State*, 47 Ga. App. 303, 170 S.E. 309 (1933).

Failure to instruct. — Failure of the court to add, in addition to other instructions

given upon the subject of dying declarations, the further instruction that the dying declaration must be received with caution, is not reversible error. *Key v. State*, 177 Ga. 329, 170 S.E. 230 (1933).

When in a homicide prosecution during colloquy between counsel and the trial judge with reference to admission of dying declaration the court stated that the court would charge the jury on dying declarations, but nothing further was said by counsel or court pertaining to the evidence of a dying declaration, it was not reversible error to fail to charge this law. *Dudley v. State*, 67 Ga. App. 256, 19 S.E.2d 833 (1942).

Failure of the court to instruct the jury as to the jury's consideration of dying declarations is not cause for a new trial since the state does not rely for conviction solely on dying declarations, and since there is no appropriate and timely written request for instructions as to dying declarations. *Murray v. State*, 214 Ga. 350, 104 S.E.2d 905 (1958).

When the state relies solely on a dying declaration, it is error to fail to instruct the jury thereon. *Holcomb v. State*, 249 Ga. 658, 292 S.E.2d 839 (1982).

When the trial court fails to properly instruct the jury as to the jury's consideration of statements preliminarily admitted by the court as dying declarations, the error is not cause for a new trial since the state does not rely for conviction solely on dying declarations and since there is no appropriate and timely written request for instructions as to the declarations. *Kitchens v. State*, 256 Ga. 1, 342 S.E.2d 320 (1986).

5. Duty of Jury

Ultimate determination. — When the foundation for a declaration has been *prima facie* established, the evidence is properly admitted, and the ultimate determination as to whether the person making the declaration was in *articulo mortis* and realized that death was impending, is a matter for the jury. *Freeman v. State*, 112 Ga. 48, 37 S.E. 172 (1900); *Darby v. State*, 22 Ga. App. 606, 96 S.E. 707 (1918); *Gibbs v. State*, 41 Ga. App. 574, 153 S.E. 613 (1930); *McCullough v. State*, 177 Ga. 315, 170 S.E. 220 (1933); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716 (1936); *Etheridge v. State*, 187 Ga. 30, 199 S.E. 185 (1938), for comment, see 1 Ga. B.J. 49 (1939); *Simmons v. State*, 181 Ga. 761,

Procedure (Cont'd)**5. Duty of Jury** (Cont'd)

184 S.E. 291 (1939); *Satterfield v. State*, 68 Ga. App. 7, 21 S.E.2d 861 (1942); *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga.

471, 228 S.E.2d 860 (1976); *Carter v. State*, 227 Ga. 788, 183 S.E.2d 392 (1971).

Weight of declarations. — Circumstances surrounding a dying declaration are matters which may properly be considered by the jury in determining the weight to be given to the declaration. *Hubbard v. State*, 208 Ga. 472, 67 S.E.2d 562 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 843.

C.J.S. — 31A C.J.S., Evidence, § 342.

ALR. — Admissibility of dying declaration with respect to transaction prior to homicide, 14 ALR 757.

Impeaching or discrediting dying declarations, 16 ALR 411.

Dying declarations involving an opinion or conclusion, 25 ALR 1370; 86 ALR2d 905.

When transfer deemed to be one in contemplation of death within the meaning of the Inheritance Tax Law, 41 ALR 989; 75 ALR 544; 120 ALR 170; 148 ALR 1051.

Admissibility of dying declarations inculcating defendant in murder of one other than victim named in indictment, 69 ALR 1221.

Admissibility of dying declarations in cases other than prosecution for homicide, 91 ALR 560.

Admissibility of dying declarations as affected by their incompleteness, 94 ALR 679.

Quantum of proof of preliminary facts necessary to admissibility of dying declarations, 96 ALR 621.

Admissibility in connection with dying declarations of other declarations by deceased not made in circumstances entitling them to admission as independent dying declarations, 104 ALR 1319.

Admissibility of oral testimony as to dying declarations which had been reduced to writing, 112 ALR 43.

Permitting dying declarations to be taken into jury room, 114 ALR 1519.

Weight and value of dying declarations as evidence, 167 ALR 147.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion, 86 ALR2d 905.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased, 34 ALR2d 451.

Admissibility of dying declaration in civil case, 47 ALR2d 526.

Opinion of doctor or other attendant as to declarant's consciousness of imminent death so as to qualify his statement as dying declaration, 48 ALR2d 733.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion, 86 ALR2d 905.

Admissibility of homicide victim's statements exculpating the accused, 95 ALR2d 637.

Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149.

Statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration, 53 ALR3d 785.

Sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration, 53 ALR3d 1196.

24-3-7. Declarations as to title by one in possession.

(a) Declarations by a person in possession of property in disparagement of his own title shall be admissible in evidence in favor of anyone and against privies of the declarant.

(b) Declarations by a person in favor of his own title shall be admissible to prove his adverse possession. (Orig. Code 1863, § 3697; Code 1868, § 3721; Code 1873, § 3774; Code 1882, § 3774; Civil Code 1895, § 5180; Civil Code 1910, § 5767; Code 1933, § 38-308.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DISPARAGEMENT OF OWN TITLE

ADVERSE POSSESSION

General Consideration

Presumption. — Until the contrary appears, every man is presumed to be cognizant of the law; and whenever admissions are made, as to the title of property, by the party in possession, the presumption is, that the statements were made, not only with a knowledge of the facts, but of the party's legal rights, also, growing out of those facts. *Butler v. Livingston*, 15 Ga. 565 (1854).

Possession required. — Statement by the alleged predecessor in title was properly rejected because it did not appear that at the time of making the admission referred to the party making the statement was in possession of the land. *George v. Williams*, 177 Ga. 630, 170 S.E. 790 (1933).

Proof of privity required. — Before the sayings of one person should be received in evidence against another, it ought to be clear beyond a reasonable doubt, that the other claims under him, or bears to him some relation of privity. *Aiken v. Cato*, 23 Ga. 154 (1857).

Tax returns. — Tax returns were held in the nature of declarations to show adverse possession. *Smith v. Haire*, 58 Ga. 446 (1877).

County property inventory purporting to include all property belonging to the county is in the nature of such a declaration. *Ogden v. Dodge County*, 97 Ga. 461, 25 S.E. 321 (1895).

Testimony held not admissible under O.C.G.A. § 24-3-7 in the following cases. — See *Ehrlich v. Mills*, 203 Ga. 600, 48 S.E.2d 107 (1948); *Turner v. McKee*, 97 Ga. App. 531, 103 S.E.2d 658 (1958).

Cited in *Wood v. Crawford*, 75 Ga. 733 (1885); *Harrison v. Hatcher*, 44 Ga. 638 (1872); *Smith v. Page*, 72 Ga. 539 (1884);

Bowman v. Owens, 133 Ga. 49, 65 S.E. 156 (1909); *Johnson v. Hayes*, 139 Ga. 218, 77 S.E. 73 (1913); *Rudolph v. Washington*, 146 Ga. 605, 91 S.E. 560 (1917); *Copeland v. Jordan*, 147 Ga. 601, 95 S.E. 13 (1918); *McCool v. Wilcher*, 27 Ga. App. 96, 107 S.E. 365 (1921); *Caraker v. Brown*, 152 Ga. 677, 111 S.E. 51 (1922); *Crider v. Woodward*, 162 Ga. 743, 135 S.E. 95 (1926); *Smith v. Lemon*, 166 Ga. 93, 142 S.E. 554 (1928); *Smith v. Smith*, 167 Ga. 368, 145 S.E. 661 (1928); *Cook v. Clarke Chevrolet Co.*, 41 Ga. App. 389, 153 S.E. 88 (1930); *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Boyd v. Boyd*, 173 Ga. 139, 159 S.E. 674 (1931); *Anderson v. Black*, 191 Ga. 627, 13 S.E.2d 650 (1941); *Miller v. Everett*, 192 Ga. 26, 14 S.E.2d 449 (1941); *Veal v. Barber*, 197 Ga. 555, 30 S.E.2d 252 (1944); *Payne v. Green*, 84 Ga. App. 689, 67 S.E.2d 195 (1951); *Rabun v. Wynn*, 209 Ga. 80, 70 S.E.2d 745 (1952); *Jackson v. GMAC*, 103 Ga. App. 865, 120 S.E.2d 810 (1961); *Davis v. Newton*, 217 Ga. 75, 121 S.E.2d 153 (1961); *Seaboard Coast Line R.R. v. Carter*, 226 Ga. 825, 177 S.E.2d 683 (1970); *Georgia Power Co. v. Irvin*, 267 Ga. 760, 482 S.E.2d 362 (1997).

Disparagement of Own Title

Competency depends on time of making. — Whether admissions made by defendant, while in possession of land levied on and claimed, in disparagement of defendant's title, are competent, depends, in some measure, upon the time when the admissions were made. If made before the commencement of the plaintiff's suit, the admissions would be admissible even in favor of the claimant. *Powell v. Watts*, 72 Ga. 770 (1884). See also *Rountree v. Gaulden*, 128 Ga. 737, 58 S.E. 346 (1907).

Disparagement of Own Title (Cont'd)

Party privy required. — While declarations by a person in possession of property, in disparagement of the person's own title, shall be admissible in evidence in favor of anyone and against privies, it was error to admit the testimony of a witness as to a statement made by someone else involved, which adjoined him, neither of these persons being in possession of the land and neither being in privity with either of the parties to the present proceeding. *Morgan v. Lester*, 215 Ga. 570, 111 S.E.2d 228 (1959).

Declarations of a deceased person in disparagement of the deceased's title to land, made while in possession thereof, are admissible in evidence, not only against the declarant and those claiming under the declarant, but also for or against strangers. *McLeod v. Swain*, 87 Ga. 156, 13 S.E. 315 (1891); *Hall v. Collier*, 146 Ga. 815, 92 S.E. 536 (1917); *McCrea v. Georgia Power Co.*, 179 Ga. 1, 174 S.E. 798 (1934), later appeal, 187 Ga. 708, 15 S.E.2d 664 (1939); *Kimbrough v. Rutherford*, 70 Ga. App. 294, 28 S.E.2d 370 (1943).

Party having two distinct titles to property may disclaim one and rely entirely on the other, and after such election is made, the admissions of one's privies in the disclaimed title are not evidence against that one. *Oliver v. Persons*, 30 Ga. 391, 76 Am. Dec. 657 (1860).

Possessor of personal property. — Declarations of one in possession of personal property, adverse to one's title, are evidence against a party holding under one by purchase subsequent to the making of such declarations. *Doughty v. McMillan*, 92 Ga. 818, 19 S.E. 59 (1894).

Party declaring against part interest. — Declaration of one in possession of a lot of land, with a deed to the whole lot, that one did not claim a particular part of the land, is admissible in evidence against a privy of the declarant. *Callaway v. Beauchamp*, 147 Ga. 17, 92 S.E. 538 (1917).

Declarations by a donor of land in favor of the donor's own title, made after the donor has delivered possession of the land to the donee, are not admissible in evidence against the latter. Declarations of a donor against the donor's title and in favor of that of the donee bind the donor and donor's

privies in estate, and consequently are admissible in the donee's favor against one who derived title from the donor after the declarations were made. *Ogden v. Dodge County*, 97 Ga. 461, 25 S.E. 321 (1895).

Admissions of trustee. — If one was a continuing trustee, holding the legal title for the cestui que trust, one's admissions, while actually handling the subject matter of the trust, would be admissible. *Knorr v. Raymond*, 73 Ga. 749 (1884).

Declarations of an assignor were admissible if the declarations were made in disparagement of the assignor's title while the assignor was in possession. *Wright v. Zeigler Bros.*, 70 Ga. 501 (1883).

Claim cases. — In a claim case, the sayings of the defendant in execution while in possession, or of any other person in possession of the land, are evidence for the plaintiff in execution to show that the defendant, or such third person, was not the tenant of the claimant. *Ozmore v. Hood & Kiddoo*, 53 Ga. 114 (1874).

Adverse Possession

Declarations are admissible to characterize the possession as bearing on whether the possession was permissive or adverse, when that fact is relevant, but not to show the truth of the statements, without more. *Sausey v. White*, 143 Ga. 7, 84 S.E. 58 (1915).

Declarations of a person in possession of land are admissible to characterize the possession as bearing on whether the possession was permissive or adverse, when that fact is relevant, but not to show the truth of the statements without more. *Higdon v. Dixon*, 203 Ga. 67, 45 S.E.2d 423 (1947).

Declarations admissible for limited purpose. — Declarations in favor of one's own title are admissible for no other purpose than to prove adverse possession. *Rucker v. Rucker*, 136 Ga. 830, 72 S.E. 241 (1911).

Nature of predecessor's title. — When a claimant relies upon statements of the claimant's father to show that the latter had purchased land with money of his wife, taking title thereto in his own name, declarations made by the father, while in possession of the land, that the land was not bought with money of his wife; but with his own funds, are admissible to show his adverse possession. *Wallace v. Mize*, 153 Ga. 374, 112 S.E. 724 (1922).

RESEARCH REFERENCES

C.J.S. — 31A C.J.S., Evidence, §§ 312, 314 et seq., 342, 350 et seq.

ALR. — Adverse possession as affected by attempt during period thereof to change, or make more specific, the tract claimed, 115 ALR 1299.

Admissibility on question of constructive trust of declarations made by grantor after execution and delivery of deed absolute on its face, 156 ALR 1335.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Admissibility of declarations of grantor on issue of delivery of deed, 34 ALR2d 588.

Adverse possession of landlord as affected by tenant's recognition of title of third person, 38 ALR2d 826.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 ALR2d 770.

Fence as factor in fixing location of boundary line — modern cases, 7 ALR4th 53.

24-3-8. Declarations against interest by one since deceased.

Declarations and entries made by a person since deceased against his interest and not made with a view to pending litigation shall be admissible in evidence in any case. (Orig. Code 1863, § 3699; Code 1868, § 3723; Code 1873, § 3776; Code 1882, § 3776; Civil Code 1895, § 5181; Civil Code 1910, § 5768; Code 1933, § 38-309.)

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

History generally. — Statute is a mere codification of a well-settled principle in the law. While such evidence is hearsay, it is admitted as one of the exceptions to the rule against hearsay evidence on the ground of the extreme improbability of its falsity. *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S.E. 92 (1905).

Former Code 1933, § 38-309 (see **O.C.G.A. § 24-3-8**) had no application since the party seeking to give hearsay evidence was not a competent witness under former Code 1933, § 38-1603 (see **O.C.G.A. § 24-9-1**). *Bloodworth v. Taylor*, 208 Ga. 770, 69 S.E.2d 747 (1952); *Dye v. Richards*, 210 Ga. 601, 81 S.E.2d 820 (1954).

Prerequisites. — To render declaration or entries admissible, it must appear that the declarant is deceased, that the declarant possessed competent knowledge of the facts, or that it was his duty to know them, and the declarations were at variance with the declarant's interests. *Field v. Boynton*, 33 Ga. 239 (1862); *Murdock v. Adamson*, 12 Ga. App. 275, 77 S.E. 181 (1913).

Declarations of persons since deceased must be trustworthy before the declarations are admissible under the rule of necessity, and self-serving declarations are not admissible. *Chrysler Motors Corp. v. Davis*, 226 Ga. 221, 173 S.E.2d 691 (1970).

Declarations of a decedent to others are admissible if there are no other witnesses to the alleged occurrence, it being for the jury, under appropriate instructions, to determine their weight and credibility. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

Time of making declarations. — Declarations are not admissible in behalf of a claimant, if made after the judgment was obtained or while the litigation was pending and with reference thereto. *James v. Taylor*, 93 Ga. 275, 20 S.E. 309 (1893).

Nature of declarations. — Declarations of one, whether verbal or in writing, of a matter which is against one's interest at the time, and who is since deceased, is admissible as evidence in a suit between third persons,

whether such declaration relates to the present or past occurrences. *Field v. Boynton*, 33 Ga. 239 (1862); *Barbre v. Scott*, 75 Ga. App. 524, 43 S.E.2d 760 (1947).

Declaration containing statements both for and against declarant's interest. — If the declaration or entry contains statements both in favor of the declarant and against the declarant's interest, the statements are to be balanced, and if those in favor of interest equal or preponderate over those against interest the declaration is not admissible; otherwise it is. *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S.E. 92 (1905).

If a declaration or entry contains statements both in favor of the declarant and against the declarant's interest, the statements are to be balanced, and if those in favor of interest equal or preponderate over those against interest, the declaration is not admissible. *Mattison v. Travelers Indem. Co.*, 167 Ga. App. 521, 307 S.E.2d 39 (1983).

Weight of evidence. — Declarations or entries when admitted are evidence as to any fact stated therein which was within the knowledge of the declarant or which it was the declarant's duty to know. *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S.E. 92 (1905).

Cause of injury. — Declaration by an injured party tending to exonerate the defendant is admissible. *Georgia R.R. & Banking v. Fitzgerald*, 108 Ga. 507, 34 S.E. 316, 49 L.R.A. 175 (1899); *Murdock v. Adamson*, 12 Ga. App. 275, 77 S.E. 181 (1913).

Declaration as to marriage. — When equivocal conduct such as cohabitation is relied upon as a circumstance material to the issue to prove marriage, declarations of one of the parties since deceased, made pending the period of cohabitation, disaffirming the marriage, are admissible. *Drawdy v. Hesters*, 130 Ga. 161, 60 S.E. 451 (1905).

Insurance. — When an insurance policy is sued on by a creditor who was a beneficiary, a letter of the insured to a third person stating that the insured had not applied for any insurance is admissible. *Chandler v. Mutual Life & Indus. Ass'n*, 131 Ga. 82, 61 S.E. 1036 (1908).

It was permissible for the defendant to prove that a few months before applying for the insurance the insured made to third persons declarations contrary to the facts

stated in the application, the same being admissible as declarations of a person, since deceased, against the deceased's interest, and not made with a view to pending litigation. *Henderson v. Jefferson Std. Life Ins. Co.*, 39 Ga. App. 609, 147 S.E. 901 (1929), overruled on other grounds, *Lawler v. Life Ins. Co. of Ga.*, 90 Ga. App. 481, 83 S.E.2d 281 (1954).

Parties to contracts. — Testimony of a person other than the party to the contract that the person heard the deceased state that the person was going to will the deceased's property to the plaintiff is admissible. *Brewer v. Mackey*, 177 Ga. 813, 171 S.E. 273 (1933).

In a personal injury case, to the extent that an employer implied or stated that a deceased employee agreed to make certain deliveries, those statements were admissible because alleged oral agreements by the decedent were considered against the decedent's interest. *Thompson v. Club Group, Ltd.*, 251 Ga. App. 356, 553 S.E.2d 842 (2001).

Proffer of declaration by beneficiary thereof. — Decedent's declarations in disparagement of decedent's title would be admissible pursuant to O.C.G.A. § 24-3-8, as the declarations negate the existence of a gift and are, therefore, against the decedent's pecuniary interest; that such declarations are proffered by one who would benefit from their admission into evidence is not a valid ground for excluding the declarations from the jury's consideration. *Cole v. Cole*, 205 Ga. App. 332, 422 S.E.2d 230 (1992).

Parties and their privities. — It is not necessary for purposes of O.C.G.A. § 24-3-8 that a declarant be a party or in privity with a party. *Horan v. Pirkle*, 197 Ga. App. 151, 397 S.E.2d 734 (1990).

Pending litigation. — While a confessor to a crime may believe that litigation is impending, that one might well become involved in criminal proceedings as a result of one's confession, the possibility or probability of litigation does not translate into "pending" litigation as the term is used in O.C.G.A. § 24-3-8. *State Farm Auto. Ins. Co. v. Great Am. Ins. Co.*, 164 Ga. App. 457, 297 S.E.2d 355 (1982).

When defendant's deceased brother had been fingerprinted and booked at the time

he was interviewed by police, his statement, made with a view to litigation, was inadmissible. *Jones v. State*, 196 Ga. App. 842, 397 S.E.2d 181 (1990).

Rule of necessity. — Since deceased was the only eyewitness to events leading up to a fire, the deceased's out-of-court declarations in the form of the deceased's "trustworthy" deposition testimony are admissible as coming within the rule of necessity. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

Declarations held inadmissible under O.C.G.A. § 24-3-8 in the following cases. — See *Hollis v. Sales*, 103 Ga. 75, 29 S.E. 482 (1897); *State Banking Co. v. Miller*, 185 Ga. 653, 196 S.E. 47 (1938); *Martin v. Turner*, 235 Ga. 35, 218 S.E.2d 789 (1975); *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *Cobb v. Garner*, 158 Ga. App. 110, 279 S.E.2d 280 (1981); *Boehm v. Abi-Sarkis*, 211 Ga. App. 181, 438 S.E.2d 410 (1993).

Declarations held properly admitted under O.C.G.A. § 24-3-8 in the following cases. — See *Elwell v. New England Mtg. Sec. Co.*, 101 Ga. 496, 28 S.E. 833 (1897); *Holland v. Gunn*, 171 Ga. 204, 154 S.E. 887 (1930).

Cited in *Wallace v. Owen*, 71 Ga. 544 (1883); *Shackelford v. Orris*, 135 Ga. 29, 68 S.E. 838 (1910); *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Gullatt v. Thompson*, 61 Ga. App. 253, 6 S.E.2d 447 (1939); *Dorsey v.*

Dorsey, 189 Ga. 662, 7 S.E.2d 273 (1940); *Miller v. Everett*, 192 Ga. 26, 14 S.E.2d 449 (1941); *Peters v. Adcock*, 196 Ga. 118, 26 S.E.2d 342 (1943); *Prothro v. Walker*, 202 Ga. 71, 42 S.E.2d 114 (1947); *Barron v. Anderson*, 205 Ga. 487, 53 S.E.2d 682 (1949); *Fowler v. Latham*, 206 Ga. 245, 56 S.E.2d 272 (1949); *Fuller v. Fuller*, 213 Ga. 103, 97 S.E.2d 306 (1957); *Davis v. Newton*, 217 Ga. 75, 121 S.E.2d 153 (1961); *Moore v. Atlanta Transit Sys.*, 105 Ga. App. 70, 123 S.E.2d 693 (1961); *Handley v. Limbaugh*, 224 Ga. 408, 162 S.E.2d 400 (1968); *Edwards v. Johnson*, 122 Ga. App. 462, 177 S.E.2d 490 (1970); *Carter v. Witherspoon*, 228 Ga. 485, 186 S.E.2d 534 (1971); *Glaze v. Bailey*, 130 Ga. App. 189, 202 S.E.2d 708 (1973); *Schulz v. Hickok Mfg. Co.*, 358 F. Supp. 1208 (N.D. Ga. 1973); *Holsomback v. Akins*, 134 Ga. App. 543, 215 S.E.2d 306 (1975); *Lewis v. Williford*, 235 Ga. 558, 221 S.E.2d 14 (1975); *Fletcher v. Fletcher*, 242 Ga. 158, 249 S.E.2d 530 (1978); *Hamrick v. Greenway*, 257 Ga. 287, 357 S.E.2d 580 (1987); *Kelley v. Horn*, 192 Ga. App. 86, 383 S.E.2d 638 (1989); *Kinard v. Luke*, 259 Ga. 861, 389 S.E.2d 223 (1990); *Bennett v. State*, 262 Ga. 149, 414 S.E.2d 218 (1992); *Fenimore v. State*, 218 Ga. App. 735, 463 S.E.2d 55 (1995); *Dodd v. Scott*, 250 Ga. App. 32, 550 S.E.2d 444 (2001); *Banks v. Echols*, 302 Ga. App. 772, 691 S.E.2d 667 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 838, 842.

C.J.S. — 31A C.J.S., Evidence, §§ 299, 313 et seq.

ALR. — Death of adverse party as affecting evidence with respect to book account, 6 ALR 756.

Admissibility of dying declarations in cases not involving homicide, 49 ALR 1282; 91 ALR 560; 47 ALR2d 526.

Constitutionality, construction, and application of statutes making statements of deceased persons admissible in evidence, 96 ALR 686.

Admissibility of memoranda made by one since deceased regarding matters in respect of which he acted for one of the parties to the present litigation, 103 ALR 1501.

Admissibility of oral or written statement by deceased as to fact or terms of an

antenuptial or postnuptial agreement which cannot be found, 140 ALR 1133.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased, 34 ALR2d 451.

Admissibility of dying declaration in civil case, 47 ALR2d 526.

Admissibility, in action on employee fidelity bond or policy, of confessions or declarations of such employee no longer available as witness, 65 ALR2d 631.

Admissibility in evidence of receipt of third person, 80 ALR2d 915.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 ALR2d 6.

Admissibility, as against interest, in civil

case of declaration of commission of criminal act, 90 ALR3d 1173.

24-3-9. Declarations of deceased persons as to ancient rights.

Declarations of deceased persons as to ancient rights made before the litigation arose shall be admissible to prove matters of public interest in which the whole community is supposed to take interest and to have knowledge. (Orig. Code 1863, § 3701; Code 1868, § 3725; Code 1873, § 3778; Code 1882, § 3778; Civil Code 1895, § 5183; Civil Code 1910, § 5770; Code 1933, § 38-311.)

JUDICIAL DECISIONS

Former dead man's statute rendered a witness incompetent to testify as to a conversation with a person since deceased regardless of whether the testimony might be admissible under other rules of evidence. *Willis v. Kennedy*, 267 Ga. 165, 476 S.E.2d 246 (1996).

Boundary lines. — Declarations of deceased individuals who do not appear to have any motive to misrepresent are properly received in evidence, at least in the case of private boundaries. *Waddell v. Cole*, 138 Ga. App. 15, 225 S.E.2d 491 (1976).

Declarations as to the location of the property line by the deceased husband were competent evidence of the line and landmarks thereon since this line had been

claimed as the true line and was at least impliedly agreed to by the deceased husband. *Banks v. Myrick*, 149 Ga. App. 252, 253 S.E.2d 873 (1979).

Actions to quiet title. — In an action to quiet title to real property, testimony about a rock foundation being the location of the family home was admissible under O.C.G.A. § 24-3-9. *Resseau v. Bland*, 268 Ga. 634, 491 S.E.2d 809 (1997).

Cited in *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *City of Marietta v. Glover*, 225 Ga. 265, 167 S.E.2d 649 (1969); *Byers v. Lieberman*, 126 Ga. App. 582, 191 S.E.2d 470 (1972); *Dodd v. Scott*, 250 Ga. App. 32, 550 S.E.2d 444 (2001).

RESEARCH REFERENCES

C.J.S. — 31A C.J.S., Evidence, §§ 299, 371.

ALR. — Admissibility of evidence of rep-

utation or declaration as to matter of public interest, 58 ALR2d 615.

24-3-10. Testimony at former trial.

The testimony of a witness since deceased, disqualified, or inaccessible for any cause which was given under oath on a former trial upon substantially the same issue and between substantially the same parties may be proved by anyone who heard it and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies. (Orig. Code 1863, § 3705; Code 1868, § 3729; Code 1873, § 3782; Code 1882, § 3782; Civil Code 1895, § 5186; Penal Code 1895, § 1001; Civil Code 1910, § 5773; Penal Code 1910, § 1027; Code 1933, § 38-314.)

Law reviews. — For survey article on trial practice and procedure, see 34 Mercer L.

Rev. 299 (1982). For annual survey on law of evidence, see 42 Mercer L. Rev. 223 (1990).

For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For annual sur-

vey on death penalty law, see 61 Mercer L. Rev. 99 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DECEASED WITNESSES

INACCESSIBLE WITNESSES

PROCEEDINGS

General Consideration

For case discussing history of statute, see *Burns v. State*, 191 Ga. 60, 11 S.E.2d 350 (1940) (see O.C.G.A. § 24-3-10).

Constitutional right of confrontation. — Confrontation Clause is not offended when the defendant waives at trial, through defendant's counsel at that time, the use of prior sworn testimony of an inaccessible witness and therefore cannot claim the waiver was error for the first time on appeal. *Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976).

Statute is really a rule of necessity. *Herndon v. Chamberlain*, 39 Ga. App. 207, 146 S.E. 503 (1929); *Parrott v. Edwards*, 113 Ga. App. 422, 148 S.E.2d 175 (1966).

Statute has been uniformly applied to criminal as well as to civil cases. *Burns v. State*, 191 Ga. 60, 11 S.E.2d 350 (1940).

O.C.G.A. § 24-3-10 is an exception to the hearsay rule to prove the testimony of a witness at a former trial under certain circumstances when the witness is unavailable at a later trial. *Gottschalk v. State*, 160 Ga. App. 769, 287 S.E.2d 107 (1982).

Relationship of O.C.G.A. § 24-3-10 to O.C.G.A. § 9-11-32(a)(5). — Specific and limited provision for the admission into evidence in a subsequent trial of depositions taken in a prior action is made by O.C.G.A. § 9-11-32(a)(5). All other issues relating to the admission into evidence in a subsequent trial of testimony taken in connection with a prior action must be resolved under O.C.G.A. § 24-3-10. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

Whether the party objecting had adequate opportunity to cross-examine the witness at the previous trial is the central issue in determining whether this statute applies. *Cates v. State*, 245 Ga. 30, 262 S.E.2d 796 (1980); *Craft v. State*, 154 Ga. App. 682, 269 S.E.2d 490 (1980).

For prior testimony to be admissible, the party challenging the testimony must have had the opportunity at the earlier proceeding to cross-examine the witness on the issue to be decided in the later proceeding, which necessarily means that the earlier and later proceedings have to involve substantially the same issue. *In re Spruell*, 227 Ga. App. 324, 489 S.E.2d 48 (1997).

Sole question determined by O.C.G.A. § 24-3-10 is whether the party against whom the former testimony is now offered had an adequate opportunity by cross-examination to sift this testimony. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

When the issues and parties are identical and the party against whom the testimony is offered called the witness to the stand at the previous hearing or trial, the need for cross-examination is basically satisfied, and the requirement of O.C.G.A. § 24-3-10 is met. *Barnes v. State*, 256 Ga. 370, 349 S.E.2d 387 (1986).

Parties and issues in actions must be same. — O.C.G.A. § 24-3-10 requires as the prerequisite to the admission in a subsequent action of the prior testimony of a since deceased witness that the parties and issues in the two actions be substantially the same. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981); *GMC v. Moseley*, 213 Ga. App. 875, 447 S.E.2d 302 (1994).

Substantial compliance with O.C.G.A. § 24-3-10. — Substantial and not a literal compliance with the conditions of this statute is all that is required. *Mitchell v. State*, 71 Ga. 128 (1883).

Same issues required. — Evidence as to what a deceased witness testified on a previous trial is not admissible when it appears that the issue therein involved was not substantially the same as that in controversy on

General Consideration (Cont'd)

the trial at which such evidence is tendered. *Lathrop v. Adkisson*, 87 Ga. 339, 13 S.E. 517 (1891); *Whitaker v. Arnold*, 110 Ga. 857, 36 S.E. 231 (1900).

Statute does not require that all the issues in the two proceedings be the same; but the issue to which the former testimony was directed must be the same as the issue upon which the testimony is offered in the second. *Craft v. State*, 154 Ga. App. 682, 269 S.E.2d 490 (1980).

Statute does not demand that all the issues or parties be the same but requires only that the issue on which the testimony was offered in the first suit be the same as the issue upon which the testimony is offered in the second. *Vanhouten v. State*, 193 Ga. App. 871, 389 S.E.2d 534 (1989).

Companion case growing out of a common occurrence, though not wholly between the same parties, is a former trial within the meaning of this statute. *Myrick v. Sievers*, 104 Ga. App. 95, 121 S.E.2d 185 (1961).

Probative value. — Testimony admitted under this statute has probative value as original testimony. *Maynard v. Rawlins*, 45 Ga. App. 91, 163 S.E. 269 (1932).

Burden of proof. — Party seeking introduction of the testimony at a prior trial must show that the witness is inaccessible. *Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976).

Party seeking to introduce testimony given at a prior trial must show that the witness is inaccessible. Whether a witness is inaccessible depends upon the diligence shown by the party seeking to use the witness's testimony in ascertaining the witness's whereabouts and the attempts made to bring the witness into court. *Johnson v. State*, 197 Ga. App. 384, 398 S.E.2d 432 (1990).

Proof by parol evidence. — When a witness who testified at a committing trial subsequently died, on the final trial of the same case in the superior court the witness's testimony so given was admissible, and there being nothing to show that the testimony was reduced to writing, it was competent to prove such testimony by parol. *Robinson v. State*, 68 Ga. 833 (1882).

Testimony compelled by grant of immunity admissible under O.C.G.A. § 24-3-10. — Testimony may be admitted pursuant to O.C.G.A. § 24-3-10 although that testimony

was compelled by the state after a grant of immunity. *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

Cited in *Executors of Riggins v. Brown*, 12 Ga. 271 (1852); *Hughes v. Clark*, 67 Ga. 19 (1881); *City of Columbus v. Ogletree*, 102 Ga. 293, 29 S.E. 749 (1897); *Hardin v. State*, 107 Ga. 718, 33 S.E. 700 (1899); *Western Union Tel. Co. v. Wright*, 185 F. 250 (5th Cir. 1910); *Parker v. State*, 17 Ga. App. 252, 87 S.E. 705 (1915); *Tuggle v. State*, 24 Ga. App. 655, 101 S.E. 767 (1920); *Hill Bros. v. Render*, 33 Ga. App. 13, 125 S.E. 79 (1924); *Allen v. Davis*, 34 Ga. App. 5, 128 S.E. 74 (1925); *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Goodwin v. State*, 49 Ga. App. 223, 174 S.E. 742 (1934); *Craig v. State*, 55 Ga. App. 207, 189 S.E. 727 (1937); *Burns v. State*, 191 Ga. 60, 11 S.E.2d 350 (1940); *Johnson v. State*, 192 Ga. 571, 15 S.E.2d 786 (1941); *Cantrell v. Byars*, 71 Ga. App. 287, 30 S.E.2d 643 (1944); *Moultrie Nat'l Bank v. Travelers Indem. Co.*, 181 F. Supp. 444 (M.D. Ga. 1959); *Moultrie Nat'l Bank v. Travelers Indem. Co.*, 275 F.2d 903 (5th Cir. 1960); *Manor v. State*, 223 Ga. 594, 157 S.E.2d 431 (1967); *Rowe v. City Council*, 119 Ga. App. 571, 168 S.E.2d 209 (1969); *Johnson v. State*, 130 Ga. App. 704, 204 S.E.2d 302 (1974); *Clay v. State*, 238 Ga. 285, 232 S.E.2d 559 (1977); *Lingerfelt v. State*, 238 Ga. 355, 233 S.E.2d 356 (1977); *Lee v. State*, 239 Ga. 769, 238 S.E.2d 852 (1977); *Greenway v. State*, 144 Ga. App. 558, 241 S.E.2d 453 (1978); *Fleming v. State*, 243 Ga. 120, 252 S.E.2d 609 (1979); *Todd v. State*, 243 Ga. 539, 255 S.E.2d 5 (1979); *Washington v. State*, 253 Ga. 173, 318 S.E.2d 55 (1984); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *Reid v. Harbin Lumber Co.*, 172 Ga. App. 615, 323 S.E.2d 845 (1984); *De La Gonzalez v. Krystal Co.*, 173 Ga. App. 574, 327 S.E.2d 546 (1985); *Moody v. State*, 273 Ga. 24, 537 S.E.2d 666 (2000); *Walker v. State*, 281 Ga. 521, 640 S.E.2d 274 (2007).

Deceased Witnesses

Deceased witness's testimony from preliminary hearing admissible. — Recounting of deceased's preliminary hearing testimony which had been given subject to cross-examination by the defendant's attorney does not violate the defendant's right of confrontation. *Little v. Balkcom*, 245 Ga. 285, 264 S.E.2d 219 (1980).

Error to admit testimony from deceased witness. — Because defendant had no opportunity to confront a deceased witness at an accomplice's trial, the trial court erred in admitting the witness's statements at defendant's trial pursuant to O.C.G.A. § 24-3-10; in addition, the statements were testimonial and violated defendant's confrontation rights. *Willingham v. State*, 279 Ga. 886, 622 S.E.2d 343 (2005).

Deceased codefendant's entire testimony at defendant's first trial was admissible at retrial even though defendant's character was incidentally placed in issue. *Chambers v. State*, 213 Ga. App. 414, 444 S.E.2d 820 (1994).

Deceased witness testimony from sentencing proceeding admissible. — Prior testimony of a deceased witness at a sentencing trial held before the defendant withdrew the defendant's guilty plea was admissible at the defendant's guilt/innocence trial. The state sought the admission of this testimony, which included the witness's account of the witness's rape and the murders of family members to help meet the state's burden to prove beyond a reasonable doubt that the defendant was guilty of these crimes; furthermore, there was no limitation on the defendant's cross-examination of the witness at the sentencing trial. *Martin v. State*, 284 Ga. 504, 668 S.E.2d 685 (2008).

Inaccessible Witnesses

Whether a witness is inaccessible depends upon the diligence shown by the party seeking to use the witness's testimony of a former trial in ascertaining where the witness is and in attempting to bring the witness into court. *Gaither v. State*, 227 Ga. 668, 182 S.E.2d 434 (1971); *Robertson v. State*, 124 Ga. App. 119, 183 S.E.2d 47 (1971); *Smith v. State*, 247 Ga. 453, 276 S.E.2d 633 (1981).

Prima facie showing of inaccessibility is sufficient. *Williams v. Wolff*, 3 Ga. App. 737, 60 S.E. 357 (1908); *Savannah Bank & Trust Co. v. Estill*, 142 Ga. 447, 83 S.E. 137 (1914); *Estill v. Citizens & S. Bank*, 153 Ga. 618, 113 S.E. 552 (1922); *Goodwin v. Allen*, 83 Ga. App. 615, 64 S.E.2d 212 (1951).

Mere contention insufficient. — State is allowed to use a transcript of testimony of an absent witness upon the state's showing, and not mere contention, that after diligent search, the state could not locate the witness.

Hewell v. State, 136 Ga. App. 420, 221 S.E.2d 219 (1975), later appeal, 139 Ga. App. 622, 229 S.E.2d 92 (1976), rev'd on other grounds, 238 Ga. 578, 234 S.E.2d 497 (1977).

Proof of inability to find a witness after diligent search may be sufficient to establish that such witness is inaccessible within the meaning of this statute. *Robinson v. State*, 128 Ga. 254, 57 S.E. 315 (1907); *Goodwin v. State*, 49 Ga. App. 223, 174 S.E. 742 (1934); *Jones v. State*, 250 Ga. 166, 296 S.E.2d 598 (1982).

Parties never inaccessible. — Party to a pending case is not, though beyond the jurisdiction of the court when the case is tried, inaccessible within the meaning of this statute. *Crumm v. Allen & Co.*, 11 Ga. App. 203, 75 S.E. 108 (1912).

Sufficiency of the search for the witness who testified previously is a matter left to the discretion of the trial judge, whose judgment will not be reversed unless a manifest abuse of discretion appears. *Robinson v. State*, 128 Ga. 254, 57 S.E. 315 (1907); *Goodwin v. State*, 49 Ga. App. 223, 174 S.E. 742 (1934); *Norris v. State*, 58 Ga. App. 399, 198 S.E. 714 (1938); *Gaither v. State*, 227 Ga. 668, 182 S.E.2d 434 (1971).

Witness beyond the limits of the state is inaccessible. *Adair v. Adair*, 39 Ga. 75 (1869); *Smith v. State*, 72 Ga. 114 (1883); *Swift v. Oglesby & Smith*, 8 Ga. App. 540, 70 S.E. 97 (1911); *Brinson Ry. v. Beard*, 11 Ga. App. 737, 76 S.E. 76 (1912); *Brown v. Matheson*, 142 Ga. 396, 83 S.E. 98 (1914); *Smith v. State*, 147 Ga. 689, 95 S.E. 281 (1918); *Estill v. Citizens & S. Bank*, 153 Ga. 618, 113 S.E. 552 (1922); *Taylor v. State*, 155 Ga. 785, 118 S.E. 675 (1923); *Carswell, Moxley & Son v. Harrison*, 33 Ga. App. 140, 126 S.E. 293 (1924); *Norris v. State*, 58 Ga. App. 399, 198 S.E. 714 (1938); *Goodwin v. Allen*, 83 Ga. App. 615, 64 S.E.2d 212 (1951).

Word "inaccessible" does not apply to a witness who, though absent from the county of the trial, is nevertheless at the time of the trial, a resident of a different county in the same state. *Broach v. Kelly*, 71 Ga. 698 (1883), overruled on other grounds, *Ward v. Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729 (1985); *Taylor v. State*, 126 Ga. 557, 55 S.E. 474 (1906); *Brinson Ry. v. Beard*, 11 Ga. App. 737, 76 S.E. 76 (1912).

In the case of a witness who may be difficult to locate, the state should begin to

Inaccessible Witnesses (Cont'd)

look for the witness sooner than the date of the beginning of the trial. *Gaither v. State*, 227 Ga. 668, 182 S.E.2d 434 (1971).

Disability of witness. — In criminal prosecutions, according to the weight of authority, the mere temporary illness or disability of a witness is not sufficient to justify the reception of the witness's former testimony; it must appear that the witness is in such a state, either mentally or physically, that in reasonable probability the witness will never be able to attend the trial. *Tanner v. State*, 213 Ga. 820, 102 S.E.2d 176 (1958).

Privilege as constituting inaccessibility. — Inaccessibility of witness has been construed to include assertion of privilege by a witness. *Wiseman v. State*, 249 Ga. 559, 292 S.E.2d 670 (1982).

Testimony from escaped prisoner admissible. — In trial for murder, where witness from preliminary hearing was not available at time of trial, having had escaped from prison, defendant's right of confrontation under U.S. Const., amend. 6 was not violated by admission of transcript of witness's testimony at defendant's preliminary hearing, at which defendant was represented by counsel and witness was cross-examined. *Stidem v. State*, 246 Ga. 637, 272 S.E.2d 338 (1980).

Failure to grant continuance proper. — Trial court did not err in admitting the testimony given by an inaccessible witness under oath in a former trial on substantially the same issue and between the same parties, and, thus, did not err in denying defendant's motion for a continuance as the former testimony was deemed "inherently reliable", its use did not violate the accused's right of confrontation, and defendant did not show that the witness could have been located if a continuance had been granted as diligent attempts had already been undertaken, without success, to locate the witness. *Dillingham v. State*, 275 Ga. 665, 571 S.E.2d 777 (2002).

Testimony from probation revocation hearing admissible when witness unavailable. — When a witness made it clear that the witness would not testify about the shooting at trial, the witness's sworn testimony at the defendant's probation revocation hearing, which concerned substantially the same issue and where the witness was subject to cross-examination, was admissible under

O.C.G.A. § 24-3-10. *Hardeman v. State*, 277 Ga. App. 180, 626 S.E.2d 138 (2006).

Evidence sufficient to show inaccessibility of witnesses in the following cases. — See *Armstrong Furn. Co. v. Nickle*, 110 Ga. App. 686, 140 S.E.2d 72 (1964); *Hewell v. State*, 139 Ga. App. 622, 229 S.E.2d 92 (1976), rev'd on other grounds, 238 Ga. 578, 234 S.E.2d 497 (1977); *Tolbert v. State*, 239 Ga. App. 703, 521 S.E.2d 827 (1999); *Walton v. State*, 272 Ga. 73, 526 S.E.2d 333 (2000).

Evidence insufficient to show inaccessibility of witnesses in the following cases. — See *Herndon v. Chamberlain*, 39 Ga. App. 207, 146 S.E. 503 (1929); *Standridge v. Standridge*, 224 Ga. 102, 160 S.E.2d 377 (1968); *Whatley v. State*, 230 Ga. 523, 198 S.E.2d 176 (1973); *Century Dodge, Inc. v. Mobley*, 155 Ga. App. 712, 272 S.E.2d 502 (1980).

Inaccessibility not shown. — Trial court's ruling that defendant failed to show inaccessibility of a witness upon the exercise of due diligence was affirmed since defendant had six months after defendant's arraignment attempted three times to serve a subpoena on the witness prior to trial, and since defendant declined the trial court's offer of a continuance for the purpose of further searching for the witness. *Carter v. State*, 266 Ga. App. 691, 598 S.E.2d 76 (2004).

Inaccessibility of a witness is to be determined within the sound discretion of the court and will not be disturbed unless there is a manifest abuse of discretion. *Estill v. Citizens & S. Bank*, 153 Ga. 618, 113 S.E. 552 (1922); *Brooks v. State*, 69 Ga. App. 697, 26 S.E.2d 549 (1943); *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952); *Tanner v. State*, 213 Ga. 820, 102 S.E.2d 176 (1958); *Robertson v. State*, 124 Ga. App. 119, 183 S.E.2d 47 (1971); *Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976); *LaCount v. State*, 237 Ga. 181, 227 S.E.2d 31 (1976), cert. denied, 429 U.S. 1046, 97 S. Ct. 753, 50 L. Ed. 2d 761 (1977); *Hewell v. State*, 139 Ga. App. 622, 229 S.E.2d 92 (1976), rev'd on other grounds, 238 Ga. 578, 234 S.E.2d 497 (1977); *Smith v. State*, 247 Ga. 453, 276 S.E.2d 633 (1981); *Gibson v. State*, 160 Ga. App. 615, 287 S.E.2d 595 (1981); *Jones v. State*, 250 Ga. 166, 296 S.E.2d 598 (1982); *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983); *Thomas v. State*, 192 Ga. App. 744, 386 S.E.2d 402 (1989); *Barry v.*

State, 214 Ga. App. 418, 448 S.E.2d 243 (1994); *Palmer v. Taylor*, 215 Ga. App. 546, 451 S.E.2d 486 (1994).

Standard on appeal of question of inaccessibility. — Primary consideration on appeal is not whether the Court of Appeals agrees with the trial court's finding that a witness was inaccessible, but whether that finding constitutes an abuse of discretion. *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

Proceedings

Survival of action. — When a parent began suit against a railroad for damages for a personal injury to the parent, and subsequently died from the results of the injury, and a suit for the homicide was brought by the parent's child, answers of the decedent to interrogatories taken during the decedent's life in the suit were admissible in the action by the child. *Atlanta & W.P.R.R. v. Venable*, 67 Ga. 697 (1881).

Substantial similarity not found. — Suit for personal injuries to a minor, brought in the minor's behalf by the minor's father as next friend, is not, either as to cause of action or as to parties, actually or substantially the same as a suit by the father in the father's own right for loss of the minor's services, occasioned by those injuries. *Hooper v. Southern Ry.*, 112 Ga. 96, 37 S.E. 165 (1900).

Preliminary hearings. — Introduction of testimony previously taken of a witness at a preliminary hearing is permitted if it is shown either that the witness is out of the jurisdiction or that the witness cannot with due diligence be found within the state. *LaCount v. State*, 237 Ga. 181, 227 S.E.2d 31 (1976), cert. denied, 429 U.S. 1046, 97 S. Ct. 753, 50 L. Ed. 2d 761 (1977).

When the victim died before trial, the victim's preliminary hearing testimony identifying defendant as a burglar was admissible. *Igle v. State*, 223 Ga. App. 498, 478 S.E.2d 622 (1996).

Testimony given at hearing on suppression of evidence. — Transcript of the testimony of an unavailable witness who testified for the defendant at the hearing on defendant's motion to suppress evidence was admissible since the testimony involved essentially the same issue as in the trial. *Williams v. State*, 214 Ga. App. 280, 447 S.E.2d 676 (1994),

aff'd, 265 Ga. 471, 457 S.E.2d 665 (1995).

Testimony given at coroner's inquest. — Testimony as to the substance of evidence given at a coroner's inquest by a witness since deceased was admissible when offered for impeachment purposes. *Darby v. Moore*, 144 Ga. 758, 87 S.E. 1067 (1916).

Production of articles present at former trial. — When the testimony of a deceased witness who had testified at the former trial contained references to certain physical objects, which at the former trial were in court, this fact did not stop the operation of this statute on the ground that such articles were not produced in court at the trial now under review nor offered in evidence, even though the state did not account for their absence. *Bloodworth v. State*, 161 Ga. 332, 131 S.E. 80 (1925).

Agreed writing. — Evidence of a witness, since deceased, given on a former trial, on the same case, between the same parties, reduced to writing and agreed upon by counsel, is admissible on a subsequent trial. *Walker v. Walker*, 14 Ga. 242 (1853); *Smith v. State*, 28 Ga. 19 (1859); *Adair v. Adair*, 39 Ga. 75 (1869); *Lathrop v. Adkisson*, 87 Ga. 339, 13 S.E. 517 (1891).

Ex parte affidavits. — Statute does not authorize the admission in evidence on the final trial of the case an ex parte affidavit made by a witness since deceased for use on the hearing of an application for interlocutory injunction in the same case. *Fender v. Ramsey & Phillips*, 131 Ga. 440, 62 S.E. 527 (1908); *Byrd v. Prudential Ins. Co. of America*, 185 Ga. 625, 196 S.E. 72 (1938).

Testimony given at execution of an affidavit for an arrest warrant. — In a probation revocation proceeding, a court clerk's testimony regarding a wife's statements at the time of an application for an arrest warrant was not admissible since the party against whom the warrant was offered had not had the opportunity to cross-examine the wife. *Farmer v. State*, 266 Ga. 869, 472 S.E.2d 70 (1996).

"Former trial" includes a commitment hearing. *Wiseman v. State*, 249 Ga. 559, 292 S.E.2d 670 (1982).

Guilty plea to a reduced criminal charge is proper evidence as an admission in a subsequent civil action, despite the fact that the admission was the result of a compromise in the criminal case. *Kesler v. Veal*, 165 Ga.

Proceedings (Cont'd)

App. 475, 300 S.E.2d 217 (1983).

Statement of child witness about abuse of victim not admissible. — Out-of-court statements of a child witness who observes the physical abuse of another child, but who is not personally a victim of such abuse, may not be admitted as an exception to the hearsay rule under O.C.G.A. § 24-3-10. *Thornton v. State*, 264 Ga. 563, 449 S.E.2d 98 (1994).

Testimony in probation revocation hearings. — Trial court erred in considering the prior testimony of witnesses who were not shown to be dead, disqualified, or otherwise inaccessible in a probation revocation hearing; nevertheless, any inadmissible hearsay was merely cumulative of the admissible probative testimony which was sufficient to show by a preponderance of the evidence that defendant committed the offense of aggravated assault. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

Admission of cumulative testimony denied. — Defendant's reading into evidence the prior testimony of an unavailable witness was properly denied since the testimony would have been cumulative of other testimony, except as to a nonprobative matter. *Pickens v. State*, 225 Ga. App. 792, 484 S.E.2d 731 (1997).

Former testimony was properly admitted in the following cases. — See *Banks v. Bradwell*, 140 Ga. 640, 79 S.E. 572 (1913); *Hunter v. State*, 147 Ga. 823, 95 S.E. 668 (1918); *Sheppard v. State*, 167 Ga. 326, 145 S.E. 654 (1928); *Georgia Chem. Works v. Malcolm*, 186 Ga. 275, 197 S.E. 763 (1938); *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952); *National Life & Accident Ins. Co. v. Fender*, 146 Ga. App. 545, 247 S.E.2d 195 (1978); *Gibson v. State*, 160 Ga. App. 615, 287 S.E.2d 595 (1981); *Knight v. State*, 210 Ga. App. 63, 435 S.E.2d 276 (1993); *Ortiz v. State*, 222 Ga. App. 432, 474 S.E.2d 300 (1996); *Pope v. Fields*, 273 Ga. 6, 536 S.E.2d 740 (2000).

Testimony properly excluded in the following cases. — See *Brooks v. State*, 69 Ga. App. 697, 26 S.E.2d 549 (1943); *Elders v. State*, 145 Ga. App. 139, 253 S.E.2d 817 (1979); *Smith v. State*, 247 Ga. 453, 276 S.E.2d 633 (1981); *Troy v. Interfinancial, Inc.*, 171 Ga. App. 763, 320 S.E.2d 872 (1984); *Green v. State*, 207 Ga. App. 800, 429 S.E.2d 169 (1993); *Adams v. State*, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

Testimony improperly excluded in the following cases. — See *Parrott v. Edwards*, 113 Ga. App. 422, 148 S.E.2d 175 (1966); *Rini v. State*, 236 Ga. 715, 225 S.E.2d 234, cert. denied, 429 U.S. 924, 97 S. Ct. 326, 50 L. Ed. 2d 293 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 904 et seq.

C.J.S. — 31A C.J.S., Evidence, § 537 et seq.

ALR. — Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial, 15 ALR 495; 79 ALR 1392; 122 ALR 425; 159 ALR 1240.

When one deemed to be beyond jurisdiction of court within meaning of statute relating to admissibility of testimony given on former trial, 87 ALR 891.

Effect of war on litigation pending at the time of its outbreak, 137 ALR 1335; 147 ALR 1298; 148 ALR 1384; 149 ALR 1451; 149 ALR 1452; 150 ALR 1417; 150 ALR 1418; 151 ALR 1453; 152 ALR 1450; 154 ALR 1447.

Identity of parties as condition of admissi-

bility in civil case of testimony or deposition in former action or proceeding of witness not available in present action or proceeding, 142 ALR 673.

Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30.

Identity of subject matter or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 ALR2d 494.

Use in civil case of testimony given in criminal case by witness no longer accessible, 70 ALR2d 1179.

Sufficiency of efforts to procure missing witness's attendance to justify admission of his former testimony — state cases, 3 ALR4th 87.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions, 40 ALR4th 514.

Admissibility under Rules 804(b)(1) and

807 of Federal Rules of Evidence (Fed. Rules Evid. Rules 804(b)(1) and 807, 28 USCA) of grand jury testimony of unavailable witness, 149 ALR Fed. 231.

24-3-11. Ancient documents.

Ancient documents purporting to be a part of the transaction to which they relate shall be admissible in evidence. (Orig. Code 1863, § 3702; Code 1868, § 3726; Code 1873, § 3779; Code 1882, § 3779; Civil Code 1895, § 5184; Civil Code 1910, § 5771; Code 1933, § 38-312.)

JUDICIAL DECISIONS

Proof without compliance. — An instrument may be properly admitted as having been sufficiently proved pursuant to former Code 1933, § 38-707 (see O.C.G.A. § 24-7-5), irrespective of whether or not there was a sufficient compliance with former Code 1933, § 38-312 (see O.C.G.A. § 24-3-11). *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Copy not admissible. — Copy is not admissible as an ancient document; the paper itself must be introduced. *Jones v. Morgan*, 13 Ga. 515 (1853); *Bryan v. Walton*, 14 Ga. 185 (1853).

Comparison of handwriting. — Deed proven to be 30 years of age, purporting to be signed by the alleged grantor and under which the grantor surrendered possession to the person purporting to be the grantee who by the grantee and the grantee's privies in estate remained in possession, was so far proven to be the genuine deed of the alleged grantor, and so far established the genuineness of the grantor's signature thereto, as to authorize the deed's admission in evidence, for the purpose of a comparison of handwriting, upon the trial of a cause involving the question of the genuineness of the signature of such grantor to another instrument. *Goza v. Browning*, 96 Ga. 421, 23 S.E. 842 (1895).

Bond for title to land, if 30 years old, accompanied with proof of possession under

the bond, was held to be admissible in evidence. *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351 (1851).

Marriage contract was held to be admissible in evidence as an ancient document. *Adams v. Dickson*, 23 Ga. 406 (1857).

Muniments of title proven to have been in existence for 40 years, with possession in conformity, and coming from the proper custody, are admissible as ancient documents. *Bell v. McCawley*, 29 Ga. 355 (1859).

Will more than 50 years old, proven and recorded in the proper office, is admissible as an ancient paper or document, notwithstanding that probate is defective; provided, possession has been held of the property under and by virtue of that will. *Jordan v. Cameron*, 12 Ga. 267 (1852).

Plat that does not show it was purportedly made by authority since it was shown to have been made before the city charter was ever issued does not meet the requirements of law, and could not be used in evidence without other testimony or evidence. *Central of Ga. Ry. v. City of Metter*, 222 Ga. 74, 148 S.E.2d 661 (1966).

Cited in *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *McDay v. Metropolitan Life Ins. Co.*, 51 Ga. App. 791, 181 S.E. 871 (1935); *Shaw v. Crawford*, 208 Ga. 595, 68 S.E.2d 598 (1952); *Save the Bay Comm., Inc. v. Mayor of Savannah*, 227 Ga. 436, 181 S.E.2d 351 (1971); *Buchheit v. Gillis*, 246 Ga. App. 838, 541 S.E.2d 441 (2000).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 978 et seq.

ALR. — Effect of filing affidavit of forgery against ancient deed, 18 ALR 908.

Dispensing with proof of proper custody as condition of admission of ancient document, 29 ALR 630.

Admissibility in evidence of ancient maps and the like, 46 ALR2d 1318.

Admissibility in evidence of receipt of third person, 80 ALR2d 915.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of Federal Rules of Evidence, 186 ALR Fed. 485.

24-3-12. Proof of pedigree.

Pedigree, including descent, relationship, birth, marriage, and death, may be proved by the declarations of deceased persons related by blood or marriage, by general repute in the family, or by genealogies, inscriptions, "family trees," and similar evidence. (Orig. Code 1863, § 3695; Code 1868, § 3719; Code 1873, § 3772; Code 1882, § 3772; Civil Code 1895, § 5177; Civil Code 1910, § 5764; Code 1933, § 38-303.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RELATIONSHIP

BIRTH AND AGE

MARRIAGE

DEATH

REQUIREMENTS FOR ADMISSION

General Consideration

History generally. — Statute did not arise from a legislative enactment, but from a codification of the general rule. *Terry v. Brown*, 142 Ga. 224, 82 S.E. 566 (1914).

Former dead man's statute rendered a witness incompetent to testify as to a conversation with a person since deceased regardless of whether the testimony might be admissible under other rules of evidence. *Willis v. Kennedy*, 267 Ga. 165, 476 S.E.2d 246 (1996).

Statute is declaratory of the common law. *Whigby v. Burnham*, 135 Ga. 584, 69 S.E. 1114 (1911).

Statute provides one of the specified cases in which the general hearsay rule has been relaxed. *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Vital records law. — It was never intended that the vital statistics act (former Code 1933, § 88-1102 et seq., see O.C.G.A. Ch. 10, T. 31) pertaining to vital records should repeal the provisions of former Code 1933, § 38-303 (see O.C.G.A. § 24-3-12). *Stewart v. State*, 72 Ga. App. 308, 33 S.E.2d 744 (1945).

Rule as to proof of race-ancestry is not so strict as the rule as to proof of pedigree which confines evidence of reputation to general repute in the family. *White v. Holderby*, 192 F.2d 722 (5th Cir. 1951).

Possession of land cannot be established by family repute. *Luttrell v. Whitehead*, 121 Ga. 699, 49 S.E. 691 (1905).

Cited in *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Garner v. Wood*, 188 Ga. 463, 4 S.E.2d 137 (1939); *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939); *Garrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948); *Byers v. Lieberman*, 126 Ga. App. 582, 191 S.E.2d 470 (1972); *Simeonides v. Zervis*, 127 Ga. App. 506, 194 S.E.2d 324 (1972); *Mincey v. Mincey*, 233 Ga. 512, 212 S.E.2d 345 (1975); *Darling v. State*, 248 Ga. 485, 284 S.E.2d 260 (1981); *Johnson v. Bialach*, 167 Ga. App. 775, 307 S.E.2d 295 (1983).

Relationship

Relationship cannot be proved by reputation in community outside of family. *Lamar v. Allen*, 108 Ga. 158, 33 S.E. 958 (1899).

Branches of same family. — When the question is whether any, or what, relationship exists between two supposed branches of the same family, it is sufficient to establish the connection of the deceased declarant with either branch in order to render such declaration admissible. *Terry v. Brown*, 142 Ga. 224, 82 S.E. 566 (1914).

Next of kin. — It was competent for a caveatrix to support a contention that she was the next of kin of the decedent by proving declarations to that effect made by the latter while in life. *Malone v. Adams*, 113 Ga. 791, 39 S.E. 507, 84 Am. St. R. 259 (1901).

Relationship to jurors. — In order for a new trial to be granted on the ground that the prosecutor was related to one of the jurors, it must be shown that the witness, testifying to such relationship, was testifying either from personal knowledge or from knowledge acquired by some means within the purview of the law. *Davis v. State*, 24 Ga. App. 776, 102 S.E. 378, cert. denied, 24 Ga. App. 816 (1920); *Davis v. State*, 150 Ga. 19, 102 S.E. 445 (1920).

Affidavits by relatives, showing relationship to challenged jurors, are properly admitted in support of motion for new trial. *Harris v. State*, 188 Ga. 745, 4 S.E.2d 651 (1939).

Paternity of child. — When the paternity of a child is the issue involved, the declarations of the reputed father, since deceased, are admissible in evidence. The weight to be given the declarations is a matter for the jury. *Estill v. Estill*, 149 Ga. 384, 100 S.E. 365 (1919).

Proof seeking indirectly to show that a child is illegitimate, by showing general reputation in the community that the father was a single man, was inadmissible. *Gibson v. Mason*, 31 Ga. App. 584, 121 S.E. 584 (1924).

Evidence sufficient to prove relationship with deceased. — Husband of the plaintiff having testified that she was his wife and that she was the mother of the deceased child sufficiently proved the necessary relationship between the plaintiff and the deceased. *Scoggins v. Hughes*, 112 Ga. App. 777, 146 S.E.2d 134 (1965).

Birth and Age

Births may be proved by general reputation in the family. *Luke v. Hill*, 137 Ga. 159, 73 S.E.

345, 38 L.R.A. (n.s.) 559 (1911); *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Witness may testify to the witness's age without first requiring the witness to show from what source the witness derived the witness's information, and when and where the witness was born. *Central R.R. v. Coggin*, 73 Ga. 689 (1884); *McCollum v. State*, 119 Ga. 308, 46 S.E. 413, 100 Am. St. R. 171 (1904).

Bible containing family record. — Bible containing a family record, in the handwriting of a deceased daughter, which remained in the possession of the mother until her death, and then went into the possession of daughters, from whom the witness got it, is competent evidence on the question of age of one of the children of that mother. *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

Marriage

Proof of marriage. — Fact of marriage may be at least prima facie shown by proof of general reputation in family, by proof of general reputation in the community, or by proof of the fact that the man or the woman, as the case may be, lives together with a person of the opposite sex as his or her spouse, with general recognition in the community of their being married to each other. *Plummer v. State*, 27 Ga. App. 185, 108 S.E. 128 (1921). See also *Drawdy v. Hesters*, 130 Ga. 161, 60 S.E. 451 (1908); *Gibson v. Mason*, 31 Ga. App. 584, 121 S.E. 584 (1924).

Validity of marriage. — On an issue of validity of marriage, the declarations of the parties themselves that they were or were not married, made without view to litigation, are admissible evidence of the fact declared. But the declaration of such party as to a fact, evidentiary of the invalidity of the marriage, does not come within this exception to the rule of hearsay evidence. *Whigby v. Burnham*, 135 Ga. 584, 69 S.E. 1114 (1911).

Death

Proof of death. — While, in a sense, hearsay is admissible to prove death, yet before the hearsay is admissible for that purpose, it must come up to the requirements of statute. *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672, 72 S.E. 51

Death (Cont'd)

(1911); *Cone v. Lythgoe*, 40 Ga. App. 491, 150 S.E. 465 (1929).

Death may be established as provided by this statute, by family repute, but by no other species of hearsay evidence. *Ferguson v. Atlanta Newspapers, Inc.*, 91 Ga. App. 115, 85 S.E.2d 72 (1954).

Source of information. — It was not competent for a witness to testify as to the death of a certain person, and who were the witness's heirs surviving at a certain date when a deed was executed, the witness testifying that the witness did not know these facts from the witness's own personal knowledge, but the witness knew the facts from family repute and from various other sources of information, such as a vast amount of correspondence from the decedent's family, and from the court records, and from wills and documents, which made the matter conclusive so far as could be ascertained by search. *Imboden v. Etowah & Battle Branch Mining Co.*, 70 Ga. 86 (1883); *Mobley v. Baxter & Co.*, 143 Ga. 565, 85 S.E. 859 (1915); *Mobley v. Pierce*, 144 Ga. 327, 87 S.E. 24 (1915).

After proof that a woman was married, her declaration that she had heard her husband was dead is not admissible to prove his death; it not appearing from whom her information was derived. *Williams v. State*, 86 Ga. 548, 12 S.E. 743 (1891).

Missing persons. — In an action brought by a wife upon a policy of insurance in her favor upon the life of her husband, the insurance being against death by accident within one year from the date of the policy, and he having disappeared within the year, that his family regarded him as dead, or recognized him as being dead, is not competent evidence in behalf of the plaintiff. *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S.E. 18 (1890).

Requirements for Admission

Limitation on rule. — Statute which permits declarations to be received in proof of pedigree is limited to the extent that the declarations must have been made without view to litigation and under such circumstances that the person making the declarations could have no motive to misrepresent the facts. *Mobley v. Pierce*, 144 Ga. 327, 87 S.E. 24 (1915); *Hines v. Donaldson*, 193 Ga.

783, 20 S.E.2d 134 (1942); *Johnson v. Roberson*, 88 Ga. App. 548, 77 S.E.2d 232 (1953).

First-hand knowledge not required. — Witnesses must appear to have had fair knowledge, or fair opportunity for acquiring knowledge upon the subject. It is not required that the witnesses were present at the birth, marriage, or death to be competent to testify as to relationship. *Wilson v. State*, 173 Ga. 275, 160 S.E. 319 (1931).

Declarations concerning pedigree, to be admissible, need not be upon the knowledge of the declarant. Thus, evidence is admissible that a deceased member of the family said that the deceased heard from others of the deceased's family the facts of family history which the deceased stated. *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Family source required. — One of the conditions upon which family tradition is received in evidence is that it emanate from a source within the family, and from persons having such a connection with the party to whom it relates that it is natural and likely that they cannot be mistaken and will speak the truth. In the event it appears that the evidence offered does not emanate from such source, the presumption of the reliability of the source of information is rebutted and the evidence becomes inadmissible. *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Presumption of knowledgeable source. — Declarations respecting pedigree do not stand upon the footing of secondary evidence to be excluded when a witness can be produced who speaks upon the subject from the witness's own knowledge. This rule of law rests upon the presumption that the declaration or family tradition comes from persons who have competent knowledge with respect to the subject matter of the declaration, and speak the truth with reference thereto. *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Notwithstanding the declarant did not mention the source from which the declarant derived the declarant's information, facts of family history heard from other family members are admissible. *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Proof of relationship required. — Before the declarations of deceased persons may be

received in evidence, the fact of relationship must be shown by other evidence. *Greene v. Almand*, 111 Ga. 735, 36 S.E. 957 (1900); *Terry v. Brown*, 142 Ga. 224, 82 S.E. 566 (1914); *Mobley v. Pierce*, 144 Ga. 327, 87 S.E. 24 (1915); *Wilson v. State*, 173 Ga. 275, 160 S.E. 319 (1931); *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Only slight proof of relationship is required as a foundation for the admission of hearsay evidence regarding pedigree. *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Family members as witness. — When a witness reports matters of general repute and tradition in the witness's own family, it is not necessary for the witness to first establish by independent evidence the witness's relationship to the witness's family. *Crawley v.*

Selby, 208 Ga. 530, 67 S.E.2d 775 (1951).

No particular form of statement is required to render a declaration as to pedigree admissible. It may be oral or written, such as a letter or a recital in a deed. *Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

Admission over objection. — When affidavit contained declarations tending to establish pedigree, and contained other statements which were inadmissible if properly objected to, and when the admissibility of such affidavit was objected to as a whole, upon the ground that it was hearsay and not binding upon the defendants, its admission over such objection is not ground for a new trial. *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 141 S.E. 653 (1928).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 694.

C.J.S. — 31A C.J.S., Evidence, § 332 et seq., 32A C.J.S., Evidence, § 1296.

ALR. — Death certificate as evidence, 17 ALR 359; 42 ALR 1454; 96 ALR 324.

Entries in family Bible as evidence, 29 ALR 372.

Requirement of "positive" proof of death of insured as excluding circumstantial evidence, 60 ALR 592.

Admissibility of declaration of persons other than members of family as to pedigree, 15 ALR2d 1412.

Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 ALR2d 989.

Burden of proof defendant's age, in prosecution where attainment of particular age is statutory requisite of guilt, 49 ALR3d 526.

24-3-13. Ancient boundaries and landmarks.

Traditional evidence as to ancient boundaries and landmarks shall be admissible in evidence, the weight to be determined by the jury according to the source from which it comes. (Orig. Code 1863, § 3703; Code 1868, § 3727; Code 1873, § 3780; Code 1882, § 3780; Civil Code 1895, § 5185; Civil Code 1910, § 5772; Code 1933, § 38-313.)

Law reviews. — For annual survey of zoning and land use law, see 58 *Mercer L. Rev.* 477 (2006).

JUDICIAL DECISIONS

Metes and bounds description prevails over description as numbered lot. — If a deed describes land as being parts of certain numbered lots, and also contains a description of the tract of land by metes and

bounds, calling for natural, visible, and ascertained objects and monuments, and such description by such metes and bounds includes a part of a lot not designated by number, such metes and bounds must gov-

ern. *McCann v. Miller*, 177 Ga. App. 53, 338 S.E.2d 509 (1985).

Deed with overly vague description does not validly convey title. — Deed wherein the description of the property sought to be conveyed is so vague and indefinite as to afford no means of identifying any particular tract of land is inoperative either as a conveyance of title or as color of title. *McCann v. Miller*, 177 Ga. App. 53, 338 S.E.2d 509 (1985).

Reputation as evidence. — An ancient boundary, corner, or station tree cannot, generally, be proved otherwise than by reputation; consequently, hearsay evidence is admissible for this purpose, from the necessity of the case. It is not the best testimony, however, to prove the identity of a lot of land, there being higher evidence of that fact in the power of the party. *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403 (1849). See also *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726 (1854).

Present day reputation is not sufficient to establish a line or landmark. *McAfee v. Newberry*, 144 Ga. 473, 87 S.E. 392 (1915); *Patterson v. Baugh*, 56 Ga. App. 660, 193 S.E. 364 (1937).

Evidence sufficient to support plaintiff's boundaries. — In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict as: (1) the boundary line indicated on a plat reflecting the locations of monuments on the parcel owned by two landowners complied with the monuments referenced in the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. *Dover v. Higgins*, 287 Ga. App. 861, 652 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 237 (Ga. 2008).

Evidence of declarations of persons since deceased, relative to the location of a landmark, is admissible over an objection on the ground of hearsay. *Deaton v. Swanson*, 196 Ga. 833, 28 S.E.2d 126 (1943); *Phelps v. Huff*, 214 Ga. App. 398, 448 S.E.2d 64 (1994).

A witness's testimony to declarations made to the witness a number of years earlier by a now deceased predecessor in title regarding the disputed location of the line between the properties of the contesting parties is admissible as an exception to the hearsay rule. *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E.2d 447 (1975).

As evidence the owners of several parcels of land sought to introduce regarding an iron pin was not as to the general reputation of the pin but rather was what the original grantor (by then deceased) had said about that specific pin, the evidence was hearsay and was properly excluded from a quiet title trial. *Gibson v. Rustin*, 297 Ga. App. 169, 676 S.E.2d 799 (2009).

Appraisals constitute opinions and are inadmissible as hearsay. — Appraisals of property by a deceased appraiser were not admissible in a wrongful foreclosure action since the appraisals represented the opinion of the appraiser and as such constituted hearsay. *Dickens v. Calhoun First Nat'l Bank*, 214 Ga. App. 490, 448 S.E.2d 237 (1994).

That a smaller tract is located within a larger tract, if the boundaries of which larger tract are not located, cannot be shown by common reputation. *McAfee v. Newberry*, 144 Ga. 473, 87 S.E. 392 (1915).

In locating land described in a deed it is competent to establish the land's boundaries by proof of traditional reputation in the neighborhood, derived from ancient sources or from the declarations of persons since deceased who had peculiar means of knowing what the reputation of the boundary was in an ancient day. *McAfee v. Newberry*, 144 Ga. 473, 87 S.E. 392 (1915).

When land conveyed in a deed is described as a city lot "designated by stakes", extrinsic evidence may supply the location and shape of the particular tract of land. The test as to the sufficiency of the description in a deed is whether or not it discloses with sufficient certainty the intention of the grantor with respect to the quantity and location of the land therein described. *Lankford v. Pope*, 206 Ga. 430, 57 S.E.2d 538 (1950).

Boundaries of political subdivisions. — When the location of the line between two counties was disputed, and the line between adjoining lands coincided with the county line, which was claimed by both sides to be a

straight line, evidence was admissible to show that for a considerable distance south of the place where the line was in dispute owners of land in the two counties, whose lands were bounded by the county line, had built fences up to a certain line and recognized it as being the county line, and had so bounded their possessions for 20 years or more; and that the line run between the lands of the parties by processioners was a continuation of the line so recognized. *Ivey v. Cowart*, 124 Ga. 159, 52 S.E. 436, 110 Am. St. R. 160 (1905).

As to the location of county lines and state lines and other boundaries, a witness is entitled to testify from what others have told the witness, from reputation in the community, and from hearsay. *Green v. State*, 123 Ga. App. 286, 180 S.E.2d 564 (1971).

Iron pipes, fence line, hedgerow, and acquiescence in boundary was sufficient evidence for court. — While no natural landmarks established the disputed boundary between property belonging to the parties, other evidence did, including iron pipes marking the corners of the property, a fence line, a hedgerow, and acquiescence in the boundary, and the failure in landowners' deed to reference the land lot where the

disputed acreage was located did not determine the result; sufficient evidence supported the trial court's findings as to the location of the boundary line. *Sledge v. Peach County*, 276 Ga. App. 780, 624 S.E.2d 288 (2005).

Venue. — Venue must be proved positively, and one of the methods of proving venue is by the testimony of witnesses as to their knowledge of a place, which the witnesses have learned from hearsay and from reputation. *Green v. State*, 123 Ga. App. 286, 180 S.E.2d 564 (1971).

Cited in *Aultman v. Hodge*, 150 Ga. 370, 104 S.E. 1 (1920); *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Davis v. Terrell*, 70 Ga. App. 478, 28 S.E.2d 590 (1944); *Dye v. Dotson*, 201 Ga. 1, 39 S.E.2d 8 (1946); *Georgia Marble Co. v. Voyles*, 74 Ga. App. 312, 39 S.E.2d 488 (1946); *Ledford v. Hill*, 82 Ga. App. 299, 60 S.E.2d 555 (1950); *Shuman v. State*, 84 Ga. App. 585, 66 S.E.2d 152 (1951); *Austin v. State*, 100 Ga. App. 142, 110 S.E.2d 422 (1959); *Durand v. Reeves*, 217 Ga. 492, 123 S.E.2d 552 (1962); *Durand v. Reeves*, 219 Ga. 182, 132 S.E.2d 71 (1963); *Hazlip v. Morris*, 242 Ga. 7, 247 S.E.2d 747 (1978); *Adsitt v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981).

RESEARCH REFERENCES

ALR. — Admissibility in evidence of ancient maps and the like, 46 ALR2d 1318.

Admissibility of evidence of reputation or declaration as to matter of public interest, 58 ALR2d 615.

Fence as factor in fixing location of boundary line — modern cases, 7 ALR4th 53.

Admissibility of evidence of reputation as to land boundaries or customs affecting land, under Rule 803(20) of Uniform Rules of Evidence and similar formulations, 79 ALR4th 1044.

24-3-14. Records made in regular course of business admissible; effect of circumstances of making; construction of Code section.

(a) As used in this Code section, the term “business” shall include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

(b) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible in evidence in proof of the act, transaction, occurrence, or event, if the trial judge shall find that it was made in the regular course of any business and that it was the regular course

of such business to make the memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter.

(c) All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight; but they shall not affect its admissibility.

(d) This Code section shall be liberally interpreted and applied. (Ga. L. 1952, p. 177, §§ 1, 2, 3.)

Law reviews. — For article advocating admissibility of business entries, see 14 Ga. B.J. 7 (1951). For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For article, "Business Entries as Evidence," see 16 Ga. B.J. 383 (1954). For article, "Decisions Under the Georgia Business Records Act of 1952," see 21 Ga. B.J. 211 (1958). For article, "Evidence from Computers," see 8 Ga. L. Rev. 562 (1974). For article surveying developments in Georgia evidence law, see 33 Mercer L. Rev. 129 (1981). For article, "The Admissibility of Computer-Generated Evidence in Georgia," see 18 Ga. St. B.J. 137 (1982). For survey article on evidence law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 249 (2003). For annual 11th Circuit survey of

evidence law, see 56 Mercer L. Rev. 1273 (2005); and 57 Mercer L. Rev. 1083 (2006). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006).

For comment on *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370, 374 (1957), holding that the Georgia business records as evidence statute does not authorize the introduction into evidence of papers containing the opinion of experts or physicians when the party in whose interest the papers are offered is not allowed to examine their author, see 20 Ga. B.J. 381 (1958). For comment on *Yarbrough v. Cantex Mfg. Co.*, 97 Ga. App. 392, 103 S.E.2d 130 (1958), see 22 Ga. B.J. 100 (1959).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PROCEDURAL CONSIDERATIONS

1. FOUNDATION FOR ADMISSION
2. WEIGHT AND CREDIBILITY
3. OBJECTIONS

APPLICATIONS AND ILLUSTRATIONS =NON 1.

FOUNDATION FOR ADMISSION

General Consideration

Purpose of statute. — Purpose of statute is not to bolster the witness on the stand but to serve in place of witness by giving the manner of entry within the usual course of the business enterprise an independent prima facie probative value of its own, thus broadening an exception to the hearsay rule. *Calhoun v. Chappell*, 117 Ga. App. 865, 162 S.E.2d 300 (1968).

Statute is primarily adapted to allowing testimony of business records the authentication of which is otherwise difficult against

a hearsay objection because it is "the routine product of an efficient clerical system." *Calhoun v. Chappell*, 117 Ga. App. 865, 162 S.E.2d 300 (1968).

Purpose of statute in allowing into evidence routine business records is not to allow the conclusions of anyone, and it certainly was not intended that such conclusions stand without opportunity to cross-examine the maker. *Wesley v. State*, 225 Ga. 22, 165 S.E.2d 719 (1969).

Purpose of statute is to allow the determination of records without the necessity of producing all the various clerical personnel

who made the entries. *Dowling v. Jones-Logan Co.*, 123 Ga. App. 380, 181 S.E.2d 75 (1971); *Timothy McCarthy Constr. Co. v. Southern Detectives, Inc.*, 125 Ga. App. 205, 186 S.E.2d 895 (1971); *Cotton v. John W. Eshelman & Sons*, 137 Ga. App. 360, 223 S.E.2d 757 (1976); *Lewis v. United Cal. Bank*, 143 Ga. App. 126, 237 S.E.2d 645 (1977), *aff'd*, 240 Ga. 823, 242 S.E.2d 581 (1978); *Record Data, Inc. v. Vinylgrain Indus. of Ga., Inc.*, 143 Ga. App. 854, 240 S.E.2d 223 (1977); *Gray v. Cousins Mtg. & Equity Invs.*, 150 Ga. App. 296, 257 S.E.2d 365 (1979); *Reisman v. Martori, Meyer, Hendricks, & Victor*, 155 Ga. App. 551, 271 S.E.2d 685 (1980).

Purpose of O.C.G.A. § 24-3-14 is to provide for the admissibility of records that would otherwise be excluded as hearsay. *Allen v. State*, 248 Ga. 676, 286 S.E.2d 3 (1982).

Statute was intended to preempt the field with regard to admission of business records and the statutory requirements are exclusive in this regard. *Dowling v. Jones-Logan Co.*, 123 Ga. App. 380, 181 S.E.2d 75 (1971).

Statute was intended to bring realities of business and professional practice into courtroom and should not be interpreted so as to destroy the statute's obvious usefulness. *Cotton v. John W. Eshelman & Sons*, 137 Ga. App. 360, 223 S.E.2d 757 (1976).

Statute opens a broad departure from the hitherto fixed rules of evidence relative to the introduction of books and papers. *Guthrie v. Berrien Prods. Co.*, 91 Ga. App. 45, 84 S.E.2d 596 (1954).

Statute has never been expanded to include private custody or simple possession since the circumstances of private possession are infinitely more varied than those of business or official custody. *Martin v. State*, 135 Ga. App. 4, 217 S.E.2d 312 (1975).

Summary need not qualify as "business record." — Summary of business records is admissible even though the summary itself may not qualify as a "business record" under O.C.G.A. § 24-3-14. *Polma, Inc. v. Coastal Canvas Prods. Co.*, 199 Ga. App. 616, 405 S.E.2d 531, *cert. denied*, 199 Ga. App. 906, 405 S.E.2d 531 (1991).

Discussion of the admissibility of summaries of business records. — See *Tyner v. Sheriff*, 164 Ga. App. 360, 297 S.E.2d 114 (1982).

Summaries of voluminous business records are admissible so long as the original records are accessible to the court and the parties. *Lawhorn v. State*, 200 Ga. App. 451, 408 S.E.2d 425 (1991).

An affidavit need not recite the words "true and correct copies" before the accompanying business records will be admissible. Questions about the accuracy of business records go to their weight, not their admissibility. *Bagley v. Fulton-DeKalb Hosp. Auth.*, 216 Ga. App. 537, 455 S.E.2d 325 (1995).

Language of statute suggests that writing must be made as memorandum or record rather than for some other purpose. *American San. Servs., Inc. v. EDM of Tex., Inc.*, 139 Ga. App. 662, 229 S.E.2d 136 (1976).

Statute does not abrogate right of party to cross-examine witness called against the party. *Meeks v. Lunsford*, 106 Ga. App. 154, 126 S.E.2d 531 (1962).

O.C.G.A. § 24-3-14 must be liberally interpreted and applied. *McConnell v. State*, 166 Ga. App. 530, 304 S.E.2d 733 (1983).

Confrontation clause. — Business record exception is an exception to the hearsay rule, and not a general exception to the confrontation clause. *Adams v. State*, 217 Ga. App. 706, 459 S.E.2d 182 (1995).

Right to confrontation. — In a case when a summary of business records is properly admitted and the figures so introduced are relied upon by another witness, there is ordinarily no violation of defendant's right of confrontation. *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

Records noting conversation's contents not admissible. — Records which note the contents of a conversation rather than an act, transaction, occurrence, or event are not eligible for the business records exception to the hearsay rule. *Mitchell v. State*, 254 Ga. 353, 329 S.E.2d 481 (1985).

Reason for reasonable time requirement is so the entry might appear to have taken place while the memory of the fact was recent, or the source from which the knowledge of it is derived was unimpaired. *Martin v. Glenn's Furn. Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972).

Uniform business records as evidence statute. — Statute contains what is referred to by courts of other states and textbooks as the "Uniform Business Records as Evidence" statute. There is no material differ-

General Consideration (Cont'd)

ence in the Georgia statute and similar statutes of the other states. *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957), for comment, see 20 Ga. B.J. 381 (1958).

Kind of books. — Books contemplated by this statute are permanent books. *Bush v. Fourcher*, 3 Ga. App. 43, 59 S.E. 459 (1907); *Eley v. Holden*, 48 Ga. App. 152, 172 S.E. 75 (1933).

Waiver. — Requirement that entries be made in the ordinary course of business can be waived. *Finch v. Caldwell*, 155 Ga. App. 813, 273 S.E.2d 216 (1980).

Cited in *Ferguson v. Atlanta Newspapers, Inc.*, 93 Ga. App. 622, 92 S.E.2d 321 (1956); *Gordy Tire Co. v. Bulman*, 96 Ga. App. 739, 101 S.E.2d 220 (1957); *Guthrie v. Luke*, 98 Ga. App. 88, 104 S.E.2d 921 (1958); *Whitener v. Baly Tire Co.*, 98 Ga. App. 257, 105 S.E.2d 775 (1958); *Martin v. Baldwin*, 215 Ga. 293, 110 S.E.2d 344 (1959); *Ragsdale v. Duren*, 100 Ga. App. 291, 111 S.E.2d 144 (1959); *Fidelity & Cas. Co. v. Scott*, 215 Ga. 491, 111 S.E.2d 223 (1959); *Reserve Life Ins. Co. v. Gay*, 101 Ga. App. 96, 112 S.E.2d 786 (1960); *Childs v. Logan Motor Co.*, 103 Ga. App. 633, 120 S.E.2d 138 (1961); *Rouse v. Fussell*, 106 Ga. App. 259, 126 S.E.2d 830 (1962); *One In All Corp. v. Fulton Nat'l Bank*, 108 Ga. App. 142, 132 S.E.2d 116 (1963); *American Int'l Indus., Inc. v. Ivan Allen Co.*, 110 Ga. App. 148, 138 S.E.2d 61 (1964); *Henry v. Century Fin. Co.*, 110 Ga. App. 498, 139 S.E.2d 123 (1964); *Green v. State*, 112 Ga. App. 329, 145 S.E.2d 80 (1965); *Johnson v. State*, 112 Ga. App. 597, 145 S.E.2d 636 (1965); *Daniel v. Dixie Plumbing Supply Co.*, 112 Ga. App. 427, 145 S.E.2d 796 (1965); *Forsyth v. Peoples, Inc.*, 114 Ga. App. 726, 155 S.E.2d 713 (1966); *Thruway Serv. City, Inc. v. Townsend*, 116 Ga. App. 379, 157 S.E.2d 564 (1967); *Anderson v. Department of Family & Children Servs.*, 118 Ga. App. 318, 163 S.E.2d 328 (1968); *Norman v. Allen*, 118 Ga. App. 394, 163 S.E.2d 859 (1968); *Travelers Indem. Co. v. Worley*, 119 Ga. App. 537, 168 S.E.2d 168 (1969); *Massey v. Consolidated Equities Corp.*, 120 Ga. App. 165, 169 S.E.2d 672 (1969); *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga. App. 380, 170 S.E.2d 724 (1969); *Gregory v. Star Enters., Inc.*, 122 Ga.

App. 12, 176 S.E.2d 241 (1970); *Newton v. Higdon*, 226 Ga. 649, 177 S.E.2d 57 (1970); *Photographic Bus. & Prod. News v. Commercial Color Corp.*, 122 Ga. App. 825, 178 S.E.2d 922 (1970); *Hawes v. Shuman*, 123 Ga. App. 543, 181 S.E.2d 708 (1971); *Marby v. Henley*, 123 Ga. App. 561, 181 S.E.2d 884 (1971); *Leslie, Inc. v. Russ*, 123 Ga. App. 611, 181 S.E.2d 912 (1971); *Ghingold v. Ghingold*, 228 Ga. 515, 186 S.E.2d 747 (1972); *Security Dev. & Inv. Co. v. Ben O'Callaghan Co.*, 125 Ga. App. 526, 188 S.E.2d 238 (1972); *McDaniel v. Gangarosa*, 126 Ga. App. 666, 191 S.E.2d 578 (1972); *Taylor v. State*, 229 Ga. 536, 192 S.E.2d 249 (1972); *Ricketts v. Liberty Mut. Ins. Co.*, 127 Ga. App. 483, 194 S.E.2d 311 (1972); *Simeonides v. Zervis*, 127 Ga. App. 506, 194 S.E.2d 324 (1972); *Key Life Ins. Co. v. Mitchell*, 129 Ga. App. 192, 198 S.E.2d 919 (1973); *Baker v. Smiley*, 231 Ga. 375, 202 S.E.2d 39 (1973); *Harrison v. Lawhorne*, 130 Ga. App. 314, 203 S.E.2d 292 (1973); *Guardian of Ga., Inc. v. Granite Equip. Leasing Corp.*, 130 Ga. App. 514, 203 S.E.2d 733 (1974); *Gearhart v. Etheridge*, 131 Ga. App. 285, 205 S.E.2d 456 (1974); *Strother v. South Expressway Radio*, 132 Ga. App. 771, 209 S.E.2d 93 (1974); *Little v. State*, 133 Ga. App. 304, 211 S.E.2d 197 (1974); *Bowen v. Sentry Ins. Co.*, 134 Ga. App. 88, 213 S.E.2d 185 (1975); *P. & M. Masonry v. W.J. Black Co.*, 136 Ga. App. 646, 222 S.E.2d 152 (1975); *Ball v. State*, 137 Ga. App. 333, 223 S.E.2d 743 (1976); *Guy v. State*, 138 Ga. App. 11, 225 S.E.2d 492 (1976); *Peachtree N. Apts. Co. v. Arkhora Assocs.*, 140 Ga. App. 20, 230 S.E.2d 83 (1976); *Ware v. Nationwide Mut. Ins. Co.*, 140 Ga. App. 660, 231 S.E.2d 556 (1976); *Williams v. Davis Water & Waste Indus., Inc.*, 141 Ga. App. 49, 232 S.E.2d 389 (1977); *Andrews v. Adams Drive, Ltd.*, 142 Ga. App. 32, 234 S.E.2d 835 (1977); *Brooks v. National City Bank*, 142 Ga. App. 492, 236 S.E.2d 132 (1977); *Williams v. Murray*, 239 Ga. 276, 236 S.E.2d 624 (1977); *B.G. v. State*, 143 Ga. App. 725, 240 S.E.2d 133 (1977); *Lewis v. United Cal. Bank*, 240 Ga. 823, 242 S.E.2d 581 (1978); *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978); *Farley v. State*, 145 Ga. App. 98, 243 S.E.2d 322 (1978); *Orkin Exterminating Co. v. Dauer*, 146 Ga. App. 61, 245 S.E.2d 320 (1978); *Gordon v. Athens Convalescent Ctr., Inc.*, 146 Ga. App. 134, 245 S.E.2d 484 (1978); *Johnson v. State*,

146 Ga. App. 277, 246 S.E.2d 363 (1978); *Ambrose v. E.F. Hutton & Co.*, 146 Ga. App. 403, 246 S.E.2d 423 (1978); *Reaves v. State*, 146 Ga. App. 409, 246 S.E.2d 427 (1978); *Liberty Loan Corp. v. A.P.S., Inc.*, 147 Ga. App. 492, 249 S.E.2d 308 (1978); *Transamerica Ins. Co. v. Smith*, 147 Ga. App. 574, 249 S.E.2d 663 (1978); *Benson v. State*, 150 Ga. App. 569, 258 S.E.2d 156 (1979); *Hilliard v. Canton Whsle. Co.*, 151 Ga. App. 184, 259 S.E.2d 182 (1979); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 151 Ga. App. 898, 262 S.E.2d 151 (1979); *Crosswell v. Arten Constr. Co.*, 152 Ga. App. 162, 262 S.E.2d 522 (1979); *Minnich v. First Nat'l Bank*, 152 Ga. App. 833, 264 S.E.2d 287 (1979); *Camilla Cotton Oil Co. v. Mills Mgt. Sources, Inc.*, 152 Ga. App. 823, 264 S.E.2d 294 (1979); *Kilgore v. Caldwell*, 152 Ga. App. 863, 264 S.E.2d 312 (1980); *Carroll v. State*, 155 Ga. App. 514, 271 S.E.2d 650 (1980); *Chafin v. State*, 246 Ga. 709, 273 S.E.2d 147 (1980); *United Rentals Sys. v. Safeco Ins. Co.*, 156 Ga. App. 63, 273 S.E.2d 868 (1980); *A.S. Wikstrom, Inc. v. Norair Eng'r Corp.*, 156 Ga. App. 49, 274 S.E.2d 28 (1980); *Ford Motor Credit Co. v. Spicer*, 156 Ga. App. 541, 275 S.E.2d 116 (1980); *Adbe Distrib. Co. v. Hundred E. Credit Corp.*, 156 Ga. App. 787, 275 S.E.2d 347 (1980); *Jones v. State*, 247 Ga. 268, 275 S.E.2d 67 (1981); *Wickes Lumber v. Energy Efficient Homes, Inc.*, 157 Ga. App. 303, 277 S.E.2d 298 (1981); *Alexander v. Weems*, 157 Ga. App. 507, 277 S.E.2d 793 (1981); *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981); *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981); *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981); *Horton v. Diamond Auto Parts & Recycling, Inc.*, 158 Ga. App. 750, 282 S.E.2d 207 (1981); *Speight v. State*, 159 Ga. App. 5, 282 S.E.2d 651 (1981); *Griffith v. State*, 159 Ga. App. 252, 283 S.E.2d 40 (1981); *Smith v. State*, 160 Ga. App. 302, 287 S.E.2d 306 (1981); *Dabbas v. Merrill Lynch, Pierce, Fenner & Smith*, 161 Ga. App. 373, 288 S.E.2d 651 (1982); *DOT v. Lowery*, 163 Ga. App. 114, 291 S.E.2d 573 (1982); *Jones v. Sudduth*, 162 Ga. App. 602, 292 S.E.2d 448 (1982); *City of Saint Marys v. Stottler Stagg & Assocs.*, 163 Ga. App. 45, 292 S.E.2d 868 (1982); *Witt v. Robbins*, 163 Ga. App. 182, 292 S.E.2d 894 (1982); *GaDonna v. State*, 164 Ga. App. 582, 298 S.E.2d 556 (1982); *Hill Aircraft & Leasing Corp. v. Cintas Corp.*,

169 Ga. App. 747, 315 S.E.2d 263 (1984); *C & H Couriers, Inc. v. American Mut. Ins. Co.*, 170 Ga. App. 684, 318 S.E.2d 77 (1984); *Flynn v. State*, 255 Ga. 415, 339 S.E.2d 259 (1986); *Griffin v. Citizens Bank*, 177 Ga. App. 771, 341 S.E.2d 298 (1986); *McCall v. Parker*, 177 Ga. App. 774, 341 S.E.2d 303 (1986); *Stoneridge Properties, Inc. v. Kuper*, 178 Ga. App. 409, 343 S.E.2d 424 (1986); *Property Tax Research Co. v. Lewis Textile, Inc.*, 180 Ga. App. 247, 349 S.E.2d 8 (1986); *Hendrix v. State*, 186 Ga. App. 665, 368 S.E.2d 181 (1988); *Anton Int'l Corp. v. Williams-Russell & Johnson, Inc.*, 190 Ga. App. 150, 377 S.E.2d 688 (1989); *Russell v. Wickes Lumber*, 190 Ga. App. 16, 378 S.E.2d 148 (1989); *Gann v. State*, 190 Ga. App. 82, 378 S.E.2d 369 (1989); *Wood v. Turner*, 196 Ga. App. 815, 397 S.E.2d 161 (1990); *Lehman v. Zuckerman*, 198 Ga. App. 202, 400 S.E.2d 704 (1990); *Conner Ins. Agency, Inc. v. Strauch*, 198 Ga. App. 536, 402 S.E.2d 129 (1991); *Sullivan v. Fabe*, 198 Ga. App. 824, 403 S.E.2d 208 (1991); *E.H. Crump Co. v. Millar*, 200 Ga. App. 598, 409 S.E.2d 235 (1991); *Lee v. State*, 205 Ga. App. 659, 423 S.E.2d 29 (1992); *Shaw v. Ruiz*, 207 Ga. App. 299, 428 S.E.2d 98 (1993); *Goodwin v. State*, 208 Ga. App. 707, 431 S.E.2d 473 (1993); *Dixieland Truck Brokers, Inc. v. International Indem. Co.*, 210 Ga. App. 160, 435 S.E.2d 520 (1993); *Lane v. Tift County Hosp. Auth.*, 228 Ga. App. 554, 492 S.E.2d 317 (1997); *Athens Int'l, Inc. v. Venture Capital Properties, Inc.*, 230 Ga. App. 286, 495 S.E.2d 900 (1998); *Hunnicut v. State*, 234 Ga. App. 560, 507 S.E.2d 802 (1998); *Rabenstein v. Cannizzo*, 244 Ga. App. 107, 534 S.E.2d 847 (2000); *Span v. Phar-Mor, Inc.*, 251 Ga. App. 320, 554 S.E.2d 309 (2001); *DeGolyer v. Green Tree Servicing, LLC*, 291 Ga. App. 444, 662 S.E.2d 141 (2008); *Banks v. Echols*, 302 Ga. App. 772, 691 S.E.2d 667 (2010).

Procedural Considerations

1. Foundation for Admission

Compliance renders further proof unnecessary. — Once a certificate of inspection is completed as specified under O.C.G.A. § 24-3-14, the certificate is admissible in any court of law without further proof, and a further foundation for admission under the business records exception to the hearsay

Procedural Considerations (Cont'd)**1. Foundation for Admission** (Cont'd)

rule is rendered unnecessary. *State v. Had-dock*, 235 Ga. App. 726, 510 S.E.2d 561 (1998).

Nature of foundation. — Before a writing or record is admissible under subsection (b) of O.C.G.A. § 24-3-14, a foundation must be laid through the testimony of a witness who is familiar with the method of keeping records and who can testify thereto and to facts which show that the entry was made in the regular course of business at the time of the event or within a reasonable time thereafter. *Suarez v. Suarez*, 257 Ga. 102, 355 S.E.2d 649 (1987).

In an action in which the victim was awarded restitution for tools and equipment taken from a stolen truck, all that was required was that a foundation be laid through the testimony of a witness who was familiar with the method of keeping the record of the list of equipment and tools normally found on the truck who could testify thereto, and to facts which showed that the entry was made in the regular course of business at the time of the event or within a reasonable time thereafter. *Tindol v. State*, 284 Ga. App. 45, 643 S.E.2d 329 (2007).

Preliminary proof is necessary before the writing or record is admissible. The evidence should include identification of the writing or record by a witness who is familiar with the method of keeping the records and who can testify thereto and to facts which show that the entry was made in the regular course of business and that it was the regular course of the business to make such memorandum or record at the time of the event or within a reasonable time thereafter. *Walburn v. Taunton*, 107 Ga. App. 411, 130 S.E.2d 279 (1963); *Cassano v. Pilgreen's, Inc.*, 117 Ga. App. 260, 160 S.E.2d 439 (1968).

Absent preliminary proof required to qualify statements as to facts, the knowledge of which were obtained from records not personally kept by testifying witness, had no probative value. *Eaton Oil & Auto Co. v. Greene County*, 53 Ga. App. 145, 185 S.E. 296 (1936); *Thomasson v. Trust Co. Bank*, 149 Ga. App. 556, 254 S.E.2d 881 (1979); *Harris v. Collins*, 149 Ga. App. 638, 255 S.E.2d 107 (1979); *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 158 Ga. App. 151, 279 S.E.2d 250 (1981).

When defendant submitted an unsigned document purported to be in the plaintiff's handwriting, but was not able to locate anyone who could identify the document, defendant was unable to produce the required foundation testimony, and the document was properly excluded. *Metropolitan Atlanta Rapid Transit Authority v. Green Int'l, Inc.*, 235 Ga. App. 419, 509 S.E.2d 674 (1998).

Authentication required. — Witness's testimony is inadmissible in the absence of any authentication of the records which the witness's testimony is purported to track. *Hall v. State*, 244 Ga. 86, 259 S.E.2d 41 (1979).

In the absence of authentication by the issuing officer or testimony of the witness officers that the license tag number on the traffic ticket accurately reflected the license tag number of the car the witnesses saw appellant driving, the citations were hearsay as to the identity of the license tag number. Since the proper foundation was not laid, the tickets did not qualify for the business record exception to the hearsay rule. *Curtis v. State*, 190 Ga. App. 173, 378 S.E.2d 516 (1989).

An uncertified copy of a check was properly excluded since the witness had no personal knowledge of the transaction or the making of the copy and provided conflicting testimony about the witness's familiarity with the business practices or regular course of dealing. *U.B. Vehicle Leasing, Inc. v. Vision Int'l, Inc.*, 224 Ga. App. 611, 481 S.E.2d 597 (1997).

Ride safety checklist had not been authenticated as a business record and thus was merely inadmissible hearsay that could not be considered as evidence in support of a motion for summary judgment. *Valentin v. Six Flags Over Ga., L.P.*, 286 Ga. App. 508, 649 S.E.2d 809 (2007).

Personal knowledge not required. — It is not necessary that a witness identifying business records have personal knowledge of the correctness of the records or have actually made the entries personally. *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957), for comment, see 20 Ga. B.J. 381 1958; *Seaboard Coast Line R.R. v. Smalley*, 127 Ga. App. 652, 194 S.E.2d 612 (1972); *Welborn v. State*, 132 Ga. App. 207, 207 S.E.2d 688 (1974); *Cotton v. John W. Eshelman & Sons*, 137 Ga. App. 360, 223 S.E.2d 757 (1976); *F.N.B. Fin. Co. v. Glaze*

Tire Co., 140 Ga. App. 184, 230 S.E.2d 342 (1976); *Smith v. Bank of S.*, 141 Ga. App. 114, 232 S.E.2d 629 (1977); *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977); *Bentley v. State*, 153 Ga. App. 410, 265 S.E.2d 293 (1980); *Whittington v. State*, 155 Ga. App. 667, 272 S.E.2d 532 (1980); *Hines v. Good Housekeeping Shop*, 161 Ga. App. 318, 291 S.E.2d 238 (1982); *Murphy v. State*, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

Witness identifying business records under O.C.G.A. § 24-3-14 does not have to have personal knowledge of the correctness of the records or have made the entry personally. *Hertz Corp. v. McCray*, 198 Ga. App. 484, 402 S.E.2d 298 (1991).

There is no requirement that in order to lay a proper foundation for the admission of a certificate of inspection under the business record exception, the person who conducted the inspection of the machine, or someone who actually witnessed the inspection, appear in court to testify about the inspection or the completion of the certificate. *State v. Haddock*, 235 Ga. App. 726, 510 S.E.2d 561 (1998).

There was no error in denying the property owner's motion to strike virtually all of the evidence against the owner; the trial judge was authorized to admit the tax documents into evidence as records made in the regular course of business under O.C.G.A. § 24-3-14(b) because the testimony of the custodian of the sheriff department's tax levy files and an employee of the county tax commissioner's delinquent tax division, even without personal knowledge, was sufficient to authorize finding that the witnesses were familiar with the method of keeping the records and that the documents were made in the regular course of business at the time of the events. *Tharp v. Vesta Holdings I, LLC*, 276 Ga. App. 901, 625 S.E.2d 46 (2005).

Trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to O.C.G.A. §§ 24-3-14 and 24-5-26, despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the card, as the card itself showed that the card was created and transmitted at the time of the defendant's arrest, and was handled in the gath-

ering agency's regular and routine course of business. *Tubbs v. State*, 283 Ga. App. 578, 642 S.E.2d 205 (2007).

Person laying foundation need not be custodian of records. — Georgia Business Records Act, O.C.G.A. § 24-3-14, does not require that the person laying the foundation for business records' admissibility be the custodian of the records, that is, be the person who "keeps the records" under that person's "control and supervision." *Hertz Corp. v. McCray*, 198 Ga. App. 484, 402 S.E.2d 298 (1991).

In a negligence action seeking compensatory damages for a disabling injury, the trial court did not err in admitting certain prescription drug records pertaining to the injured plaintiff as a pharmacist presented sufficient testimony to satisfy the foundational requirements necessary for admission under the business records exception to the hearsay rule. *Imm v. Chaney*, 287 Ga. App. 606, 651 S.E.2d 855 (2007).

Housekeeping supervisor of a motel where a victim was found dead of strangulation after being seen with a defendant could properly lay the foundation for the motel's lock interrogation log as the record only had to be made in the regular course of business at the time of the transaction; any lack of personal knowledge by the supervisor as to how the records were created only went to the weight of the evidence. *Hamilton v. State*, 297 Ga. App. 47, 676 S.E.2d 773 (2009).

Testimony of a bank officer may provide the required foundation for business records. *Shannon v. Toronto-Dominion Bank*, 168 Ga. App. 279, 308 S.E.2d 682 (1983).

Affidavit of custodian of bank records. — The affidavit of a bank records custodian was properly admitted in support of the bank's motion for summary judgment under O.C.G.A. § 24-3-14(b). The custodian averred that the custodian was the records custodian for the bank and that the records filed with the custodian's affidavit were maintained in the regular and ordinary course of business and that the transactions were recorded contemporaneously with the events as they occurred. *Vadde v. Bank of Am.*, 301 Ga. App. 475, 687 S.E.2d 880 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. 2010).

Procedural Considerations (Cont'd)**1. Foundation for Admission (Cont'd)**

In questions of proof of business records stored on tape on electronic computing equipment, the proper foundation to be laid is the same as that for business records of any other type or description. *Cotton v. John W. Eshelman & Sons*, 137 Ga. App. 360, 223 S.E.2d 757 (1976).

Officer qualified to introduce other officer's report. — Police officer was qualified to lay foundation for introduction of accident report prepared by another officer since testifying officer was able to testify as to the preparation and keeping of such reports. *Reed v. Heffernan*, 171 Ga. App. 83, 318 S.E.2d 700 (1984).

Any alleged inaccuracies in a ledger would go to weight and not to admissibility. *Murphy v. State*, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

Compliance with provisions of statute prohibiting drunk driving not necessary for admission of blood-alcohol test. — When the blood-alcohol test was performed pursuant to the medical treatment of the plaintiff and recorded in the regular course of hospital business, and it was not administered for the purpose of determining whether plaintiff violated O.C.G.A. § 40-6-391, it was not necessary that defendant establish compliance with § 40-6-391 to render the test results admissible; the blood test results thus recorded in the regular course of hospital business were admissible under O.C.G.A. § 24-3-14. *Bynum v. Standard (Chevron) Oil Co.*, 157 Ga. App. 819, 278 S.E.2d 669, cert. dismissed, 248 Ga. 429, 285 S.E.2d 186 (1981).

Medical records in drunk driving case. — Medical records certified by the records custodian of a hospital showing the results of an independent chemical test requested by defendant in a drunk driving case were not admissible without further foundational evidence that would satisfy the requirements of the business records exception to the hearsay rule. *Brahm v. State*, 230 Ga. App. 407, 497 S.E.2d 240 (1998).

Presumption on review. — Mere recital in the motion for a new trial that the preliminary proof of the requirements for admissibility of documentary evidence was lacking is insufficient to show that as a matter of fact

such preliminary proof was not made, and the reviewing court must presume that such preliminary proof was made and affirm the action of the trial judge in admitting the evidence. *Gray v. General Fin. Corp.*, 108 Ga. App. 586, 134 S.E.2d 58 (1963).

State laid the proper foundation for the admission of certificates of equipment testing when two witnesses testified to them having been made within a reasonable time of the testing, and the notary jurat for each certificate confirmed the certificate was filled out on the day of inspection. *Davis v. State*, 236 Ga. App. 32, 510 S.E.2d 889 (1999).

When a patrolman testified that certificates of inspection were generated in the police department's ordinary course of business, made at the time the breath analyzer was inspected, and kept along side the machine, this evidence was sufficient to satisfy the foundational requisites for the admission of the certificates as business records. *Brandon v. State*, 236 Ga. App. 203, 511 S.E.2d 573 (1999).

Proper foundation found. — Professional association did not fail to lay the proper foundation for admission of computer printouts under the business records exception to the hearsay rule in order to establish the amount owed to a client for professional services since the president of the firm described of the president's own personal knowledge how the computer printouts were developed and how the printouts were used in determining what a client owed. *Reisman v. Martori, Meyer, Hendricks, & Victor*, 155 Ga. App. 551, 271 S.E.2d 685 (1980).

Trial court did not err by admitting into evidence two accident reports created by a driver's supervisor because the supervisor made the reports in the regular course of business shortly after the collision occurred based on what the driver had told the supervisor, and both the driver and the supervisor testified at trial and were available for cross examination. *Lee v. Thomason*, 277 Ga. App. 573, 627 S.E.2d 168 (2006).

In a criminal case where the victim was robbed of a cellular telephone, the telephone records were properly admitted under O.C.G.A. § 24-3-14; the testimony of the telephone company's records custodian provided the necessary foundation for the records to be introduced into evidence, and

the custodian's lack of personal knowledge as to how the records were actually printed out affected their weight, not their admissibility. *Santana v. State*, 283 Ga. App. 696, 642 S.E.2d 390 (2007).

State laid the foundation for admission of a hospital-administered blood alcohol test as a routine business record with the testimony of two witnesses, and admission of the results of the test was proper; a custodian of medical records testified that when a blood test was completed in the hospital, the results were printed out then entered into the hospital computer system in the normal course of business, the printout was stored as a hard copy, and the printout contained only the factual data of the test results and a lab manager familiar with the usual practices and policies of the emergency room testified that it was the normal procedure of emergency room personnel to draw a patient's blood once the patient was admitted, before the patient has been seen by an attending physician. The certified copy of the test results printout showed that the defendant's blood was drawn within the normal procedures of the hospital. *Daniel v. State*, 298 Ga. App. 245, 679 S.E.2d 811 (2009).

A "cash for keys" agreement entered into between a former owner's tenant and the new owner following a foreclosure sale was admissible in the former owner's wrongful eviction suit under the business record exception to the hearsay rule; the agreement was authenticated in the affidavit of the person who signed the agreement and witnessed the tenant sign the agreement, and the custodian testified by affidavit that the agreement was one of the custodian's own business records that were maintained in the regular course of business. *Steed v. Fed. Nat'l Mortg. Corp.*, 301 Ga. App. 801, 689 S.E.2d 843 (2009).

Proper foundation not laid. — Trooper testified that the trooper was familiar with the book in which the records were maintained, but the trooper did not know if the documents were made contemporaneously with the testing; therefore, the trooper's testimony did not satisfy the foundational requirements. *Mullinax v. State*, 231 Ga. App. 534, 499 S.E.2d 903 (1998).

Disciplinary reports of a Diversion Center were not admissible as business records absent inquiry as to whether it was in the

regular course of the Center's control officer to make an incident or disciplinary report and whether the reports were in fact made in the regular course of the Center's business. *Kendrick v. State*, 240 Ga. App. 530, 523 S.E.2d 414 (1999).

State failed to lay the foundation required to admit hearsay under the business records exception when a police sergeant testified that reports were "copies of the typewritten reports submitted by an officer of the police department" and that the officer retrieved the reports from the police files, but the officer gave no testimony regarding the preparation and keeping of the reports. *Johnson v. State*, 247 Ga. App. 660, 544 S.E.2d 496 (2001).

Trial court properly ruled in favor of a subdivision association board of directors as to claims by the owner of a development company that the board erred in charging water service and building fees because the owner failed to show that any damages were suffered as a result of the imposition of the fees, as the trial court properly excluded computer records concerning the fees, as the records did not meet the O.C.G.A. § 24-3-14 standard for the business records hearsay exception as the owner did not testify that the writings proffered were made in the regular course of business at the time of the underlying transaction or within a reasonable time thereafter. *Crawford v. Dammann*, 277 Ga. App. 442, 626 S.E.2d 632 (2006).

In an action to recover the balance of the money owed under a loan, because the guarantor of the loan failed to show the lack of an adequate foundation for the admitted evidence, a claim that the trial court erred in admitting the loan history report as a business record failed; hence, the proponent bank was properly granted summary judgment on the issue. *Ishak v. First Flag Bank*, 283 Ga. App. 517, 642 S.E.2d 143 (2007).

Worker injured while using an elevator had not shown that reports purportedly generated by elevator maintenance company fell within the business records exception to the hearsay rule; company's service technician was unfamiliar with the reports and did not testify that the reports were made in the regular course of business. *Henson v. Georgia-Pacific Corp.*, 289 Ga. App. 777, 658 S.E.2d 391 (2008).

Procedural Considerations (Cont'd)**1. Foundation for Admission (Cont'd)**

Trial court erred in admitting the state's exhibits, which were copies of two traffic citations stamped "FTA," pursuant to O.C.G.A. § 24-5-20 without any determination that the exhibits fell within an exception to the rule prohibiting the use of hearsay because the state introduced the exhibits to prove the truth of the statement of the unidentified person who stamped "FTA" on the citations that the defendant failed to appear for the defendant's court date, and despite defendant's objection to the documents as hearsay, the state argued only the issue of authentication and never identified any exception to the rule prohibiting hearsay that would authorize admitting the documents; the state failed to lay the required foundation for the application of the business records exception, O.C.G.A. § 24-3-14(b), because the state did not call any witness to provide the required foundation. *McKinley v. State*, 303 Ga. App. 203, 692 S.E.2d 787 (2010).

Absence of foundation held harmless. — Assuming a proper foundation was not presented for the introduction of medical records at defendant's trial for battery, any error in admitting the records was harmless since the records were not critical but merely cumulative evidence showing the extent of the victim's injuries. *Flowers v. State*, 181 Ga. App. 572, 353 S.E.2d 69 (1987).

2. Weight and Credibility

Questions for jury. — Credibility, both of the books and of the party, is to be weighed by the jury, and depends upon various circumstances of which the jury are the judges. *Taylor v. Tucker*, 1 Ga. 231 (1846); *Allstate Ins. Co. v. Buck*, 96 Ga. App. 376, 100 S.E.2d 142 (1957); *Seaboard Coast Line R.R. v. Hart*, 120 Ga. App. 492, 171 S.E.2d 383 (1969).

All circumstances may be shown to affect weight of evidence but not the admissibility of the evidence. *Hurst v. Jackson*, 134 Ga. App. 129, 213 S.E.2d 511 (1975); *Serve v. First Nat'l Bank*, 143 Ga. App. 239, 237 S.E.2d 719 (1977).

Trial court did not err in admitting a podiatrist's medical records on a patient into evidence in a medical malpractice suit as the

circumstances of the making of the records could be shown to affect the weight of the evidence; but the circumstances could not affect the admissibility of the records. *Kohl v. Tirado*, 256 Ga. App. 681, 569 S.E.2d 576 (2002).

Physical appearance of records and their self-serving nature are questions that go to the weight of the evidence but not to admissibility. *Whitehead v. Joiner*, 234 Ga. 457, 216 S.E.2d 317 (1975); *Hall v. State*, 239 Ga. 832, 238 S.E.2d 912 (1977).

Dispute over accuracy of record and of the witness's recollection affects only the weight to be given the record by the jury. *Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co.*, 154 Ga. App. 648, 269 S.E.2d 506 (1980).

Irregularities in account books sought to be introduced in evidence should be exceedingly gross and palpable to justify the court in arresting the evidence from that tribunal whose peculiar province it is to judge of the credibility of testimony. *Bush v. Fourcher*, 3 Ga. App. 43, 59 S.E. 459 (1907).

Gaps in chain of custody of blood sample. — When the blood-alcohol test results are properly admitted as a business record, gaps in the chain of custody of the blood sample admitted as part of the hospital record do not affect the admissibility of the test results but merely go to the weight of the evidence accorded by the jury. *Bynum v. Standard (Chevron) Oil Co.*, 157 Ga. App. 819, 278 S.E.2d 669, cert. dismissed, 248 Ga. 254, 285 S.E.2d 186 (1981).

Impeachment. — In a suit by a bank, the defendant having introduced in evidence the books of the bank, the defendant cannot impeach the books as a whole, but may show that particular items in the books are wrong and disprove those items, and that by mistake or fraud they have been improperly kept. *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394 (1849).

3. Objections

When document offered in evidence is admissible in part and inadmissible in part, and objection is made to the document as a whole, it is not error to admit the whole document. *Stubbs v. Daughtry*, 115 Ga. App. 22, 153 S.E.2d 633 (1967).

Deletion of objectionable material. — If it is desired by either side that a police report

of accident be introduced in evidence after the foundation is laid, the report will not be offered unless all parts of the report containing objectionable material are first deleted. *Calhoun v. Chappell*, 117 Ga. App. 865, 162 S.E.2d 300 (1968).

Failure to identify objectionable portions of record. — When defendant was offered two opportunities to identify objectionable portions of hospital records and was given time to review the records for that purpose, defendant's failure to identify objectionable portions resulted in a waiver of defendant's hearsay objection. *Corbett v. State*, 266 Ga. 561, 468 S.E.2d 757 (1996).

Opinions and conclusions. — If a hospital record contains diagnostic opinions and conclusions, the record cannot, upon proper objection, be admitted into evidence unless and until the proper foundation is laid, i.e., the person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate the facts upon which the entry was based. *Cassano v. Pilgreen's, Inc.*, 117 Ga. App. 260, 160 S.E.2d 439 (1968).

When the document as a whole contained conclusions, opinions, estimates, impressions, and recommendations of a third party not before the court the document is not admissible as a whole. *Hurt v. State*, 239 Ga. 665, 238 S.E.2d 542 (1977).

Applications and Illustrations

Prima facie evidence. — When the books conform to the provisions of the statute, the books themselves stand as a witness of the correctness of the account and make a prima facie case which shifts the burden of proof to the defendant debtor to show the items contained in the books, or some of the items, are not correct. *Chambers v. Williams Bros. Lumber Co.*, 80 Ga. App. 38, 55 S.E.2d 244 (1949); *International Bus. Consulting, Ltd. v. First Union Nat'l Bank*, 192 Ga. App. 742, 386 S.E.2d 400 (1989) (see O.C.G.A. § 24-3-14).

Books of account when admitted under this statute are prima facie evidence of the facts the books state, and when not contradicted or explained may become conclusive. *Wright v. Trust Co.*, 108 Ga. App. 783, 134 S.E.2d 457 (1963) (see O.C.G.A. § 24-3-14).

Admission by defendant in defendant's testimony, that defendant bought of plain-

tiffs the articles set forth in the account sued on, the price being attached to each article, establishes prima facie the correctness of the account. *F.N.B. Fin. Co. v. Glaze Tire Co.*, 140 Ga. App. 184, 230 S.E.2d 342 (1976).

If a business record is qualified according to the statutory standard it may be admissible to prove the truth of the fact stated therein. *Moore v. State*, 154 Ga. App. 535, 268 S.E.2d 706 (1980).

Primary evidence. — As a general rule, the testimony of a person who has knowledge of the facts from which books of account are made up is primary evidence as to these facts, and is admissible, whether or not the books themselves are put in evidence. *Harper v. Hammond & Sons*, 13 Ga. App. 238, 79 S.E. 44 (1913); *Christopher v. Georgian Co.*, 22 Ga. App. 707, 97 S.E. 97 (1918); *Atlantic Coast Line R.R. v. Grimes*, 99 Ga. App. 774, 109 S.E.2d 890 (1959); *Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co.*, 154 Ga. App. 648, 269 S.E.2d 506 (1980).

Admission against deceased debtors. — Business records that are admissible under this statute are admissible against a deceased debtor. *F & W Farm Serv., Inc. v. Citizens & S. Nat'l Bank*, 116 Ga. App. 757, 159 S.E.2d 190 (1967); *Roberts v. Artistic Ornamental Iron Co.*, 124 Ga. App. 744, 186 S.E.2d 143 (1971); *Glo-Ann Plastic Indus., Inc. v. Peak Textiles, Inc.*, 134 Ga. App. 924, 216 S.E.2d 715 (1975) (see O.C.G.A. § 24-3-14).

Agents. — Rule that the entries of an agent, made in the course of the business, are admissible in evidence after the agent's death is recognized by statute. *Turner v. Turner*, 123 Ga. 5, 50 S.E. 969 (1905).

Fact that a document was not signed by an agent or representative of the party to whom the document pertains does not affect the document's admissibility. *F.N. Roberts Corp. v. Southern Bell Tel. & Tel. Co.*, 132 Ga. App. 800, 209 S.E.2d 138 (1974) (see O.C.G.A. § 24-3-14).

Business records. — Information in the affidavit of the management corporation's vice president regarding the lessor's record keeping methods fell squarely within the business records exception to the hearsay rule codified at O.C.G.A. § 24-3-14. *Int'l Biochemical Indus. v. Jamestown Mgmt. Corp.*, 262 Ga. App. 770, 586 S.E.2d 442 (2003).

Applications and Illustrations (Cont'd)

Trial court's order granting summary judgment to a collection company and against a debtor in the former's deficiency action was upheld on appeal as it was not based on inadmissible hearsay, but upon records kept in the ordinary course of business, and thus admissible under the business records exception to the hearsay rule. *Boyd v. Calvary Portfolio Servs.*, 285 Ga. App. 390, 646 S.E.2d 496 (2007).

In a breach of contract action, a lender's witness was properly allowed to testify about the loan records involving the debtor sued under the business records exception to the hearsay rule as: (1) the witness testified that the records were kept in the ordinary course of the lender's business; (2) the witness was familiar with the records and the manner in which the records were kept; (3) the records were made at or near the time the documents were created or received by the lender; and (4) the records of the lender's predecessors became the records of the lender. *Jenkins v. Sallie Mae, Inc.*, 286 Ga. App. 502, 649 S.E.2d 802 (2007).

Trial court properly granted summary judgment to the purchaser of real estate in a quiet title action that involved the taxpayer's home and the taxpayer's failure to pay the property taxes on the property as the property was properly levied upon and no question of fact remained that the sheriff officially seized the property. Further, the affidavits of the civil process coordinator at the time of the tax sale, and the coordinator's successor, were properly admitted into evidence as such affidavits fell within the business records exception to the rule against hearsay. *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008).

In convictions of aggravated child molestation and statutory rape, defendant was not entitled to admission into evidence of a motel registration card under O.C.G.A. § 24-3-14(b) because the defendant failed to present testimony of a motel employee, who was familiar with the motel registration card and the methods for generation and keeping the motel's business records. *Flewelling v. State*, 300 Ga. App. 505, 685 S.E.2d 758 (2009).

Trial court did not abuse its discretion in admitting the results of a hospital-admin-

istered blood test under the business record exception to the hearsay rule, O.C.G.A. § 24-3-14, because the defendant acquiesced in the procedure by which a lab technician identified the computer printout but did not relate the results stated thereon, and acquiescence deprived the defendant of the right to complain of the procedure on appeal; because the lab technician testified that the document tendered was an accurate copy of the result obtained, the testimony was properly admitted as original evidence. *Potter v. State*, 301 Ga. App. 411, 687 S.E.2d 653 (2009).

Telephone messages. — As telephone messages made following conversations between a party opponent and a testifying witness noted the contents of a conversation, not an act, transaction, occurrence, or event, the business records exception to the hearsay rule was inapplicable; for the contents of the party's telephone conversations to be admissible, the party would have to be given the opportunity to cross-examine the employees to whom the witness spoke with regard to the potential for misrepresenting the statements. *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006).

Notations of a telephone conversation and testimony explaining the notation were not admissible under the business record exception to the hearsay rule, O.C.G.A. § 24-2-14(b), because such notations were not considered records of a transaction, event or occurrence as contemplated by this rule. *Griffin v. Bankston*, 302 Ga. App. 647, 691 S.E.2d 229 (2009).

Notice of cancellation of insurance policy. — Supervisor who was the custodian of documents showing that notice of cancellation of an insurance policy was properly mailed was not required to have actual personal knowledge of the preparation of and mailing of the notice. *Stapleton v. Colonial Ins. Co.*, 209 Ga. App. 674, 434 S.E.2d 116 (1993).

Types of evidence held admissible. — See *Hall v. Carey*, 5 Ga. 239 (1848) (corporate books); *Banks v. Darden ex rel. Jerrenaud*, 18 Ga. 318 (1855) (bank books); *Ganahl v. Shore*, 24 Ga. 1 (1858) (account books); *Bush v. Fourcher*, 3 Ga. App. 43, 59 S.E. 459 (1907) (account books of repairer); *Harper v. Hammond & Sons*, 13 Ga. App. 238, 79 S.E. 44 (1913) (ledgers); *Chambers v. Will-*

iams Bros. Lumber Co., 80 Ga. App. 38, 55 S.E.2d 244 (1949) (ledger sheets and tradesman's shop book); Allstate Ins. Co. v. Buck, 96 Ga. App. 376, 100 S.E.2d 142 (1957) (invoices, delivery slips and circulation accounts); Franco v. Bank of Forest Park, 118 Ga. App. 700, 165 S.E.2d 593 (1968) (insurance policies and bank records showing premiums deposited to accounts of issuing companies); Hamilton v. State, 118 Ga. App. 842, 165 S.E.2d 884 (1968) (photostat copy of check identified as bank record); Pickett v. State, 123 Ga. App. 1, 179 S.E.2d 303 (1970) (police report); Butler v. Garrison, 123 Ga. App. 645, 182 S.E.2d 185 (1971) (recorded claim for materialman's lien and invoices for materials); Tidwell Co. v. Robley Hats, Inc., 125 Ga. App. 102, 186 S.E.2d 489 (1971) (fire department records); Smith v. Smith, 125 Ga. App. 257, 187 S.E.2d 330 (1972) (x-rays); Harris v. United States Fid. & Guar. Co., 134 Ga. App. 739, 216 S.E.2d 127 (1975) (mailing list constituting post office receipt for mailing); Lawson v. State, 236 Ga. 770, 225 S.E.2d 258, cert. denied, 429 U.S. 857, 97 S. Ct. 156, 50 L. Ed. 2d 134, cert. denied, 429 U.S. 859, 97 S. Ct. 159, 50 L. Ed. 2d 136 (1976) (registration of particular phone); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484 (1976), aff'd, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978) (return of search warrant); Benn v. McBride, 140 Ga. App. 698, 231 S.E.2d 438 (1976) (invoices); Tillman & Deal Farm Supply, Inc. v. Deal, 146 Ga. App. 232, 246 S.E.2d 138 (1978) (laboratory tests records); SCM Corp. v. Thermo Structural Prods., Inc., 153 Ga. App. 372, 265 S.E.2d 598 (1980) (annual tax return); Graham v. State, 154 Ga. App. 198, 267 S.E.2d 842 (1980) (computer printouts); Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427 (1982) (certifications from manufacturer regarding radar device; records of Department of Public Safety kept for use in speeding cases); Zipperer v. State, 162 Ga. App. 775, 293 S.E.2d 44 (1982) (probationer's travel permits in probation revocation proceeding); Boatner v. Kandul, 180 Ga. App. 234, 348 S.E.2d 753 (1986) (ledger book); White v. State, 263 Ga. 94, 428 S.E.2d 789 (1993) (Red Cross blood testing); Morris v. National W. Life Ins. Co., 208 Ga. App. 443, 430 S.E.2d 813 (1993) (computer-generated summaries); Gee v.

State, 210 Ga. App. 60, 435 S.E.2d 275 (1993) (hospital intake record); Stephens v. Howard, 221 Ga. App. 469, 471 S.E.2d 898 (1996) (physical therapist's report prepared for treating physician); Neill v. State, 247 Ga. App. 152, 543 S.E.2d 436 (2000) (hotel registration card).

Admission of lawyer's notes. — In an action seeking reformation of an option contract, even assuming the trial court erred in admitting a lawyer's handwritten notes indicating that an option contract was to include all of the decedent's land because such notes were inadmissible hearsay, the estate failed to show reversible error because there was other evidence to support the court's ruling. *Morris v. Morris*, 282 Ga. App. 127, 637 S.E.2d 838 (2006).

Documents transmitted between businesses. — When routine, factual documents are made by one business, transmitted, or delivered to a second business, and there entered or kept by the second business in the regular course of business of the receiving business, the documents can become business records of the receiving business. *Moore v. State*, 154 Ga. App. 535, 268 S.E.2d 706 (1980); *Jackson v. State*, 209 Ga. App. 217, 433 S.E.2d 655 (1993).

Sufficient evidence supported defendant's convictions for two counts of theft by deception based on defendant withdrawing the contents of two bank accounts after depositing checks from other banks into the accounts that were eventually dishonored because the dishonored checks were properly admitted into evidence without testimony from the payor banks as the checks became the business records of the bank from which funds were withdrawn, since there was testimony that the bank received, relied upon, and retained the checks in the regular course of the bank's business, as well as testimony from the bank establishing a foundation for admitting the checks. *Ross v. State*, 298 Ga. App. 525, 680 S.E.2d 435 (2009).

Opinions. — Statute does not authorize the introduction of papers containing the opinions of experts or the diagnosis of physicians. *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957). For comment, see 20 Ga. B.J. 381 (1958); *Meeks v. Lunsford*, 106 Ga. App. 154, 126 S.E.2d 531 (1962).

Applications and Illustrations (Cont'd)

When a report was the opinion of the persons making the report and was based, at least to some extent, on what was reported to the people by unidentified persons, it was not admissible in evidence. *Yarbrough v. Cantex Mfg. Co.*, 97 Ga. App. 438, 103 S.E.2d 138 (1958), for comment, see 22 Ga. B.J. 100 (1959).

Business record containing hearsay opinions is not generally admissible. *Wallis v. Odom*, 130 Ga. App. 437, 203 S.E.2d 613 (1973); *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974).

Business records must be reflective of an act, occurrence, or event, and not an opinion. *Finch v. Caldwell*, 155 Ga. App. 813, 273 S.E.2d 216 (1980).

Affidavits by company officials concerning alleged forgeries that were not memoranda or records of acts, transactions, occurrences, or events and that contained inadmissible opinions and conclusions were not admissible as business records. *Adams v. State*, 217 Ga. App. 706, 459 S.E.2d 182 (1995).

Even though an affidavit in support of a motion for summary judgment did not recite that the affidavit was made from the affiant's personal knowledge, it was admissible because the affidavit set forth the affiant's title and responsibilities and included attached documents made and kept in the ordinary course of business. *Kondo v. Marietta Toyota, Inc.*, 224 Ga. App. 490, 480 S.E.2d 851 (1997).

As the affidavits of an assignee's chief financial officer (CFO) showed that the CFO's knowledge of the facts sworn to was based on the CFO's review of the attached business records and not personal knowledge, the affidavits were inadmissible hearsay. *Nyankojo v. North Star Capital Acquisition*, 298 Ga. App. 6, 679 S.E.2d 57 (2009).

Testimony by corporate attorney. — Testimony by attorney, who handled right of way acquisitions and maintained corporate records regarding rights of way for defendant corporation, as to width of the defendant's right of way was relevant background information that the attorney could testify to both from the attorney's personal knowledge and from corporate business records. *Simpson v. Colonial Pipeline Co.*, 269 Ga. 520, 499 S.E.2d 634 (1998).

Affidavit of an official made after a review of business records which were in the official's care, custody, and control, and which were maintained in the course of the company's business, was admissible. *Carter v. Tokai Fin. Servs., Inc.*, 231 Ga. App. 755, 500 S.E.2d 638 (1998).

Contents of records. — Since there was no testimony to the effect that a card or record was customarily made in the due course of business and since the card or record was not introduced in evidence as a record made in the due course of business, the admission of testimony as to the contents of the card or record was erroneous. *Hardy v. Waits*, 97 Ga. App. 580, 104 S.E.2d 136, rev'd on other grounds, 214 Ga. 495, 105 S.E.2d 719 (1958).

Testimony concerning the content of records, unsupported in the evidence by the records themselves, which are never offered in evidence should be excluded as hearsay. *Foster v. National Ideal Co.*, 119 Ga. App. 773, 168 S.E.2d 872 (1969).

Compiling documents for admission. — Individual documents could be compiled and admitted as a group, even though the documents were not kept together by the business as one record since each of the documents was made in the regular course of business and was kept as a business record. *Archer Motor Co. v. International Bus. Inv., Inc.*, 193 Ga. App. 86, 386 S.E.2d 918 (1989).

Summaries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the expert's investigation, provided the books themselves are accessible to the court and the parties. *Bible v. Somers Constr. Co.*, 197 Ga. 761, 30 S.E.2d 623 (1944); *Cotton v. John W. Eshelman & Sons*, 137 Ga. App. 360, 223 S.E.2d 757 (1976); *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977); *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

Extracts, summaries, and transcripts provided by one business purely as information to the second business clearly do not fall within the statute. *Moore v. State*, 154 Ga.

App. 535, 268 S.E.2d 706 (1980) (see O.C.G.A. § 24-3-14).

Monthly statements which were either drafted by president of firm or prepared under the president's supervision were admissible as summaries of computer printouts which were already in evidence. *Reisman v. Martori, Meyer, Hendricks, & Victor*, 155 Ga. App. 551, 271 S.E.2d 685 (1980).

When invoices of business records were admissible under O.C.G.A. § 24-3-14(b), an account statement that was a summary of the invoices therein was admissible. *Walter R. Thomas Assocs. v. Media Dynamite, Inc.*, 284 Ga. App. 413, 643 S.E.2d 883 (2007).

Self-serving memoranda. — Statute does not go to the extent of rendering admissible self-serving memoranda. *Maryfield Plantation, Inc. v. Harris Gin Co.*, 116 Ga. App. 744, 159 S.E.2d 125 (1967); *Nationwide Mut. Fire Ins. Co. v. Rhee*, 160 Ga. App. 468, 287 S.E.2d 257 (1981) (see O.C.G.A. § 24-3-14).

Document did not qualify as a business record since the document was prepared from notes dictated while a receiver of the property performed a complete walk-through of vacant units in an apartment complex and since the purpose of the document was to remind the receiver of what the receiver observed in each unit. *Great W. Bank v. Davis*, 203 Ga. App. 473, 416 S.E.2d 899 (1992).

Trial court properly refused to admit into evidence unauthenticated handwritten bid allegedly taken over the telephone by a secretary no longer employed by defendant contractor. *Bishop Contracting Co. v. North Ga. Equip. Co.*, 203 Ga. App. 655, 417 S.E.2d 400, cert. denied, 203 Ga. App. 905, 417 S.E.2d 400 (1992).

Handwritten note of deceased payee of promissory notes, as to loans to and payments from the signatory of the notes, was admissible. *Harrison v. Martin*, 213 Ga. App. 337, 444 S.E.2d 618 (1994).

Letters. — To construe Ga. L. 1952, p. 177, § 1 et seq. (see O.C.G.A. § 24-3-14) to permit the admission in evidence of a letter in which is contained the diagnosis of a party's condition by a witness who has not been qualified as an expert, and a memorandum opinion not signed by any person but simply enclosed in the letter, when the party whose interest the letter and memorandum opinion are offered is not afforded the op-

portunity to examine either the author of the letter or the maker of the memorandum would in effect repeal former Code 1933, § 38-1705 (see O.C.G.A. § 24-9-64), relating to the right of cross-examination, and ignore opinions of the Supreme Court and of this court. *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957). For comment, see 20 Ga. B.J. 381 (1958).

Letters frequently would not qualify as letters are usually written for the purpose of communicating rather than recording information. *American San. Servs., Inc. v. EDM of Tex., Inc.*, 139 Ga. App. 662, 229 S.E.2d 136 (1976).

Statute does not automatically render admissible correspondence and all kinds of writings if made by one in connection with the operation of a business. *American San. Servs., Inc. v. EDM of Tex., Inc.*, 139 Ga. App. 662, 229 S.E.2d 136 (1976) (see O.C.G.A. § 24-3-14).

Claim letter required by the Department of Transportation as part of the department's contract with a contractor was admissible as original evidence and as a business record. *DOT v. Dalton Paving & Constr., Inc.*, 227 Ga. App. 207, 489 S.E.2d 329 (1997).

Financial statements. — Financial statement compiled from the records of the corporation is not itself a memorandum or record of any act, transaction, occurrence, or event but a compilation of figures furnished by someone else, and should not be admissible. *Smith v. Smith*, 224 Ga. 689, 164 S.E.2d 225 (1968).

Unaudited financial statements which had been prepared by independent accountants who were not present in court to authenticate the reports should not have been admitted into evidence as business records. *DOT v. Fitzpatrick*, 184 Ga. App. 249, 361 S.E.2d 241 (1987).

Documents provided by subcontractors to plaintiff for purposes of billing and reimbursement qualified as business records of the plaintiff and testimony of plaintiff's president was appropriate to lay the foundation for their admittance. *Wheat Enters., Inc. v. Redi-Floors, Inc.*, 231 Ga. App. 853, 501 S.E.2d 30 (1998).

Credit card holder failed to prove that the statement, demonstrating the holder's debt, attached to the assignee's summary judg-

Applications and Illustrations (Cont'd)

ment motion affidavit was hearsay and should not have been considered by the trial court in the court's grant of summary judgment; the holder failed to contradict the assignee's claim, made in the assignee's affidavit, that the statement fell under the business records exception to the hearsay rule under O.C.G.A. § 24-3-14. *Bozeman v. CACV of Colo., LLC*, 282 Ga. App. 256, 638 S.E.2d 387 (2006).

When a plaintiff purchased advertising time from media providers on behalf of the defendant, invoices received from the media providers and kept by the plaintiff as part of the plaintiff's own records were business records of the plaintiff under O.C.G.A. § 24-3-14(b), and testimony from the plaintiff's president could lay a foundation for their introduction into evidence. *Walter R. Thomas Assocs. v. Media Dynamite, Inc.*, 284 Ga. App. 413, 643 S.E.2d 883 (2007).

Department of Labor records. — In a prosecution for fraudulently obtaining public housing, computer printouts of defendant's wage records received by the county housing authority from the Department of Labor were admissible as business records. *Robertson v. State*, 210 Ga. App. 834, 437 S.E.2d 816 (1993).

Timeline prepared by a Georgia Department of Children and Families case worker was not a business record as it was prepared for a termination of parental rights proceeding, was not prepared in the regular course of business, and was not prepared and maintained pursuant to a routine practice; however, the admission of the timeline was harmless error. *In re C.M.*, 258 Ga. App. 387, 574 S.E.2d 433 (2002).

Computer printouts. — Absence of original daily time sheets did not render computer printouts inadmissible; this may have gone to their credit but not to their admissibility. *Reisman v. Martori, Meyer, Hendricks, & Victor*, 155 Ga. App. 551, 271 S.E.2d 685 (1980).

Computer printouts are clearly admissible under O.C.G.A. § 24-3-14. *WGNX, Inc. v. Gorham*, 185 Ga. App. 489, 364 S.E.2d 621 (1988).

Subcontractor agreement forms. — Because a limited liability company did not object to the admission of subcontractor

agreement forms at trial on the ground that the forms did not fall within the business records exception to the hearsay rule, O.C.G.A. § 24-3-14, an appellate court would not consider that argument on appeal. *Forrest Cambridge Apts., LLC v. Redi-Floors, Inc.*, 295 Ga. App. 840, 673 S.E.2d 318 (2009).

Operating record of intoximeter operator admissible. — Operating record of an intoximeter operator who gave a test to a driver, subsequently accused of driving while intoxicated, was a writing in proof of an act or transaction and, thus, was admissible as direct evidence of the manner in which a scientific test was conducted and results thereby obtained. *Munda v. State*, 172 Ga. App. 857, 324 S.E.2d 799 (1984).

Breath testing device certificates. — Breath testing device certificates provided for in O.C.G.A. § 40-6-392(f) are records made within the regular course of business. *Brown v. State*, 268 Ga. 76, 485 S.E.2d 486 (1997); *Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998); *Jackson v. State*, 233 Ga. App. 568, 504 S.E.2d 505 (1998).

Proper foundation for admitting an inspection certificate was provided through testimony of the trooper who actually tested the machine. *Mealor v. State*, 233 Ga. App. 193, 504 S.E.2d 29 (1998).

"Self-authenticating" provision, itself, of O.C.G.A. § 40-6-392(f) contains the proper foundation for admission of a certificate of inspection, and a further foundation under the "business records" exception of subsection (b) of O.C.G.A. § 24-3-14 is not necessary. *Jackson v. State*, 233 Ga. App. 568, 504 S.E.2d 505 (1998).

Admission of self-authenticating certificates of inspection for the Intoxilyzer 5000 used to test defendant's breath was proper as the certificates were required by O.C.G.A. § 40-6-392(f), the certificates qualified as business records under O.C.G.A. § 24-3-14, and the certificates did not violate defendant's confrontation rights under U.S. Const., amend. 6. *Neal v. State*, 281 Ga. App. 261, 635 S.E.2d 864 (2006).

As certificates of inspection regarding an Intoxilyzer 5000 used in defendant's criminal matter were properly admitted pursuant to the business records exception to the hearsay rule under O.C.G.A. §§ 24-3-14 and 40-6-392(f), the trial court's refusal to give

the limiting instruction regarding their use, as requested by defendant, was not reversible error. *Neal v. State*, 281 Ga. App. 261, 635 S.E.2d 864 (2006).

Fingerprints. — An adequate foundation was laid for the admission of evidence of defendant's fingerprints since the trial record reflected that everybody arrested had a folder on them and the fingerprints were kept in the folder, the fingerprint card was a part of the record and was generally made at the time of a subject's arrest during the booking procedure, the name of the person who took the prints was on the card, and the card normally was maintained in the file jacket of the subject's arrest record at the sheriff's department. *Davis v. State*, 194 Ga. App. 902, 392 S.E.2d 327 (1990).

Evidence established that the defendant's 1991 fingerprint card was made in the regular course of business when the card bore the defendant's full name, date of birth, description, and signature and when the officer who conducted the fingerprinting and signed the card testified that the officer would have obtained the information on the card from written identification. The defendant's assertion that the prints on the 1991 card could be those of someone else purporting to be the defendant and using the defendant's identification at the time the prints were obtained amounted to mere speculation, and the state was under no obligation to re-fingerprint the defendant. *Hurst v. State*, 285 Ga. 294, 676 S.E.2d 165 (2009).

Trial court did not err in allowing the testimony of the state's fingerprint expert, an employee of the Georgia Bureau of Investigation (GBI), who identified the victim based on the victim's comparison of a post-mortem fingerprint card belonging to the victim and a fingerprint card bearing the victim's known fingerprints because a proper foundation was laid, and the fingerprints cards were properly admitted in evidence as business records under O.C.G.A. § 24-3-14; the expert testified that the expert was familiar with GBI's methods of recordkeeping, that the GBI maintained post-mortem fingerprint cards in the regular course of business, and that the fingerprint cards were made contemporaneously with autopsies of dead persons conducted at the morgue. *Rowe v. State*, 302 Ga. App. 239, 690 S.E.2d 884 (2010).

Police report. — Narratives contained in police reports generated in connection with police investigations are not the appropriate subject of the business records exception to the hearsay rule. To the extent that any case holds that a police report narrative is admissible as a business record, those cases are overruled. *Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001).

Because a form document, entitled the "Henry County Police Department Roadblock & Safety Checkpoint Record," introduced at a motion to suppress hearing by the state was properly admitted as a business record under O.C.G.A. § 24-3-14, and the testimonial evidence regarding the primary purpose of the roadblock passed constitutional muster, in that it was legitimately conducted as part of a statewide "zero tolerance" campaign, the defendant's motion to suppress the evidence seized as a result was properly denied. *Yingst v. State*, 287 Ga. App. 43, 650 S.E.2d 746 (2007).

Even if the trial court in a nuisance and trespass case erred in admitting narrative portions of a police officer's reports as business records, the error was harmless because the officer was available for cross-examination and because the reports were cumulative of the officer's testimony. *Stanfield v. Waste Mgmt. of Ga., Inc.*, 287 Ga. App. 810, 652 S.E.2d 815 (2007), cert. denied, 2008 Ga. LEXIS 228 (Ga. 2008).

There is no error in the admission of a police report showing that the defendant had a large amount of change in the defendant's possession when the defendant was apprehended inside a store. *Johnson v. State*, 168 Ga. App. 271, 308 S.E.2d 681 (1983).

Police officer's receipt for property constituted business record. — When an undercover officer who purchased marijuana from defendant testified regarding the purchase, opined that the substance was marijuana, and also identified the receipt for property and testified that the official filled out the receipt in the normal course of business, the receipt for property was clearly identified as a business record and was properly admitted as such over defendant's hearsay objection. *Green v. State*, 165 Ga. App. 702, 302 S.E.2d 604 (1983).

Police officer's letter containing compilation of figures furnished by another showing the number of accidents involving

Applications and Illustrations (Cont'd)

left-turning vehicles at an intersection over a three-year period was not admissible as a business record. *Loper v. Drury*, 211 Ga. App. 478, 440 S.E.2d 32 (1994).

With regard to proof of transmittal of contraband to state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by O.C.G.A. § 24-5-4, the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to O.C.G.A. §§ 24-3-14 and 24-5-26. *Spead v. State*, 187 Ga. App. 359, 370 S.E.2d 213 (1988).

1. Foundation for Admission

Business records admissible to prove crime. — Defendant's conviction for theft by taking in violation of O.C.G.A. § 16-8-2 was proper under O.C.G.A. § 24-3-14 because the business records exception did not require that the person laying the foundation for the admission of business records be the custodian of the records. Instead, the statute required only that the record offered to prove an act or transaction be made in the regular course of business and that it was the regular course of business to make the record at the time of the act or transaction; the witness's lack of personal knowledge regarding how the records were created did not render the records inadmissible, but merely affected the weight given to the evidence. *Loyal v. State*, 300 Ga. App. 65, 684 S.E.2d 124 (2009).

Pawn ticket admissible as business record. — Pawn ticket constitutes a contemporaneous record of a transaction made in the regular course of business pursuant to regu-

lar business practices, and thus is admissible as evidence of the transaction under O.C.G.A. § 24-3-14. *Baxter v. State*, 254 Ga. 538, 331 S.E.2d 561 (1985), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 275 (1985); 498 U.S. 1041, 111 S. Ct. 714, 112 L. Ed. 2d 703 (1991).

Report containing opinions of party not before court. — Even if a proper foundation was laid to introduce a laboratory report as a business record, it was still not admissible as a whole if the report contained the opinions or conclusion of a third party not before the court. *Department of Human Resources v. Corbin*, 202 Ga. App. 10, 413 S.E.2d 484 (1991), cert. denied, 202 Ga. App. 905, 413 S.E.2d 484 (1992).

Trial court did not err by refusing to admit medical records of non-testifying physicians who had treated plaintiff because defendant failed to lay a proper foundation. *Hodson v. Mawson*, 227 Ga. App. 490, 489 S.E.2d 855 (1997).

Records which contain diagnostic opinions of third parties not before the court are not admissible under the business records exception to the hearsay rule. *Baker v. State*, 251 Ga. 464, 306 S.E.2d 917 (1983).

Testimonials from customers. — In a suit between a manufacturer and a purchaser, the testimony of one of the purchaser's customers was properly excluded as hearsay because the testimony did not contain the type of routine facts whose accuracy was not affected by bias, judgment, and memory, as contemplated for the admission of business records under O.C.G.A. § 24-3-14(b). *Pendley Quality Trailer Supply, Inc. v. B&F Plastics, Inc.*, 260 Ga. App. 125, 578 S.E.2d 915 (2003).

Medical records. — Medical records regarding plaintiff's injuries and treatment were not admissible in the absence of testimony satisfying foundational requirements. *Buford v. Benton*, 232 Ga. App. 102, 501 S.E.2d 272 (1998).

Blood-alcohol test as hospital business record. — When the doctor who treated plaintiff-driver in the hospital emergency room following the accident detected what the doctor thought was the odor of alcohol about the plaintiff-driver and, without a request or direction by the officer, ordered a blood-alcohol test to be performed upon the plaintiff-driver in order to determine the

type of anesthesia to use on plaintiff-driver, the blood-alcohol test results were admissible under O.C.G.A. § 24-3-14 as part of a hospital record made in the regular course of hospital business, and thus, compliance with O.C.G.A. § 40-6-392(a)(2) and (3) was not a prerequisite to the admission of the blood test results. *Bynum v. Standard (Chevron) Oil Co.*, 157 Ga. App. 819, 278 S.E.2d 669, cert. denied, 248 Ga. 254, 285 S.E.2d 186 (1981).

Trial court properly admitted, at defendant's trial for vehicular homicide, the results of a blood test performed by a hospital, since the test was administered for the purpose of assisting in defendant's medical treatment, was requested by the treating physician and not by a law enforcement officer, and was not obtained for the purpose of showing that defendant was in violation of the driving-under-the-influence statute. *Jackson v. State*, 196 Ga. App. 724, 397 S.E.2d 13 (1990).

Blood alcohol test performed by officer. — There was adequate foundation to admit printouts of test results of defendant's breath test as business records under subsection (b) of O.C.G.A. § 24-3-14, in that it was in the regular course of the trooper's business to perform such a test, and these printouts were the result of one of those tests conducted in the regular course of the trooper's duties; consequently, there was no violation of defendant's right of confrontation. *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998).

Blood test results. — Hospital record showing blood test results was properly admitted as a business records exception to the hearsay rule. *Dixon v. State*, 227 Ga. App. 533, 489 S.E.2d 532 (1997).

Videotape of surgical procedure. — Videotape of arthroscopic surgical procedure performed on plaintiff's shoulder was admissible as a business record since the doctor was available for cross-examination. *Freeland v. Baker*, 205 Ga. App. 470, 422 S.E.2d 315 (1992).

Summary prepared in support of demand for payment not "business record". — When a witness's testimony concerning the amount of alleged indebtedness under a lease is derived not from an examination of any books of account or other records prepared in the ordinary course of business, but

rather from a summary prepared in support of a demand for payment, this summary is not a "business record" within the meaning of O.C.G.A. § 24-3-14. *Gateway Leasing Corp. v. Heath*, 168 Ga. App. 858, 310 S.E.2d 549 (1983).

Tax assessments did not fall under the business record exception to hearsay. *Sheppard v. Sheppard*, 229 Ga. App. 494, 494 S.E.2d 240 (1997).

List of promissory notes, not made according to regular business procedure, which was offered in evidence to support the witness's contention that such notes existed and to alert the jury of the amount of the notes, was improperly admitted under the business records exception. *Growth Properties of Fla., Ltd. v. Wallace*, 168 Ga. App. 893, 310 S.E.2d 715 (1983).

Bulldozer operator's worksheets prepared in anticipation of litigation were not admissible as evidence since the operator had not kept a contemporaneous record of the operator's hours or expenses. *Goss v. Mathis*, 188 Ga. App. 702, 373 S.E.2d 807, cert. denied, 188 Ga. App. 911, 373 S.E.2d 807 (1988).

Automobile repair estimates were not admissible in a personal injury action arising out of an automobile collision. *Moore v. Graham*, 221 Ga. App. 616, 472 S.E.2d 152 (1996).

Billing statements. — Proof of attorney fees did not require the testimony of the attorneys or paralegals who performed the work; sufficient evidence was presented by a witness who introduced billing statements that were admissible as business records. *Santora v. American Combustion, Inc.*, 225 Ga. App. 771, 485 S.E.2d 34 (1997).

Minutes from meeting of church members. — Minutes of a meeting of church members were not admissible as business records in the absence of a statement that it was the regular course of business to create the minutes. *White Missionary Baptist Church v. Trustees of First Baptist Church*, 268 Ga. 668, 492 S.E.2d 661 (1997).

Fiber counts. — There was no evidence that skill of observation or judgment was a significant factor affecting the reliability of fiber counts performed for the former employer by an independent laboratory, or that the accuracy of the counts was affected by bias, so the trial court did not err by admitting the fiber counts under the business

Applications and Illustrations (Cont'd)
1. Foundation for Admission (Cont'd)

records exception to the hearsay rule. *Stewart v. CSX Transp., Inc.*, 268 Ga. App. 434, 602 S.E.2d 665 (2004).

Affidavit by creditor's "recovery specialist." — An affidavit supported by a creditor in support of the creditor's motion for summary judgment satisfied the business records exception when the affiant, a "recovery specialist," stated that the affiant was familiar with the creditor's books and records, that the books and records were kept in the ordinary course of business, that it was the ordinary course of business to keep such books and records, that the entries on the books and records concerning the debtor were posted at or about the time of the transaction, and that the documents named in the affidavit and identifiable in the record showed the terms of the contract between the parties and provided the financial history of the debtor's personal credit line account. *Gerben v. Beneficial Ga., Inc.*, 283 Ga. App. 740, 642 S.E.2d 405 (2007).

Preprinted form documents admissible. — As preprinted form documents contained very specific information concerning goods purchased, and bore signatures on behalf of the buyer and the seller, the trial court was authorized to find sufficient circumstantial

evidence of authentication to admit the documents as business records. *Nyankojo v. North Star Capital Acquisition*, 298 Ga. App. 6, 679 S.E.2d 57 (2009).

Sales acknowledgment. — In a suit against a carrier by a shipper's insurer under 49 U.S.C. § 14706 of the Interstate Commerce Act, the shipper's "sales acknowledgment" business records were admissible to show the sale of the goods to a third party, but were not sufficient to establish the necessary element of proof that the goods were delivered to the carrier in good condition. *Transp. Solutions, Inc. v. St. Paul Mercury Ins. Co.*, 297 Ga. App. 757, 678 S.E.2d 201 (2009).

Evidence was properly admitted under O.C.G.A. § 24-3-14 in the following cases. — See *Haygood v. Smith*, 80 Ga. App. 461, 56 S.E.2d 310 (1949); *Guthrie v. Berrien Prods. Co.*, 91 Ga. App. 45, 84 S.E.2d 596 (1954); *Crooke v. Elliott*, 96 Ga. App. 314, 99 S.E.2d 842 (1957); *Home Fin Co. v. Smith*, 116 Ga. App. 76, 156 S.E.2d 522 (1967); *Calhoun v. Chappell*, 117 Ga. App. 865, 162 S.E.2d 300 (1968); *Huff v. State*, 141 Ga. App. 66, 232 S.E.2d 403 (1977); *Tucker v. Whitehead*, 155 Ga. App. 104, 270 S.E.2d 317 (1980); *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980); *Anderson v. Chatham*, 190 Ga. App. 559, 379 S.E.2d 793 (1989); *Johnson v. State*, 266 Ga. 775, 470 S.E.2d 637 (1996); *Tolver v. State*, 269 Ga. 530, 500 S.E.2d 563 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Computer printout sheets. — Although computer printout sheets are generally classified as hearsay, and to be admissible into evidence the sheets must fall within an exception to the well-known hearsay rule, subject to the discretion of the court, computer

printout sheets or records stored in an electronic computer may be admissible into evidence when such are permanent records made in the regular course of business. 1973 Op. Att'y Gen. No. 73-91.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Admissibility of Computerized Business Records, 14 POF2d 173.

Foundation for Offering Business Records in Evidence, 34 POF2d 509.

Routine Business Practice, 35 POF2d 589.

Recovery and Reconstruction of Electronic Mail as Evidence, 41 POF3d 1.

Establishing A Foundation to Admit

Computer-Generated Evidence as Demonstrative or Substantive Evidence, 57 POF3d 455.

C.J.S. — 32 C.J.S., Evidence, §§ 916 et seq., 924, 939 et seq., 967, 971 et seq. 32A C.J.S., Evidence, § 1029 et seq.

ALR. — Death of adverse party as affecting evidence with respect to book account, 6 ALR 756.

Character and sufficiency of evidence to show that letter was mailed, 25 ALR 9; 86 ALR 541.

Necessity and manner of authenticating paper purporting to be act of private corporation, 65 ALR 329.

Validity, construction, and effect of statutory provision to effect that corporate stock book shall be evidence, 65 ALR 758.

Admissibility of loose-leaf systems of accounts, 83 ALR 806.

Admissibility of memoranda made by one since deceased regarding matters in respect of which he acted for one of the parties to the present litigation, 103 ALR 1501.

Privilege against self-incrimination as justification for refusal to comply with order or subpoena requiring production of books or documents of private corporation, 120 ALR 1102.

Admissibility of books of account as affected by mutilation, erasures, or alterations, 142 ALR 1406.

Statute providing for admissibility as evidence of records or entries in the regular course of business (Model Act) as applicable to reports of accidents, 144 ALR 727; 10 ALR Fed 858.

Financial statement or report to stockholders as admissible in evidence on issue between seller and purchaser as to value of stock sold, 147 ALR 1150.

Admissibility of corporate books and records against officers or stockholders in criminal prosecutions against them, 154 ALR 279.

What constitutes books of original entry within rule as to admissibility of books of account, 17 ALR2d 235.

Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts," 21 ALR2d 773.

Carrier's issuance of bill of lading or shipping receipt, without notation thereon of visible damage or defects in shipment, as creating presumption or prima facie case of good condition when received, 33 ALR2d 867.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 ALR2d 752.

Admissibility of hospital record relating to

cause or circumstances of accident or incident in which patient sustained injury, 44 ALR2d 553.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536.

Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 ALR2d 619; 98 ALR Fed. 20.

Admissibility in evidence of receipt of third person, 80 ALR2d 915.

Admissibility of party's book accounts to prove loans or payments by person by or for whom they are kept, 13 ALR3d 284.

Necessity of expert evidence to support action against hospital for injury to or death of patient, 40 ALR3d 515.

Letters to or from customers or suppliers as business records under statutes authorizing reception of business records in evidence, 68 ALR3d 1069.

Admissibility under business entry statutes of hospital records in criminal case, 69 ALR3d 22.

Admissibility under Uniform Business Records as Evidence Act or similar statute of medical report made by consulting physician to treating physician, 69 ALR3d 104.

Admissibility in state court proceedings of police report as business records, 77 ALR3d 115.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 ALR3d 456.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 ALR3d 944.

Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 ALR3d 1012.

Evidence: admissibility of memorandum of telephone conversation, 94 ALR3d 975.

Business records: authentication and verification of bills and invoices under Rule 803(6) of the uniform rules of evidence, 1 ALR4th 316.

Admissibility of computerized private business records, 7 ALR4th 8.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule, 31 ALR4th 913.

Admissibility of school records under hearsay exceptions, 57 ALR4th 1111.

Admissibility of government factfinding in products liability actions, 29 ALR5th 534.

Admissibility and weight of fingerprint evidence obtained or visualized by chemical, laser, and digitally enhanced imaging processes, 110 ALR5th 213.

Admissibility in state court proceedings of

police reports as business records, 111 ALR5th 1.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule, 112 ALR5th 621.

Admissibility of summaries or charts of writings, recordings, or photographs under Rule 1006 of Federal Rules of Evidence, 198 ALR Fed. 427.

24-3-15. Admissions and confessions distinguished.

The term “admissions” usually refers to civil cases. The term “confessions” usually refers to criminal cases. (Orig. Code 1863, § 3706; Code 1868, § 3730; Code 1873, § 3783; Code 1882, § 3783; Civil Code 1895, § 5187; Penal Code 1895, § 1002; Civil Code 1910, § 5774; Penal Code 1910, § 1028; Code 1933, § 38-401.)

Law reviews. — For article discussing exceptions to the hearsay rule and advocating

elimination of the *res gestae* exception, see 5 Mercer L. Rev. 257 (1954).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ADMISSIONS

CONFESSIONS

GUILTY PLEAS

INSTRUCTIONS

General Consideration

No clear dividing line. — Admissions may be of such character as to render it difficult to say whether the admissions amount to confessions or to mere incriminating statements. The dividing line is not always clear, though the legal distinction is apparent. *Covington v. State*, 79 Ga. 687, 7 S.E. 153 (1887); *Weaver v. State*, 135 Ga. 317, 69 S.E. 488 (1910).

Terms “admissions” and “confessions” are interchangeable and the probative value of a declaration that the defendant did the main fact charged is the same whether called a confession or an admission. *Lumpkin v. American Sur. Co.*, 69 Ga. App. 887, 27 S.E.2d 412 (1943).

Inference of guilt. — A confession is direct evidence of guilt, while an admission is circumstantial evidence from which guilt can be inferred. *Riley v. State*, 1 Ga. App. 651, 57 S.E. 1031 (1907); *Thomas v. State*, 18 Ga.

App. 101, 88 S.E. 917 (1916); *Kinard v. State*, 19 Ga. App. 624, 91 S.E. 941 (1917); *Stephens v. State*, 127 Ga. App. 416, 193 S.E.2d 870 (1972).

When a person only admits certain facts from which the jury may or may not infer guilt, there is no confession. *Chappell v. State*, 71 Ga. App. 147, 30 S.E.2d 289 (1944); *Braswell v. State*, 87 Ga. App. 430, 74 S.E.2d 106 (1953).

Effect of admission of main fact. — An admission of the main fact, from which the essential elements of the criminal act may be inferred, amounts to an admission of the crime itself. *Powers v. State*, 172 Ga. 1, 157 S.E. 195 (1931); *Secrist v. State*, 145 Ga. App. 391, 243 S.E.2d 599, cert. dismissed, 242 Ga. 69, 248 S.E.2d 157 (1978).

Cited in *Millen v. State*, 175 Ga. 283, 165 S.E. 226 (1932); *Wilson v. State*, 74 Ga. App. 42, 38 S.E.2d 750 (1946); *Moore v. State*, 230 Ga. 839, 199 S.E.2d 243 (1973); *Jones v.*

State, 137 Ga. App. 612, 224 S.E.2d 473 (1976); Woolums v. State, 247 Ga. App. 306, 540 S.E.2d 655 (2000).

Admissions

An admission in the law of evidence is a statement by a party of the existence of a fact which is relevant to the cause of the party's adversary. *Brooks v. Sessoms*, 47 Ga. App. 554, 171 S.E. 222 (1933).

An admission, as applied to a criminal case, is the statement by the defendant of a fact or facts pertinent to the issues, and tending, in connection with proof of other facts or circumstances, to prove the guilt of the accused, but which is of itself insufficient to authorize conviction. *Ranson v. State*, 2 Ga. App. 826, 59 S.E. 101 (1907); *Easterling v. State*, 24 Ga. App. 424, 100 S.E. 727 (1919); *Morris v. State*, 176 Ga. 243, 167 S.E. 509 (1933); *Teague v. State*, 48 Ga. App. 225, 172 S.E. 571 (1934); *Roberts v. State*, 59 Ga. App. 192, 200 S.E. 233 (1938); *Timbs v. State*, 71 Ga. App. 141, 30 S.E.2d 290 (1944); *Braswell v. State*, 87 Ga. App. 430, 74 S.E.2d 106 (1953); *Stephens v. State*, 127 Ga. App. 416, 193 S.E.2d 870 (1972); *Pendergrass v. State*, 245 Ga. 626, 266 S.E.2d 225 (1980).

An admission is to be scanned with care, but it is evidence which, with other evidence, may and often does justify a conviction. *Stephens v. State*, 127 Ga. App. 416, 193 S.E.2d 870 (1972).

An admission of a fact not in itself involving criminal intent is not a confession. *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954).

Confessions

Confession defined. — A confession is a voluntary statement made by a person charged with the commission of a crime, wherein the person acknowledges personally to be guilty of the offense charged. *Owens v. State*, 120 Ga. 296, 48 S.E. 21 (1904); *Ranson v. State*, 2 Ga. App. 826, 59 S.E. 101 (1907); *Reed v. State*, 15 Ga. App. 435, 83 S.E. 674 (1914); *Easterling v. State*, 24 Ga. App. 424, 100 S.E. 727 (1919); *Teague v. State*, 48 Ga. App. 225, 172 S.E. 571 (1934); *Grubbs v. State*, 53 Ga. App. 377, 186 S.E. 140 (1936); *Braswell v. State*, 87 Ga. App. 430, 74 S.E.2d 106 (1953); *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954); *Reece v. State*, 212 Ga.

609, 94 S.E.2d 723 (1956); *Stephens v. State*, 127 Ga. App. 416, 193 S.E.2d 870 (1972).

A confession is rather a fact to be proved by evidence, than evidence to prove a fact. *Powers v. State*, 172 Ga. 1, 157 S.E. 195 (1931).

Waiver of technical proof. — A confession is not so much proof that a particular thing took place as it is a waiver by the party charged of the party's right to have certain facts alleged against that party technically proven. *Powers v. State*, 172 Ga. 1, 157 S.E. 195 (1931).

Entire criminal act must be confessed to find a confession. *Owens v. State*, 120 Ga. 296, 48 S.E. 21 (1904); *Goolsby v. State*, 133 Ga. 427, 66 S.E. 159 (1909); *Hart v. State*, 14 Ga. App. 714, 82 S.E. 164 (1914); *Neal v. State*, 24 Ga. App. 148, 100 S.E. 12 (1919), cert. denied, 24 Ga. App. 817 (1920); *Powers v. State*, 172 Ga. 1, 157 S.E. 195 (1931); *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954).

True determinant of whether the defendant has made a confession or merely has given a statement is whether the statement is offered by the accused as exculpatory or inculpatory. *Kennedy v. State*, 156 Ga. App. 792, 275 S.E.2d 339 (1980); *Wells v. State*, 247 Ga. 792, 279 S.E.2d 213 (1981).

Justification not confession. — Statement which admits the commission of an act, but which also gives legal excuse or justification, is not a confession. *Owens v. State*, 120 Ga. 296, 48 S.E. 21 (1904); *Reed v. State*, 15 Ga. App. 435, 83 S.E. 674 (1914); *Powers v. State*, 172 Ga. 1, 157 S.E. 195 (1931); *Logue v. State*, 149 Ga. App. 797, 256 S.E.2d 31 (1979); *Kennedy v. State*, 156 Ga. App. 792, 275 S.E.2d 339 (1980); *Wells v. State*, 247 Ga. 792, 279 S.E.2d 213 (1981).

Incriminating statements distinguished. — There is a difference between an incriminating statement and a confession of guilt, since in the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. *Owens v. State*, 120 Ga. 296, 48 S.E. 21 (1904); *Goolsby v. State*, 133 Ga. 427, 66 S.E. 159 (1909); *Powers v. State*, 172 Ga. 1, 157 S.E. 195 (1931); *Cumberlander v. State*, 53 Ga. App. 276, 185 S.E. 379 (1936); *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954); *Logue v. State*, 149 Ga. App. 797, 256 S.E.2d 31 (1979).

Guilty Pleas

Confessions distinguished. — Plea of guilty differs from a full and voluntary confession in that while the latter is merely evidence of guilt, the former is a formal confession before the court on which judgment may be rendered. *Lumpkin v. American Sur. Co.*, 69 Ga. App. 887, 27 S.E.2d 412 (1943).

Use in civil actions. — Plea of guilty in a federal court is competent as an admission in a civil action in a state court. *Lumpkin v. American Sur. Co.*, 69 Ga. App. 887, 27 S.E.2d 412 (1943).

When a civil action is instituted for damages on the grounds of negligence for the violation of penal ordinances or statutes, and the defendant has previously confessed or pleaded guilty to the violation of such penal statutes whether it be in or out of court, these confessions are competent evidence as admissions against the defendant in the civil action with reference to the same transaction; and on cross-examination it is competent for the opposite party to inquire of the defendant if the defendant made such confessions. If the defendant admits in the civil action having made such confessions, it is unnecessary to produce an authenticated copy of the proceedings in the criminal case and such admissions may be considered in determining the civil action. *Roper v. Scott*, 77 Ga. App. 120, 48 S.E.2d 118 (1948).

Instructions

Failure to charge on a confession, in the absence of a request, is no cause for a new

trial. *Wilson v. State*, 74 Ga. App. 42, 38 S.E.2d 750 (1946).

Reversible error. — If a defendant has made only incriminating statements and not a confession, it is reversible error to charge the law of confession. *Logue v. State*, 149 Ga. App. 797, 256 S.E.2d 31 (1979).

Proper instruction. — Charge that “admissions usually refer to civil cases and confessions to criminal cases, all admissions should be scanned with care, and confessions of guilt received with great caution,” was not confusing and misleading to the jury and unsound as an abstract principle of law. *Reece v. State*, 212 Ga. 609, 94 S.E.2d 723 (1956).

Evidence sufficient to authorize instructions on law of confessions in the following cases. — See *Harris v. State*, 207 Ga. 287, 61 S.E.2d 135 (1950); *Patrick v. State*, 209 Ga. 645, 74 S.E.2d 848 (1953); *Reece v. State*, 212 Ga. 609, 94 S.E.2d 723 (1956); *Kennedy v. State*, 156 Ga. App. 792, 275 S.E.2d 339 (1980).

Evidence sufficient to authorize instructions on law of admissions in the following case. — See *Morris v. State*, 176 Ga. 243, 167 S.E. 509 (1933).

Evidence insufficient to authorize instructions in the following cases. — See *Reed v. State*, 15 Ga. App. 435, 83 S.E. 674 (1914); *Chappell v. State*, 71 Ga. App. 147, 30 S.E.2d 289 (1944); *Braswell v. State*, 87 Ga. App. 430, 74 S.E.2d 106 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 715 et seq., 767.

C.J.S. — 31A C.J.S., Evidence, §§ 376, 377.

ALR. — Confession by one who has been subjected to or threatened with physical suffering, 24 ALR 703.

24-3-16. Testimony as to child's description of sexual contact or physical abuse.

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another or performed with or on another in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds

that the circumstances of the statement provide sufficient indicia of reliability. (Code 1981, § 24-3-16, enacted by Ga. L. 1986, p. 668, § 1; Ga. L. 1995, p. 937, § 1.)

Cross references. — Competency of children generally, § 24-9-5.

Editor's notes. — Ga. L. 1995, p. 937, § 3, not codified by the General Assembly, provides that § 1 of the Act shall be applicable in all tribunals and trials initiated prior to, on, or subsequent to April 19, 1995.

Law reviews. — For annual survey on law of evidence, see 42 Mercer L. Rev. 223 (1990). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For annual survey on criminal law and procedure, see 44 Mercer L. Rev. 165 (1992). For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998). For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001). For article, "Evidence," see 53 Mercer L. Rev. 281 (2001). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For annual survey of evidence law, see 57 Mercer L. Rev.

187 (2005). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007).

For note, "Admissibility of Video-taped Testimony: What is the Standard After *Maryland v. Craig* and How Will the Practicing Defense Attorney be Affected?," see 42 Mercer L. Rev. 883 (1991). For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U. L. Rev. 367 (1994). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 197 (1995).

For comment, "Maryland v. Craig: The Constitutionality of Closed Circuit Testimony in Child Sexual Abuse Cases," see 25 Ga. L. Rev. 167 (1990).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 24-3-16 is not constitutionally deficient. *Rayburn v. State*, 194 Ga. App. 676, 391 S.E.2d 780 (1990), cert. denied, 498 U.S. 969, 111 S. Ct. 434, 112 L. Ed. 2d 417 (1990); *Toledo v. State*, 216 Ga. App. 480, 455 S.E.2d 595 (1995).

O.C.G.A. § 24-3-16 is not unconstitutional by allowing the state to bolster the testimony of the victim while denying the same opportunity to the defendant. *Weathersby v. State*, 262 Ga. 126, 414 S.E.2d 200 (1992).

O.C.G.A. § 24-3-16 does not violate the due process clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. I, on its face and is not void for vagueness and uncertainty. *Weathersby v. State*, 262 Ga. 126, 414 S.E.2d 200 (1992).

O.C.G.A. § 24-3-16 is not violative of the federal sixth amendment. *McLelland v. State*, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992); *Fuller v. State*, 211 Ga. App. 104, 438 S.E.2d 183 (1993).

Retroactivity. — O.C.G.A. § 24-3-16 became effective on July 1, 1986. When trial was held on April 1, 1986, the section was

inapposite. *Lynn v. State*, 181 Ga. App. 461, 352 S.E.2d 602 (1986).

Applicability at date of trial. — Testimony concerning an outcry made by the victim some four months after the last incident of child molestation was properly admitted under O.C.G.A. § 24-3-16. While the outcry occurred prior to the effective date of § 24-3-16, the determinative date as to the applicability of § 24-3-16 was the date of trial. *Vargas v. State*, 184 Ga. App. 650, 362 S.E.2d 461 (1987).

O.C.G.A. § 24-3-16 is unconstitutional with regard to child witness, as opposed to child victim. — The 1995 amendment of O.C.G.A. § 24-3-16, allowing the admission into evidence of hearsay statements made by a child under the age of 14 years who witnessed an act of physical or sexual abuse inflicted upon another, violates constitutional principles of equal protection. *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998).

Defendant's constitutional rights not violated. — Admission of videotapes in child molestation cases does not infringe upon a defendant's sixth amendment right to con-

front witnesses if the child victim testified. *Frazier v. State*, 195 Ga. App. 109, 393 S.E.2d 262 (1990); *Toledo v. State*, 216 Ga. App. 480, 455 S.E.2d 595 (1995).

Admission of a child molestation victim's out-of-court statements did not violate the defendant's sixth amendment right to confrontation since the statements bore sufficient "indicia of reliability." *Smith v. State*, 199 Ga. App. 378, 405 S.E.2d 78, cert. denied, 199 Ga. App. 907, 405 S.E.2d 78 (1991).

Constitutional right of confrontation. — O.C.G.A. § 24-3-16 is not constitutionally deficient. The defendant need not be placed in the position of calling the alleged victim to the stand in order to exercise the defendant's rights under the sixth amendment. Rather, the court will call the alleged victim at the request of either party, informing the jury that it is the court which has called the child and that both parties will have an opportunity to examine the child. *Eberhardt v. State*, 257 Ga. 420, 359 S.E.2d 908 (1987), cert. denied, 484 U.S. 1069, 108 S. Ct. 1036, 98 L. Ed. 2d 999 (1988).

O.C.G.A. § 24-3-16 contemplates testimony about what a child victim said and did relevant to the alleged sexual contact from both the child and those witnessing the child's later reaction. The purpose of this procedure is to allow a defendant to exercise the defendant's right to confrontation without requiring the defendant to be cast unfavorably before the jury for forcing the child to testify; any "bolstering" by other witnesses can be explored by the defendant on cross-examination. *Rayburn v. State*, 194 Ga. App. 676, 391 S.E.2d 780 (1990), cert. denied, 498 U.S. 969, 111 S. Ct. 434, 112 L. Ed. 2d 417 (1990).

Statute valid despite equal protection challenge. — Defendant asserted that defendant was similarly situated to all other criminal and civil litigants and that O.C.G.A. § 24-3-16 created an irrational and arbitrary class of litigants because only persons charged with physical and/or sexual abuse of a child under the age of 14 were subject to the exception contained therein. These assertions were not enough to overcome the presumptive validity of § 24-3-16. *Dobbins v. State*, 262 Ga. 161, 415 S.E.2d 168 (1992).

O.C.G.A. §§ 24-3-16 and 24-9-5 must be construed together. *Bright v. State*, 197 Ga.

App. 784, 400 S.E.2d 18 (1990); *McGarity v. State*, 212 Ga. App. 17, 440 S.E.2d 695 (1994).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath, as required by O.C.G.A. § 24-9-5(a). *Woodruff v. Woodruff*, 272 Ga. 485, 531 S.E.2d 714 (2000).

Procedure upon invocation of O.C.G.A. § 24-3-16. — If the prosecution invokes O.C.G.A. § 24-3-16 to introduce out-of-court declarations by the alleged victim, the court shall do as follows: before the state rests, the court shall, at the request of either party, cause the alleged victim to take the stand. The court shall then inform the jury that it is the court who has called the child as a witness, and that both parties have the opportunity to examine the child. The court shall then allow both parties to examine and cross-examine the child as though § 24-3-16 has not been invoked. *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562 (1987).

O.C.G.A. § 24-3-16 does not require the court to make a finding of necessity before admitting into evidence the statement of a child under the age of 14 describing sexual contact. *Newberry v. State*, 184 Ga. App. 356, 361 S.E.2d 499 (1987).

O.C.G.A. § 24-3-16 does not require that a hearing to determine indicia of reliability be held prior to receiving the testimony. Moreover, there is no requirement that the trial court make a specific finding of sufficient indicia of reliability in order for the out-of-court statements of child victims to be admissible. *Xulu v. State*, 256 Ga. App. 272, 568 S.E.2d 74 (2002).

Admission of videotape. — In a child molestation case, defendant knew that the videotaped interview of one of the children was to be played for the jury, that the child would not be testifying for the state, and that defendant had the opportunity to call the child, but defendant did not inquire about the child's availability to testify at trial, nor did defendant request that the child be produced to testify; thus, the failure of the child to testify at trial did not make the videotaped statements inadmissible at trial. *Baker v. State*, 252 Ga. App. 238, 555 S.E.2d 899 (2001).

State proffered substantial evidence to establish the reliability of children's video-

taped statements accusing defendant of molestation, and the proffer was then supported by evidence presented at trial; thus, the state fulfilled its burden in demonstrating that the children's statements had the "requisite degree of trustworthiness" to be admitted at trial and the trial court did not abuse the court's discretion in admitting the videotapes. *Baker v. State*, 252 Ga. App. 238, 555 S.E.2d 899 (2001).

Reliability of a child's videotaped statement was established since the child was not subjected to repeated questioning by different people, nor was evidence presented that the child was coached, the child's mother called the police almost immediately after discovering the molestation, and the fact that an interview took place some time after the incident, did not, without more, make the statement unreliable; the juvenile had ample opportunity to cross-examine the victim and question the child about the child's memory of and the circumstances surrounding the child's statement. In the Interest of A.H., 259 Ga. App. 608, 578 S.E.2d 247 (2003).

Trial court did not abuse the court's discretion when the court allowed the state to show the jury videotapes of interviews police made with children who accused defendant of touching their genitals, or when the court allowed the children's parents to testify about statements their children made to them, and the appellate court held that evidence which showed that defendant touched the genitals of several children who were enrolled in tae kwon do classes defendant taught and sodomized three children was sufficient to sustain defendant's convictions on 18 counts of child molestation and three counts of aggravated child molestation. *Fiek v. State*, 266 Ga. App. 523, 597 S.E.2d 585 (2004).

Trial court did not err in admitting the videotaped statement of the child victim in the defendant's trial for child molestation since the child was 11 years old when the statement was made, the clinical psychologist who conducted the interview assessed and commented on the child's demeanor and emotional state, and testified that the child's language and vocabulary were generally within normal range, that the child gave sensory and contextual details about the incidents, that the child did not appear to

have been coached, and that it was unnecessary to ask the child leading questions because the child provided sufficient details on the child's own; moreover, the child's out-of-court statements were detailed and consistent, the defendant had the opportunity to cross-examine the child in the presence of the jury, and had the opportunity to allow the jury to judge the child's demeanor, and the defendant also cross-examined the psychologist extensively regarding the statement. *Harris v. State*, 279 Ga. App. 241, 630 S.E.2d 853 (2006).

In a child molestation case involving defendant's 13-year-old child, defense counsel was not ineffective for not requesting that the trial court determine the reliability of the victim's videotaped statement under O.C.G.A. § 24-3-16 or for not objecting to the statement's admission; the victim spontaneously told the victim's foster mother about the incidents when the victim was upset, and the victim repeatedly expressed love for the defendant and a desire not to get the defendant into trouble. *Foster v. State*, 286 Ga. App. 250, 649 S.E.2d 322 (2007), cert. dismissed, 2007 Ga. LEXIS 875 (Ga. 2007).

In admitting the videotaped interview under O.C.G.A. § 24-3-16, and allowing the defendant to cross-examine the victim at trial, the trial court determined that there were sufficient indicia of reliability surrounding the victim's out-of-court statements to justify the statement's admission. *Phillips v. State*, 284 Ga. App. 224, 644 S.E.2d 153 (2007).

In a child molestation prosecution, videotaped interviews by the police with a defendant's victim had sufficient indicia of reliability to be admissible under O.C.G.A. § 24-3-16 because the victim was interviewed outside the presence of the victim's parent and the victim's recounting of the events remained consistent; an additional safeguard was provided by the fact that the victim testified at the defendant's trial and, thus, was subject to cross-examination. *Hughes v. State*, 297 Ga. App. 581, 677 S.E.2d 674 (2009).

In a conviction of aggravated child molestation and aggravated sodomy involving a four-year-old child, there was sufficient indicia of reliability to admit a videotape of a forensic interview of the child because the

interviewer developed a rapport with the child, and there were no threats or promises for the child's answers. *Brown v. State*, 300 Ga. App. 359, 685 S.E.2d 377 (2009).

Dual burden in determining reliability. — O.C.G.A. § 24-3-16 imposes a dual burden on the trial court and the proponent of child hearsay testimony. The state must present evidence proving the child's reliability, and the court must assess that evidence. But § 24-3-16 does not authorize the state to eviscerate the rule against improper bolstering. *Roberson v. State*, 241 Ga. App. 226, 526 S.E.2d 428 (1999).

Burden is on the state to show that the state's evidence falls within the hearsay exception created by O.C.G.A. § 24-3-16 for the admission of out-of-court hearsay statements of a child victim of sexual abuse; O.C.G.A. § 24-3-16 imposes a dual burden on the trial court and the proponent of child hearsay testimony, as the state must present evidence proving the child's reliability, and the trial court must assess that evidence. *Ferreri v. State*, 267 Ga. App. 811, 600 S.E.2d 793 (2004).

Court could consider factors in determining reliability. — Trial court could consider certain factors when deciding if a child's statement's provided sufficient indicia of reliability pursuant to the statute; any bolstering could be explored by a defendant in cross examination. *Howard v. State*, 252 Ga. App. 465, 556 S.E.2d 536 (2001).

Factors considered in determining reliability. — Indicia of reliability must spring from the circumstances of the statement. The factors which the court may consider, when applicable, include but are not limited to the following: (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present); (2) the spontaneity of the child's statement to the people present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the statement and, the nature of

the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child. *Gregg v. State*, 201 Ga. App. 238, 411 S.E.2d 65, cert. denied, 201 Ga. App. 903, 411 S.E.2d 65 (1991); *Williams v. State*, 204 Ga. App. 878, 420 S.E.2d 781 (1992); *Gentry v. State*, 213 Ga. App. 24, 443 S.E.2d 667 (1994); *Heard v. State*, 221 Ga. App. 166, 471 S.E.2d 22 (1996).

Statement about contact with other child inadmissible. — Statements made by the victim to a witness about sexual contact between the defendant and another child were not admissible evidence. *Riddle v. State*, 208 Ga. App. 8, 430 S.E.2d 153 (1993).

Age of child at time witness testifies irrelevant. — It is plain from the face of O.C.G.A. § 24-3-16 that the age of the child at the time the witness testifies is irrelevant as long as the child's statement about which the witness testifies was made while the child was under 14 years of age. *Greer v. State*, 201 Ga. App. 775, 412 S.E.2d 843, cert. denied, 201 Ga. App. 903, 412 S.E.2d 843 (1991).

In a child molestation case where similar transaction evidence about alleged sexual abuse of the defendant's child was admitted, testimony of the child's other parent and a videotaped interview with the child were properly admitted under the child hearsay statute because the child was ten when the child made the statements; it was immaterial that the child was 19 at the time of the trial. *Slade v. State*, 287 Ga. App. 34, 651 S.E.2d 352 (2007), cert. denied, 129 S. Ct. 56, 172 L.Ed.2d 24 (2008).

Age of the child at the time the statements were made is determinative of their admissibility under O.C.G.A. § 24-3-16. *Darden v. State*, 206 Ga. App. 400, 425 S.E.2d 409 (1992).

Statements about which the friend testified concerning the molestation of the victim by the victim's stepfather were made when the victim was 13 years old and so were admissible under O.C.G.A. § 24-3-16. *Geiger v. State*, 258 Ga. App. 57, 573 S.E.2d 85 (2002).

Because the child was not under the age of 14 when the child made the alleged hearsay statement at issue, the Child Hearsay Statute, O.C.G.A. § 24-3-16, did not apply; moreover, because the contested witness's testimony was substantially the same as to what the

child victim testified to, the evidence was cumulative and any error in admission was harmless. *Currington v. State*, 270 Ga. App. 381, 606 S.E.2d 619 (2004).

As a child was 15 when the child told an officer that the defendant had molested the child, the officer's testimony about the child's accusation was not admissible under the Georgia Child Hearsay Statute, O.C.G.A. § 24-3-16. *Cash v. State*, 294 Ga. App. 741, 669 S.E.2d 731 (2008).

Trial court did not err in permitting the victim's mother to testify to the victim's prior consistent statements about what happened on the night the defendant had sexual intercourse with the victim over the defendant's bolstering objection because the victim was thirteen years old at the time the victim made the statements, the mother's testimony relating those statements was admissible under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Davis v. State*, No. A10A0868, 2010 Ga. App. LEXIS 403 (Apr. 21, 2010).

Mental ability equivalent to child below 14 years. — Although there was evidence that the 15-year-old victim was mildly mentally handicapped with intellectual abilities and social skills equivalent to an average child below 14 years of age, the trial court improperly ruled that O.C.G.A. § 24-3-16 applied. *Foster v. State*, 216 Ga. App. 26, 453 S.E.2d 482 (1995).

When the state called the child as a witness and the child was fully cross-examined, there was no error. *McLelland v. State*, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992).

O.C.G.A. § 24-3-16 was inapplicable as the child testified at trial and was fully cross-examined by the defendant. *Hayes v. State*, 274 Ga. 875, 560 S.E.2d 656 (2002).

Five-year-old child's out-of-court statements to the child's grandmother and aunt regarding a sexual assault were admissible under O.C.G.A. § 24-3-16 because: (1) the child was upset when making the statement to the aunt; (2) the child was at home when making the statements, and there was no evidence that the child was forced to make the statements or that the child was coached regarding what to say; (3) the child used age-appropriate language; (4) the statements were consistent; and (5) the child testified and defense counsel had the opportunity to cross-examine the child. *Ingram v.*

State, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

Age of witness irrelevant. — Any competent person may present testimony under O.C.G.A. § 24-3-16; thus, a 13-year-old friend properly testified. *Peters v. State*, 206 Ga. App. 143, 424 S.E.2d 372 (1992).

Demeanor is one of the factors used to determine the reliability of a child's statement. *Keller v. State*, 221 Ga. App. 846, 473 S.E.2d 194 (1996).

Finding as to reliability not a condition precedent. — While the court must find that "the circumstances of the statement provide sufficient indicia of reliability," such finding is not a condition precedent to the admissibility of the statement; rather, the requirement of O.C.G.A. § 24-3-16 is met if after both parties have rested, the record contains evidence which would support such a finding. *Gregg v. State*, 201 Ga. App. 238, 411 S.E.2d 65, cert. denied, 201 Ga. App. 903, 411 S.E.2d 65 (1991); *Tidwell v. State*, 219 Ga. App. 233, 464 S.E.2d 834 (1995).

O.C.G.A. § 24-3-16 does not require a hearing to determine "indicia of reliability" be held prior to receiving the testimony. *Holden v. State*, 202 Ga. App. 558, 414 S.E.2d 910 (1992).

With regard to a defendant's convictions on several counts of child molestation, the trial court properly admitting the tape recorded statement of the child victim under O.C.G.A. § 24-3-16 as by stating that the court found no reason to question the reliability of the child's statement, the trial court, in effect, made the required finding that the tape was reliable. There was no requirement that the trial court make a specific finding of sufficient indicia of reliability for the out-of-court statement of the child victim to be admissible. *Taylor v. State*, 292 Ga. App. 846, 666 S.E.2d 85 (2008), overruled on other grounds, *Adams v. State*, 299 Ga. App. 39, 681 S.E.2d 725 (2009).

Questions regarding victim's credibility not allowed. — Trial court erred in asking the witness, in the presence of the jury, whether the victim had exhibited "a general attitude of credibility" during the interview process. *Buice v. State*, 239 Ga. App. 52, 520 S.E.2d 258 (1999), aff'd, 528 S.E.2d 788 (2000).

Reliability of videotaped statements not established. — Circumstances surrounding

the making of videotaped statements of 4 ½ year old alleged child molestation victim failed to establish the inherent reliability of those statements, even though the victim used terminology which would not be expected of a child the child's age and although the child had no apparent motive to fabricate, the child's statements did not meet the test of "spontaneity and consistent repetition," some of the assertions made by the child during the two videotaped interviews were inconsistent with the known facts, and the interviews were conducted by persons acting in a law enforcement capacity, with the clear intention of gathering evidence for use against the defendant. *Rolader v. State*, 202 Ga. App. 134, 413 S.E.2d 752 (1991), cert. denied, 202 Ga. App. 907, 413 S.E.2d 752 (1992).

Reliability hearing required. — Defendant's child molestation conviction was reversed as given that the child victim was three-years-old, that the victim gave inconsistent statements, that the victim might have been coached by defendant's estranged wife, that law enforcement was involved in the child's interviews, that 75 out-of-court hearsay statements of the child were introduced by the state, and that the child's hearsay statements formed the bulk of the evidence against defendant, a pretrial Gregg hearing on the reliability of the statements was required under O.C.G.A. § 24-3-16. *Ferreri v. State*, 267 Ga. App. 811, 600 S.E.2d 793 (2004).

Corroboration of testimony not required. — O.C.G.A. § 24-3-16 requires only that the child be available to testify; it does not require the child to corroborate the hearsay testimony. *Jones v. State*, 200 Ga. App. 103, 407 S.E.2d 85 (1991); *Braddy v. State*, 205 Ga. App. 424, 422 S.E.2d 260 (1992); *Bookout v. State*, 205 Ga. App. 530, 423 S.E.2d 7, cert. denied, 205 Ga. App. 899, 423 S.E.2d 7 (1992); *Kapua v. State*, 228 Ga. App. 193, 491 S.E.2d 387 (1997).

Child molestation and aggravated child molestation convictions were upheld on appeal as a videotaped statement from the victim of those crimes accusing the defendant of requiring the victim to place the defendant's penis in the victim's mouth was corroborated by another witness; hence, the defendant was not denied due process and the Child Hearsay Statute, O.C.G.A.

§ 24-3-16, did not require corroboration of child hearsay. *Simpson v. State*, 282 Ga. App. 456, 638 S.E.2d 900 (2006).

Spontaneous statement admissible. — Phrase "available to testify" means "competent to testify under O.C.G.A. § 24-9-5." In re K.T.B., 192 Ga. App. 132, 384 S.E.2d 231 (1989); In re K.G.L., 198 Ga. App. 891, 403 S.E.2d 464 (1991).

Hearsay testimony of a social worker was properly admitted under O.C.G.A. § 24-3-16 as a child was with a parent in a comfortable non-threatening environment when the child said, "(The defendant) hurt me. I don't like (the defendant. The defendant's) mean"; the statement was not made in response to any inquiry, but was a spontaneous reaction to something said by the parent. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

Child "available to testify" in § 24-3-16 means one competent to testify under § 24-9-5. For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness is not available to testify and any out-of-court statements are not rendered admissible by O.C.G.A. § 24-3-16. *Hunnicut v. State*, 194 Ga. App. 714, 391 S.E.2d 790 (1990), later appeal, 198 Ga. App. 572, 402 S.E.2d 534 (1991).

Child is considered "available to testify" under O.C.G.A. § 24-3-16 only if the child is "competent" to testify within the meaning of O.C.G.A. § 24-9-5. *Shaver v. State*, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991).

Availability of child for pretrial interview. — When the witness is a child, it is permissible for the legal custodian to decide whether the child will be made available to defense counsel for a pretrial interview. *Kelly v. State*, 197 Ga. App. 811, 399 S.E.2d 568 (1990).

Defendant's right to notice of statements before trial. — There is no requirement in O.C.G.A. § 24-3-16 that the state provide the defense with pretrial notice of the state's intention to introduce child hearsay statements in evidence. *Schwindler v. State*, 254 Ga. App. 579, 563 S.E.2d 154 (2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed. 2d 854 (2003).

Evidence admissible although child available to testify. — In a prosecution for child

molestation, hearsay evidence was admissible under O.C.G.A. § 24-3-16 because the child was clearly available to testify, and the defendant did not challenge the existence of indicia of reliability. *Trew v. State*, 244 Ga. App. 76, 534 S.E.2d 804 (2000).

Child's own statements about molestation were admissible under the child hearsay statute. *Phillips v. State*, 251 Ga. App. 179, 553 S.E.2d 847 (2001).

Tape recorded police interview with an eight year old female victim was properly admissible under O.C.G.A. § 24-3-16 at defendant's trial for child molestation. The child testified at trial and the defendant had the opportunity to cross examine the child regarding the child's memory and the circumstances surrounding the child's out-of-court statements, and the judge and jury had an opportunity to evaluate the child's veracity. The police officer testified about the manner in which the child's mother came to the officer and about the officer's involvement in recording the interview. There was no evidence that the child was forced to make the child's statements or that the child was coached regarding what to say. *Hayes v. State*, 252 Ga. App. 897, 557 S.E.2d 468 (2001).

Although a trial court stated that a child witness would not testify at trial because the child kept crying, because the child was present and available to testify at trial, inadmissibility of the child's hearsay statements was not present under O.C.G.A. § 24-3-16; the judge's comment that the witness would not testify was not an improper comment on the evidence under O.C.G.A. § 17-8-57. *Brock v. State*, 270 Ga. App. 250, 605 S.E.2d 907 (2004).

Trial court did not abuse the court's discretion in denying defendant's motion in limine to exclude statements that the 13-year-old male child molestation victim made to the parents as such statements were admissible under O.C.G.A. § 24-3-16 because sufficient indicia of reliability were established; the victim was present at trial and testified on direct examination as to why the victim initially denied the molestation when the victim was first confronted by the parents, and then why the victim finally admitted the molestation. *Steverson v. State*, 276 Ga. App. 876, 625 S.E.2d 476 (2005).

Evidence presented at trial was sufficient

to establish the reliability of the statement that the child victim made to an aunt, and the trial court did not err in finding that the statement had the requisite degree of trustworthiness to be admitted at trial; moreover, admission of the statement was harmless because all the child victims testified about the incident at trial and the defendant was acquitted of an aggravated child molestation charge. *Nelson v. State*, 279 Ga. App. 859, 632 S.E.2d 749 (2006).

In the sexual molestation case, the trial court did not err in allowing into evidence the out-of-court statements of the six-year-old victim via the parent's hearsay testimony; the statements were admissible under O.C.G.A. § 24-3-16 as the victim's out-of-court statements were made under circumstances that provided sufficient indicia of reliability in that the statements were made immediately after the incident and remained consistent, and the victim testified at trial and was cross-examined. *Mikell v. State*, 281 Ga. App. 739, 637 S.E.2d 142 (2006).

No abuse of discretion resulted from the admission of testimony from the investigating officer, the child victim's mother, and the child victim's sister, about the alleged child molestation committed by the juvenile as: (1) the child was available to testify; (2) cross-examination of the child victim in the judge's chambers was attempted, but proved unsuccessful; and (3) the judge ruled that no further purpose would be served by having the child examined in the open courtroom. In the Interest of S.S., 281 Ga. App. 781, 637 S.E.2d 151 (2006).

Evidence was sufficient for the jury to find a defendant guilty of child molestation beyond a reasonable doubt as it was within the jury's province to reject the defendant's defense denying the crime with regard to the victim as well as with regard to the witnesses who testified as to similar transactions with the defendant. The testimony of the victim was corroborated by an investigator and a forensic interviewer, who testified as to what the victim had told had occurred; the victim's statements were corroborated by the sheriff's investigator; and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Lamb v. State*, 293 Ga. App. 65, 666 S.E.2d 462 (2008).

Recanting of child victim's testimony. O.C.G.A. § 24-3-16 does not require the child to corroborate the hearsay testimony, and conflicts between the videotaped statement and the testimony of the child at trial do not necessarily render the former inadmissible, but rather present a question of credibility of the witness to be resolved by the trier of fact; despite a child victim's apparent recantation of the victim's accusations of molestation at trial, sufficient evidence supported convictions of child molestation and aggravated child molestation after the victim described the molestation in a pre-trial videotaped interview, when an expert witness testified that children may recant testimony with regard to sexual abuse for reasons unrelated to falsity, including embarrassment and fear, and a doctor also testified that the doctor's examination of the victim revealed "unusual" findings that would have caused the doctor to inquire regarding sexual abuse if the findings had appeared on a routine exam. *Amerson v. State*, 268 Ga. App. 855, 602 S.E.2d 857 (2004).

Witnesses testified pursuant to O.C.G.A. § 24-3-16 that the defendant's stepchild, then 12, told the witnesses about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under § 24-3-16, and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molestation. *Harvey v. State*, 295 Ga. App. 458, 671 S.E.2d 924 (2009).

Evidence admissible because victim took stand. — Direct testimony of the victim and out-of-court statements the victim made to others were admissible since the victim took the stand and was examined and cross-examined by both parties. *Fields v. State*, 194 Ga. App. 149, 390 S.E.2d 71 (1990).

Because a child victim testified of defendant's sexual abuse and that defendant showed the victim "pictures or movies where people didn't have any clothes on," the trial court properly admitted the videotapes and determined that a psychotherapist's testimony was admissible under O.C.G.A. § 24-3-16; consequently, defendant failed to

show that trial counsel was ineffective. *Johnson v. State*, 274 Ga. App. 69, 616 S.E.2d 848 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006); overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

In a case where a defendant was convicted of cruelty to children in violation of O.C.G.A. § 16-5-70, the trial court did not err in denying the defendant's motion for a mistrial or in refusing to strike certain testimony because hearsay statements by the defendant's daughter were admissible pursuant to O.C.G.A. § 24-3-16 since the daughter was available to appear at trial and, in fact, took the witness stand. *Stegall v. State*, 297 Ga. App. 425, 677 S.E.2d 441 (2009).

Defendant denied right of confrontation. — Trial court erroneously and over objection allowed the state to ask defendant's daughter, in a prosecution for child molestation and incest, whether she had heard her brothers tell her mother what defendant had done to them, as this evidence was hearsay and double hearsay not falling the exception of O.C.G.A. § 24-3-16 because the brothers were not available to testify. *Cobb v. State*, 209 Ga. App. 708, 434 S.E.2d 513 (1993).

Defendant was not denied the right of confrontation, even though the defendant was unable to confront the victim when the victim's statements were originally made since the victim actually testified at trial and was subject to a thorough cross-examination. *Reynolds v. State*, 257 Ga. 725, 363 S.E.2d 249 (1988); *Sticher v. State*, 209 Ga. App. 423, 433 S.E.2d 660 (1993); *White v. State*, 213 Ga. App. 429, 445 S.E.2d 309 (1994).

When the victim had been called by the state and the defendant had an opportunity to cross-examine without having to call the victim to the stand, the application of O.C.G.A. § 24-3-16 did not violate the defendant's right to due process to confront the witness. *Lawhorn v. State*, 257 Ga. 780, 364 S.E.2d 559 (1988).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable

of answering. *Bright v. State*, 197 Ga. App. 784, 400 S.E.2d 18 (1990).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. *Byrd v. State*, 204 Ga. App. 252, 419 S.E.2d 111 (1992).

Reliability of statement established. — Victim's statement to the victim's friend had a sufficient indicia of reliability to render the statement admissible pursuant to O.C.G.A. § 24-3-16 since both young women were 13 years old, there was no evidence to suggest the victim had a tendency to exaggerate or falsify information, the victim's friend testified that discussing the acts of molestation obviously upset the victim and the victim began to cry, and all of the victim's out-of-court statements and the victim's in-court testimony were consistent. *Peters v. State*, 206 Ga. App. 143, 424 S.E.2d 372 (1992).

Victims' statements made to their mother and social caseworker were sufficiently reliable in light of: (1) their repeated consistency over the course of three separate occasions; (2) the children's apparent uncoached and generally relaxed demeanor; (3) the lack of any promises or threats made to the children; and (4) their full availability to the defendant's cross-examination at trial. *Tucker v. State*, 208 Ga. App. 441, 430 S.E.2d 811 (1993).

There was a sufficient showing of reliability when the victim's statements, introduced through hearsay at trial, were made originally by the victim in a spontaneous manner without apparent coaching and, although there was evidence presented that the victim had originally named other possible perpetrators, the victim's later statements consistently named the defendant. *White v. State*, 211 Ga. App. 694, 440 S.E.2d 68 (1994).

Trial court properly admitted child hearsay testimony after the victim's version of events as recounted to the victim's mother to sheriff's department officials, to Department of Family & Children Services repre-

sentatives, in the victim's grand jury testimony, and in the victim's trial testimony was not shown by defendant to be inconsistent. *Tidwell v. State*, 219 Ga. App. 233, 464 S.E.2d 834 (1995).

Testimony of several witnesses regarding what the 11-year-old victim told the witnesses about an incident soon after the incident happened was admissible and the court was not required to make an explicit finding of sufficient indicia of reliability. *Wells v. State*, 222 Ga. App. 587, 474 S.E.2d 764 (1996).

Considering the child's age; the immediacy and spontaneity of the outcry to the child's mother; the general consistency of the child's statements to numerous adults trained to work with abused children (police, medical personnel, and a DFACS worker); the lack of time between the incident and the outcry, thereby demonstrating the absence of "coaching"; the child's fear of the defendant; and the physical manifestations of possible abuse consistent with the child's statements, the record established a sufficient showing of indicia of reliability within the meaning of O.C.G.A. § 24-3-16 so as to support the admission of the outcry testimony. *Medina v. State*, 234 Ga. App. 13, 505 S.E.2d 558 (1998).

Although the child gave differing accounts as to the number of times the defendant had molested the child, under the totality of the circumstances, the child's out-of-court statements bore sufficient indicia of reliability to authorize the statement's admission in evidence. *Jenkins v. State*, 235 Ga. App. 53, 508 S.E.2d 710 (1998).

Taped statement of the young victim was properly found to be reliable, notwithstanding that the victim was interviewed after the victim's mother was interviewed in the victim's presence, since the interviewing officer testified that the victim was not coached and spoke voluntarily and no evidence was presented showing that the tape was unreliable or inadmissible. *Scroggins v. State*, 237 Ga. App. 122, 514 S.E.2d 252 (1999).

Considering the immediacy and spontaneity of the child's outcry to the father, the child's age, the limited time between the child's return home and the initial outcry, thus demonstrating the absence of coaching, and the general consistency of the child's statements to several adults, sufficient

indicia of reliability was established to support the admission of the challenged statements. *Herrington v. State*, 241 Ga. App. 326, 527 S.E.2d 33 (1999).

Considering the atmosphere and circumstances under which a child made out-of-court statements, the spontaneity of a number of the statements, the absence of any threats, promise of benefits, or coaching, the consistency of the statements with one another, and the child's provision of certain details which could have been found corroborative, the trial court was authorized to find that sufficient indicia of reliability warranted admission of the statements in evidence. *Croy v. State*, 247 Ga. App. 654, 545 S.E.2d 80 (2001).

There was no abuse of discretion in the decision of the court to admit testimony concerning a child's statements about sexual abuse by the child's father where the child's mother's testimony corroborated the statements made by the child to others and the foster mother never suggested to the child that the child's father had abused the child. *In re J.W.*, 249 Ga. App. 849, 549 S.E.2d 802 (2001).

Circumstances surrounding a six-year-old victim's out-of-court statements to the victim's mother and a nurse practitioner regarding being sexually molested contained sufficient indicia of reliability under O.C.G.A. § 24-3-16 to allow the mother and the nurse practitioner to testify about the statements since: (1) there was no evidence that the victim was forced to make the statements or was coached regarding what to say; (2) there was a lack of contact with anyone concerning the incidents until the victim made the initial out-cry to the victim's mother; (3) the language the victim used was appropriate for a six-year-old; (4) the statement to the victim's mother was consistent with the statement that the victim made to the nurse practitioner; (5) the victim's demeanor during both statements showed that the victim was obviously upset by the acts of molestation; and (6) there was no evidence that the victim had been exposed to any sexually explicit material. *In re K.C.*, 258 Ga. App. 363, 574 S.E.2d 413 (2002).

Sufficient indicia of reliability existed for a trial court to have admitted a child victim's out-of-court statements regarding sexual abuse by the victim's father where, *inter alia*,

the victim's description of the incidents were consistent every time the victim gave a statement to an adult prior to trial and the medical evidence corroborated the victim's testimony. *Ivey v. State*, 258 Ga. App. 719, 574 S.E.2d 908 (2002).

Trial court permitted the state to introduce the testimony of the victim under the provisions of the child hearsay statute, O.C.G.A. § 24-3-16, in a trial on a charge of child molesting because the victim was made available for cross-examination, and the trial court took sufficient steps to ensure that the victim's testimony was reliable. *Howell v. State*, 278 Ga. App. 634, 629 S.E.2d 398 (2006).

Trial court did not abuse the court's discretion in concluding that a child's hearsay statements regarding abuse contained sufficient indicia of reliability to support their admission because the victim was nine years old at the time of the alleged incidents, there was no evidence that the child was forced to make the statements or coached regarding what to say, and the statements were made in a therapeutic setting without provocation or intervention from the state; although some of the statements were inconsistent with statements given to others regarding the defendant's participation in the abuse, the statements were also consistent with statements given to others. Finally, the victim was available in court, but defense counsel elected not to call the victim. *Pickle v. State*, 280 Ga. App. 821, 635 S.E.2d 197 (2006), cert. denied, 2007 Ga. LEXIS 110, 111 (Ga. 2007).

In the sexual abuse case, the trial court did not abuse the court's discretion in finding, without a hearing, the child victim's videotape hearsay to be reliable under O.C.G.A. § 24-3-16; the victim, age 12 at the time, did not refuse to speak with the interviewing detective, the victim was not coached, led, pressured, threatened, or induced, and the victim testified at trial and was subject to cross-examination. *Newton v. State*, 281 Ga. App. 549, 636 S.E.2d 728 (2006), overruled on other grounds, *McCart v. State*, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

During a defendant's trial for criminal charges arising out of sexual offenses committed against the defendant's 11-year-old child, the Georgia Child Hearsay Statute,

O.C.G.A. § 24-3-16, permitted the admission of the testimony of a caseworker that a sibling of the child saw the rapist having sex with the child and reported it several times to the defendant and the testimony of a neighbor to whom the victim said that the defendant had not tried to stop the rapist from molesting the victim; no hearing or express judicial findings of reliability were required, the defendant did not object at trial to the admission of the statements, and the defendant failed to explain on appeal how the record lacked evidence of reliability. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

In defendant's trial for child molestation, the trial court did not abuse the court's discretion by admitting the victim's statements made to the victim's mother, brother, a child forensic investigator, and the investigating officer as the statements were spontaneous when made and were remarkably consistent and corroborated at trial by the testimony of the victim's siblings, the victim's videotaped interview, and defendant's confession. *Simmons v. State*, 291 Ga. App. 642, 662 S.E.2d 660 (2008).

With regard to a defendant's convictions for child molestation and related crimes arising from actions the defendant took toward three children and those that the defendant forced the children to engage in amongst each other by gunpoint while the defendant was a babysitter for the children, the trial court did not err by allowing one of the victim's best friend to testify that the victim told the witness that the defendant had a gun and had made the victim do stuff as the testimony was properly admitted under the Child Hearsay Statute, O.C.G.A. § 24-3-16. The victim's disclosure to the friend occurred in the relaxed setting of a private conversation between two friends, there was no evidence of any threats, promise of benefits, coaching, drugs, or alcohol that would have influenced the victim's disclosure, and there was no evidence that the victim had a tendency to exaggerate or falsify information or otherwise lacked general credibility. *Sullivan v. State*, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009).

In a conviction for aggravated child molestation and child molestation for acts committed upon defendant's four-year-old

daughter, the victim's statements had sufficient indicia of reliability because the victim made several spontaneous disclosures regarding the acts committed upon the victim by defendant using age-appropriate language, which did not appear to have been the result of adult coaching, and the videotaped statements were consistent with statements made to the victim's mother and therapist, which were made in a neutral location and without any threats or promises. *Romani v. State*, No. A10A0856, 2010 Ga. App. LEXIS 412 (Apr. 23, 2010).

Testimony of officer admitted. — There was sufficient evidence of reliability of a child's statement to a police officer based on the officer's testimony that the child left the child's residence and reported the molestation immediately after the molestation occurred, that the officer spoke with the child the same evening, that the officer saw no evidence that the child was coached, and the officer did not lead the child in making a statement. *Crider v. State*, 246 Ga. App. 765, 542 S.E.2d 13 (2000).

No error in failing to determine reliability. — Because every event described by the detective and the investigator was confirmed by the victim in much greater detail, there was no error in failing to determine the reliability of the victim's statements. *Nelson v. State*, 255 Ga. App. 315, 565 S.E.2d 551 (2002).

Credibility of witness within jury's purview. — Despite defendant's argument that expert testimony showed it as likely that statements of defendant's grandson to the lead detective regarding defendant's sexual molestation of the grandson were coached, those were deemed admissible pursuant to the Child Hearsay Statute, O.C.G.A. § 24-3-16, in that they were statements by a child available to testify in the proceedings that described abuse of a child under 14 which provided sufficient indicia of reliability; determinations as to the credibility of a witness were a matter solely within the jury's purview and would not be disturbed on appeal. *Wright v. State*, 259 Ga. App. 74, 576 S.E.2d 64 (2003).

Hearsay testimony of an investigator was properly admitted under O.C.G.A. § 24-3-16 as the trial court listened to the audiotape of an interview with a child and concluded there had been no excessive coaching or

planting of information and that there was sufficient indicia of reliability; moreover, the child was available for cross-examination by defense counsel concerning the child's claimed memory lapses and confusion, but counsel chose not to cross-examine the child. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

Procedure employed by court satisfactory. — When the trial court ultimately found a child victim's statements reliable and admitted the statements, and obviously would have done the same following a separate hearing, any conceivable error arising from the procedure employed by the trial court would have been of the defendants' own making since the defendant's persuaded the trial court to review the child's video-recorded statements and assured the court at the time that the procedure was satisfactory. *Newman v. State*, 286 Ga. App. 353, 649 S.E.2d 349 (2007).

Statements of four-year-old properly admitted. — Trial court did not err in exercising the trial court's broad discretion to admit a four-year-old child's out-of-court statements under the child hearsay statute, O.C.G.A. § 24-3-16, with regard to defendant's convictions for aggravated child molestation and two counts of child molestation. Given the totality of the circumstances, the trial court was authorized to find sufficient indicia of reliability to admit the child's hearsay statements based on: (1) the child's tender years; (2) a therapist testifying that there was no indication that the child had been coached; and (3) an interview report that purportedly raised questions about coaching and the reliability of the statements was never introduced into evidence at trial. *Brumbelow v. State*, 289 Ga. App. 520, 657 S.E.2d 603 (2008).

Interval of time between offenses and interview. — Passage of an interval of time between the commission of the offenses and the making of the videotape does not preclude any possibility of spontaneity; the relevance of such chronological intervals must be considered along with other factors, but there is no authority for a bright line rule precluding admission of an interview. *Knight v. State*, 210 Ga. App. 228, 435 S.E.2d 682 (1993).

Statement made days, weeks, or months after incident. — Fact that the statement is

made days, weeks, or even several months after the alleged incident, in and of itself, does not make the statement unreliable. *Gregg v. State*, 201 Ga. App. 238, 411 S.E.2d 65, cert. denied, 201 Ga. App. 903, 411 S.E.2d 65 (1991).

Admission of similar transactions. — Nothing in O.C.G.A. § 24-3-16 restricts the statement to use solely in connection with the prior incident, and in child molestation cases, this court has consistently upheld the admission of similar transactions involving incidents for which the defendant was not on trial. *Guest v. State*, 216 Ga. App. 457, 454 S.E.2d 622 (1995).

Fathers of the two similar transaction victims were allowed to give hearsay testimony about the victims' statements that defendant had molested the victims, because this sort of hearsay testimony, describing a child's statement about sexual abuse, is admissible similar transaction evidence under O.C.G.A. § 24-3-16. *Deal v. State*, 241 Ga. App. 879, 528 S.E.2d 289 (2000).

Statements admissible as substantive evidence. — In a criminal prosecution for sexual and non-sexual acts committed against a child, the jury was allowed to consider the child's out-of-court statements as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16, and conflicts between the child's testimony at trial and out-of-court statements were for the jury to resolve. *Manders v. State*, 281 Ga. App. 786, 637 S.E.2d 460 (2006).

Subsequent report of molestation by another not admissible. — Subsequent report by the victim of molestation by another was neither prior to nor necessarily inconsistent with the victim's earlier report that the defendant was the victim's only molester, and was not admissible as impeaching evidence. *Thompson v. State*, 187 Ga. App. 152, 369 S.E.2d 523 (1988).

Testimony of child sodomy victim's accusation allowed. — Trial court did not err in allowing testimony of the child's accusation that defendant committed the acts which constitute the crime of aggravated child molestation since the victim told the victim's grandmother that defendant orally sodomized the victim and that defendant forced the victim to perform acts of oral sodomy and the victim's mother's testimony that she had never discussed oral sodomy

with the three-year-old victim and that she had never known the child to make up stories. *Williams v. State*, 204 Ga. App. 878, 420 S.E.2d 781 (1992).

Child sodomy victim's statements qualified as "outcry" arguably so near to the event and so free of afterthought and forethought, connivance, or "reflective thought," as to be part of the *res gestae*, and so as to be evidence of the crime itself, and not merely a later statement by the child about the crime, as it might have been under O.C.G.A. § 24-3-16, where these outcries occurred while the child was asleep the night the child returned home after the child's mother picked the child up at the child's grandfather's house where the crime allegedly occurred. *Godfrey v. State*, 187 Ga. App. 319, 370 S.E.2d 183 (1988).

Statement as part of *res gestae* of child molestation charge. — Child's statement to an investigative agent regarding a "game" in which the defendant, the child victim, and others removed articles of their clothing were admissible as describing part of the *res gestae* of the crime of child molestation. *Berry v. State*, 235 Ga. App. 35, 508 S.E.2d 435 (1998).

Testimony by the mother of a child-molestation victim concerning allegations made by her child to her against defendant was properly admitted since the court considered atmosphere, circumstances, spontaneity, and demeanor in judging the reliability of the statement. *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92, cert. denied, 188 Ga. App. 912, 374 S.E.2d 92 (1988).

Testimony of victim's mother concerning statements made to her by victim was admissible. *Dupree v. State*, 206 Ga. App. 4, 424 S.E.2d 316 (1992).

Mother's testimony following victim's recanting of original statement. — Although the victim was not under the age of 14 at the time the statements were made, this did not affect the admissibility of the testimony of the victim's mother and a detective because the victim's veracity was placed in issue after the victim signed an affidavit recanting the victim's original statement, and the victim was present at trial and was thoroughly cross-examined about the truthfulness of the victim's original statement. *Frady v. State*, 245 Ga. App. 832, 538 S.E.2d 893 (2000).

Statement made through interpreter admissible. — Statements made through an interpreter by an 11-year-old victim of child molestation to witnesses who asked the victim questions were admissible through testimony of the witnesses even though the interpreter did not testify at the trial. *Davis v. State*, 214 Ga. App. 360, 448 S.E.2d 26 (1994).

Witness statements admissible despite child's unresponsiveness. — Trial court did not err in refusing to strike the testimony of adult witnesses who related a child molestation victim's statements to the witnesses in spite of the victim's unresponsiveness as a witness when called by the court. *Smith v. State*, 228 Ga. App. 144, 491 S.E.2d 194 (1997).

Child who told adults that defendant placed the defendant's finger inside her vagina was not unavailable within the meaning of O.C.G.A. § 24-3-16 because she was unresponsive when she was asked questions in court, and the trial court's decision allowing adults to testify about out-of-court statements the child made to the adults was correct. *Bell v. State*, 263 Ga. App. 894, 589 S.E.2d 653 (2003).

Physical appearance of victim at trial all that is required. — Availability requirement of O.C.G.A. § 24-3-16 is met even if the victim takes the stand and is incapable of reiterating the accusations against the defendant or is uncommunicative or unresponsive; the child need only physically appear at trial. *Jenkins v. State*, 235 Ga. App. 53, 508 S.E.2d 710 (1998).

Victim/witness director allowed to testify regarding conversation with victim. — In an incest and child molestation trial, there was no error in the trial court's decision allowing the victim/witness director to testify regarding the contents of a conversation the director had with the victim. *Chambers v. State*, 205 Ga. App. 78, 421 S.E.2d 326 (1992).

Witnesses' testimony regarding statements of victim's mother admissible. — Witnesses' testimony that older victim said when she told her mother what defendant was doing, the mother said to pray and not tell anyone, was not beyond permissible hearsay under O.C.G.A. § 24-3-16 because it was not offered to show the truth of matters asserted therein. Mother's response to her daughter was not an assertion but a request, and the

testimony concerning her response was presented not to prove prayer and silence on the subject of defendant's conduct were desirable, but simply to show the mother's request for prayer and silence was made. *Gibby v. State*, 213 Ga. App. 20, 443 S.E.2d 852 (1994).

Mother's and other professional witnesses' statements admissible. — Trial court properly allowed hearsay testimony about statements made by the victim to the victim's mother, the school counselor, and the nurse practitioner who examined the victim pursuant to O.C.G.A. § 24-3-16 in defendant's child molestation trial; defendant's arguments that there was no evidence that the statements were spontaneous and that there were two inconsistencies in the victim's statements, giving differing answers when asked how many times defendant had molested the victim and describing the incidents in a different order in two different statements, were not sufficient to show that the trial court abused the court's discretion in admitting the statements. *Flowers v. State*, 255 Ga. App. 660, 566 S.E.2d 339 (2002).

Statements of victim's mother held inadmissible. — In a child custody proceeding, O.C.G.A. § 24-3-16 did not apply to allow mother to present hearsay testimony regarding harassment of her children by their stepbrother. *Martin v. True*, 232 Ga. App. 435, 502 S.E.2d 285 (1998).

Evidence inadmissible where child unavailable to testify. — Child was not available within the meaning of O.C.G.A. § 24-3-16; therefore, the child's mother's testimony regarding the child's out-of-court statements was inadmissible since the trial court excused the child without the child ever being sworn and examined as a witness because the child was distraught. *Hines v. State*, 248 Ga. App. 752, 548 S.E.2d 642 (2001).

Statements as to the circumstances in which appellant chased appellant's son down the hall while carrying a maul constitutes statements regarding any act of physical abuse within the meaning of O.C.G.A. § 24-3-16. *Brewton v. State*, 216 Ga. App. 346, 454 S.E.2d 558 (1995), rev'd on other grounds, 266 Ga. 160, 465 S.E.2d 668 (1996).

Child molestation victim's statements included in expert witness testimony are admissible. — Trial court did not err in allow-

ing into evidence the testimony of the prosecution's expert witness as to statements made to the witness by the child molestation victim, which statements were incriminating of defendant, since the record shows that the victim was not only available to testify in the proceedings, but was called as the prosecution's first witness and that, prior to the admission of the expert witness's testimony, the trial court determined that the circumstances surrounding the victim's statements provided sufficient indicia of reliability. *Knopp v. State*, 190 Ga. App. 266, 378 S.E.2d 703 (1989).

Statements admissible when victim available. — In a prosecution for child molestation, testimony by two witnesses regarding statements made by one of the victims about seeing the defendants engaged in sex was admissible since the victim, although not called by the state, was available to be called as a witness. *Grimsley v. State*, 233 Ga. App. 781, 505 S.E.2d 522 (1998).

Statements made to government agency investigator admissible. — Trial court did not err in admitting out-of-court statements made by a five-year-old victim to her aunt and a Department of Family Services investigator. *McCormick v. State*, 228 Ga. App. 467, 491 S.E.2d 903 (1997).

In a proceeding to terminate the parental rights of a father who had been convicted of molesting his children, the trial court did not err in allowing a child protective services investigator, women's shelter manager, and a therapist to testify as to statements made by the children. *In re S.M.L.*, 228 Ga. App. 81, 491 S.E.2d 186 (1997).

Defendant's claim of error in the admission of an investigator's testimony regarding a child victim's statements to a forensic interviewer was rejected as the investigator was behind a two-way mirror when the victim made the statements and the victim knew that the investigator was listening. *Brown v. State*, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the

Child Hearsay Statute, O.C.G.A. § 24-3-16, permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008).

Question regarding victim's credibility properly admitted. — Trial court properly admitted testimony from a psychologist who stated that the psychologist treated an 11-year-old girl after the girl told several people that her stepfather molested her and believed that the girl had not made up her story because the testimony was offered to rehabilitate the girl's credibility after the stepfather attacked the girl's credibility. *Horne v. State*, 262 Ga. App. 604, 586 S.E.2d 13 (2003).

With regard to a defendant's convictions on four counts of aggravated child molestation and three counts of child molestation, the trial court did not err by failing to hold a hearing outside of the jury's presence with regard to the testimony of a social worker who made an audiotape of the victim's statement, and by allowing the social worker to testify as to the general credibility assessment of the victim because the defendant failed to object at trial to the social worker's testimony. By waiting to raise the issue on appeal, the defendant waited too late and such failure amounted to a waiver of any objection that might have been raised. *Hargrove v. State*, 289 Ga. App. 363, 657 S.E.2d 282 (2008), cert. denied, 2008 Ga. LEXIS 500 (Ga. 2008).

Spontaneous statement admissible. — When the victim, a 14-year-old, in a spontaneous, unprompted, crying event told the residential manager of the mobile home park in which the victim lived that the victim's father was abusing the victim and later that same day the victim made substantially the same statements to a government social worker, the statements bore sufficient indicia of reliability. *Smith v. State*, 207 Ga. App. 55, 427 S.E.2d 48 (1993).

Videotape of interview between child victim and investigating officer. — When the circumstances surrounding the videotape of an interview between a child victim and an investigating officer provided sufficient indicia of reliability of the statements therein, any conflicts between the videotaped statement and the testimony of the child at trial would not necessarily render

the former inadmissible, but would rather present a question of credibility of the witness to be resolved by the trier of fact. *Ware v. State*, 191 Ga. App. 896, 383 S.E.2d 368 (1989).

Taped interview with a child is admissible under O.C.G.A. § 24-3-16 if it describes acts of sexual contact or physical abuse, if the child is available to testify in court, and if the circumstances of the statement are shown to have sufficient indicia of reliability. *Vick v. State*, 194 Ga. App. 616, 391 S.E.2d 455 (1990); *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000), cert. denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771 (2001).

O.C.G.A. § 24-3-16 does not require a hearing for the determination that reliability of the videotaped interviews of a four-year-old child was indicated by the neutrality of the interviewer and place of interview, and the spontaneity of the interviews conducted shortly after the alleged molestation. *King v. State*, 194 Ga. App. 662, 391 S.E.2d 660, cert. denied, 194 Ga. App. 912, 391 S.E.2d 660 (1990).

When two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child qualified to testify, nor in admitting the videotapes. *Frazier v. State*, 195 Ga. App. 109, 393 S.E.2d 262 (1990) (trial held prior to April 19, 1989); *Dupree v. State*, 206 Ga. App. 4, 424 S.E.2d 316 (1992); *Lindo v. State*, 218 Ga. App. 756, 463 S.E.2d 148 (1995).

Requirement of a neutral interviewer and place of interview should be recognized as relating to the atmosphere, circumstances, and manner in which the interview was conducted. Interviews by police officers of young victims of sexual abuse are not barred; such cases merely require that the officer conduct the interview in a manner conducive to eliciting the truth. *Knight v. State*, 210 Ga. App. 228, 435 S.E.2d 682 (1993).

In a case where defendant was tried for first degree cruelty to children for allegedly burning the three-year-old victim's back with a cigarette, the trial court did not abuse the court's discretion in admitting the victim's videotaped interview; although several factors weighed against admitting the video-

taped interview, such as the victim's tender age, the length of time between the event and the videotaped interview, and the fact that police officers conducted the interview, these factors did not require that the videotaped interview be excluded as a matter of law, and because the victim testified at trial, defendant had the opportunity to cross-examine the victim regarding the victim's memory of the interview and the circumstances surrounding the interview. *Conley v. State*, 257 Ga. App. 563, 571 S.E.2d 554 (2002).

In defendant's conviction for child molestation, trial court properly denied defendant's motion for directed verdict of acquittal as sufficient evidence existed based on testimony of the child victim's parent, who testified as to discovery of defendant on top of the victim; further evidence in support of defendant's conviction included the child's videotaped police interviews describing what happened. *Lopez v. State*, 291 Ga. App. 210, 661 S.E.2d 618 (2008).

Whether videotape bolstered testimony irrelevant. — After a defendant molested a nine-year-old child, a videotape of the child's interview by a detective was properly admitted under O.C.G.A. § 24-3-16 as a statement made by a child under the age of 14 years describing an act of sexual contact. Whether the videotape also bolstered the child's trial testimony was immaterial. *Whitaker v. State*, 293 Ga. App. 427, 667 S.E.2d 202 (2008).

Trial court did not abuse the court's discretion in admitting a videotaped forensic interview of a child molestation victim because the victim testified at trial and was subject to cross-examination about the circumstances surrounding the videotaped interview and statements the victim made during the interview, and it was the jury's responsibility, as the trier of fact, to resolve any inconsistencies in the victim's statements and judge the victim's credibility; there was no evidence to support the defendant's claim that the victim recanted the allegations the victim made or that the victim falsely accused the defendant of molesting the victim's sister; the videotape showed that the victim was sufficiently credible for the interview to be shown to the jury, and the interview in question took place at a neutral location with only the interviewer present. *Lynn v. State*, 300 Ga. App. 170, 684 S.E.2d 325 (2009).

Victim's testimony not bolstered by videotape. — Playing of the videotape of the interview with the victim before the jury did not constitute an impermissible bolstering of the victim's testimony. *Knight v. State*, 210 Ga. App. 228, 435 S.E.2d 682 (1993).

Videotape of interview between child victim and psychotherapist. — Admission of a videotaped interview with a child victim of defendant's sexual offenses was proper under the Child Hearsay Statute, O.C.G.A. § 24-3-16, although defendant was not indicted for offenses requiring proof of sexual contact or physical abuse as the statute applied to descriptions of physical abuse or sexual contact, which could have been merely verbal. *Carolina v. State*, 276 Ga. App. 298, 623 S.E.2d 151 (2005).

Audio tape of victim's testimony recorded by social worker was admissible even though the tape was stopped and restarted several times during the interview; the victim was available to testify and testimony of the social worker established sufficient indicia of reliability. *Martin v. State*, 205 Ga. App. 591, 422 S.E.2d 876, cert. denied, 205 Ga. App. 900, 422 S.E.2d 876 (1992).

In child molestation case, videotape of victim was properly admitted after the trial court conducted a lengthy hearing outside the presence of the jury to determine the tape's reliability. Court considered the atmosphere and circumstances of the interview, the spontaneity of the victim's responses, and the demeanor of the victim during the interview. *Penaranda v. State*, 203 Ga. App. 740, 417 S.E.2d 683, cert. denied, 203 Ga. App. 907, 417 S.E.2d 683 (1992); *Allen v. State*, 263 Ga. 60, 428 S.E.2d 73 (1993).

Trial court did not err in admitting a videotaped statement of a defendant's daughter describing incidents of molestation committed by defendant when she was four years old because the daughter was available for cross-examination at trial, although she was not very responsive to the state's questions on direct examination. *Conn v. State*, 300 Ga. App. 193, 685 S.E.2d 745 (2009), cert. denied, No. S10C0226, 2010 Ga. LEXIS 131 (Ga. 2010).

Showing of necessity to support the admission of a videotape of a police interview of the victim under O.C.G.A. § 24-3-16 was satisfied by the fact that the victim was a witness at the trial whom the defendant was

permitted to cross-examine. *Knight v. State*, 210 Ga. App. 228, 435 S.E.2d 682 (1993).

When one of two victims was ruled incompetent to testify, but a pediatrician's testimony established that both girls had been sexually molested, and the other child testified that the defendant molested her and that she saw him molest her sister, the defendant's conviction was not based on inadmissible hearsay. *Mantooth v. State*, 197 Ga. App. 797, 399 S.E.2d 505 (1990), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

Cumulative testimony concerning victim's statements held harmless error. — After a witness was allowed to testify as to statements which were not made directly to the witness but which the witness observed and heard by watching a monitor during the taping, the testimony was not admissible. However, the testimony was merely cumulative of other testimony presented at trial, and the error consequently presented no ground for reversal. *Kelly v. State*, 197 Ga. App. 811, 399 S.E.2d 568 (1990).

Trial court erroneously admitted under the Child Hearsay Statute, O.C.G.A. § 24-3-16, the foster mother's statement that the foster mother overheard the children making remarks to one another that allegedly implicated the defendant in sexually abusing the children as the foster mother could not testify under § 24-3-16 since the statement was not made to the foster mother; the evidence was cumulative of other evidence of abuse, however, so the error was harmless. *Clemmons v. State*, 282 Ga. App. 261, 638 S.E.2d 409 (2006).

More than one statement admissible. — Trial court did not err in allowing the introduction of the victim's prior consistent statements before the victim testified. *Wooten v. State*, 244 Ga. App. 101, 533 S.E.2d 441 (2000).

Erroneous admission of the child's statements is only reversible if it appears likely that the hearsay contributed to the guilty verdict. *Estep v. State*, 238 Ga. App. 170, 518 S.E.2d 176 (1999).

Judge was not required to conduct a hearing to determine whether there existed any indicia of reliability surrounding statements made by a child to a psychologist in a parental rights termination proceeding. *In re D.R.C.*, 198 Ga. App. 348, 401 S.E.2d 754 (1991).

Trial court did not need to make an express finding that the circumstances of the statement provided sufficient indicia of reliability before admitting the statement as this statutory requirement was met if, after both parties rested, the record contained evidence which would have supported such a finding; the admission of a child victim's out-of-court statements regarding alleged sexual molestation was proper since the statements were initially spontaneous and remained consistent, and since the victim was cross-examined by defense counsel at trial. *Frazier v. State*, 278 Ga. App. 685, 629 S.E.2d 568 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

A trial court is not required to conduct a Gregg hearing to determine the statutory requirement of "indicia of reliability" before receiving child hearsay into evidence under O.C.G.A. § 24-3-16. A defendant failed to show that any of a child victim's out-of-court statements would have been excluded from trial had trial counsel filed a motion under Gregg, and thus could not prevail on an ineffective assistance claim. *Purvis v. State*, 301 Ga. App. 648, 689 S.E.2d 53 (2009).

Necessary finding of admissibility implicit in judge's ruling. — Mother's testimony as to what the victim told her was properly admitted in evidence, even though the judge did not make a specific finding of "sufficient indicia of reliability." Implicit in any ruling by a judge is that the judge has made the necessary finding of admissibility before admitting such evidence. *Windom v. State*, 187 Ga. App. 18, 369 S.E.2d 311 (1988).

It is implicit in the admission of statements pursuant to O.C.G.A. § 24-3-16 that the trial court made the necessary finding. *Calloway v. State*, 202 Ga. App. 816, 415 S.E.2d 533 (1992); *Green v. State*, 212 Ga. App. 250, 441 S.E.2d 689 (1994); *Roberson v. State*, 214 Ga. App. 288, 447 S.E.2d 640 (1994).

Proffer required to appeal exclusion of testimony. — Defendant's failure to make a proffer at trial showing that testimony should have been admitted under O.C.G.A. § 24-3-16 precluded consideration on appeal of the issue of the exclusion of such testimony. *Jones v. State*, 232 Ga. App. 505, 502 S.E.2d 345 (1998).

Effective assistance of counsel. — Alleged failure of counsel to demand a reliability ruling for those witnesses who were called to testify about hearsay statements made by the victim did not constitute ineffective assistance since counsel did demand a reliability ruling regarding the pediatrician's repetition of the victim's statement, counsel filed a motion to invoke the procedures of *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562 (1987), and when the motion was heard the state indicated that the victim would testify. Also, there was a sufficient showing of indicia of reliability, within the meaning of O.C.G.A. § 24-3-16, as to all out-of-court statements made by the victim, which were testified to by witnesses in the presence of the jury. *Williamson v. State*, 207 Ga. App. 565, 428 S.E.2d 628 (1993).

Defendant was not denied effective assistance of counsel at a trial for aggravated child molestation because it would have been futile to object to the 10-year old victim's videotaped statement, which was admissible under the statute's exception for a child's statement of sexual abuse, since there were sufficient indicia of reliability and the child was available to testify at trial. *Campos v. State*, 263 Ga. App. 119, 587 S.E.2d 264 (2003).

Defendant did not receive ineffective assistance of counsel for counsel's failure to object to a psychologist's testimony that it was uncommon for a child to be able to specify incident dates if there was a recurrence of events over a prolonged period; the psychologist did not improperly bolster the victim's testimony and the psychologist's testimony was not a comment on an ultimate issue of fact; the trial court was authorized to find that the conclusion drawn by the expert was beyond the ken of the jurors. *Maddox v. State*, 275 Ga. App. 869, 622 S.E.2d 80 (2005).

Decision as to whether to call an expert witness concerning interviewing techniques of children in a child molestation case is one of trial strategy and in a case where trial counsel testified at the second hearing on the motion for new trial that trial counsel did not consult an expert on interviewing techniques because after reviewing the videotape, trial counsel determined that the factors outlined in case law had been met, trial counsel had filed three pretrial motions

seeking to exclude or restrict child hearsay statements, and required the state to lay a proper foundation for the use of child hearsay, trial counsel's performance was not deficient in that regard. *Nichols v. State*, 288 Ga. App. 118, 653 S.E.2d 300 (2007).

Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object and conceding to the issue of reliability for the admission of the child victim's hearsay testimony as: (1) defendant failed to point to any evidence indicating that the victim's statements were unreliable since the statements were videotaped at a neutral location in a room alone with a professional forensic interviewer; (2) the forensic interviewer testified that the victim was very bright and articulate and did not appear to be coached; (3) the victim's videotaped statements were spontaneous, voluntary, and not coerced; (4) the victim's videotaped statements were consistent with other out-of-court statements; and (5) significantly, the victim's statements were consistent with defendant's statements to police. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

Although defendant's trial counsel's performance fell below the objective standard of reasonableness under the first prong of the Strickland ineffective assistance of counsel test, the error however was harmless because although defendant's trial counsel performed deficiently in failing to raise a hearsay objection to admission of the victim's statements contained in the videotaped interview, defendant did not show that trial counsel's error prejudiced the defense since statements made by the victim during the videotaped interview were merely cumulative of testimony the victim offered at trial and for which the victim was cross-examined by trial counsel. *Forde v. State*, 289 Ga. App. 805, 658 S.E.2d 410 (2008).

Speculation does not support ineffective assistance of counsel claim. — Defendant's ineffective assistance of counsel claim was rejected as the defendant's claim that trial counsel was not knowledgeable about the Child Hearsay Statute, O.C.G.A. § 24-3-16, and failed to highlight the unreliability of the child victim's statement to a nurse was based on mere speculation that a more thorough cross-examination would have al-

tered the outcome at trial. *Brown v. State*, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

Defendant's right to notice of statements before trial. — There was no requirement that the state provide defendant with pretrial notice of the state's intention to introduce child hearsay statements and, when defendant was notified in advance that there was nothing exculpatory in videotaped interviews with children and defendant was allowed to view tapes during the trial, defendant's due process rights were not violated by not being permitted to view the tapes prior to trial. *Thornton v. State*, 264 Ga. 563, 449 S.E.2d 98 (1994).

Evidence sufficed for aggravated child molestation conviction. — Evidence and testimony from several adults that the victim reported defendant's sexual assault in the manner charged in the indictment was sufficient to convict for aggravated child molestation, although the victim testified that the criminal act occurred while the victim was wearing jeans. *McGuire v. State*, 209 Ga. App. 813, 434 S.E.2d 802 (1993).

Evidence was sufficient to convict defendant of child molestation, even if much of the evidence was hearsay repetition of the child's out-of-court statements, as defendant failed to argue that the evidence did not satisfy the reliability criteria set forth in O.C.G.A. § 24-3-16. *Brown v. State*, 267 Ga. App. 826, 600 S.E.2d 774 (2004).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false imprisonment charge, and the videotaped forensic interview and the testimony of the police investigator and the victim's mother concerning what the victim told them were

admissible as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

Statement regarding defendant masturbating in child's presence admissible. — Child's statement to an investigative agent regarding the defendant paying the child to remove the child's clothing while the defendant masturbated in the child's presence was admissible under O.C.G.A. § 24-3-16, even absent contact with the child, since defendant's masturbation was an action performed "with or on another in the presence of the child." *Berry v. State*, 235 Ga. App. 35, 508 S.E.2d 435 (1998).

Failing to object to the testimony of the state's witnesses regarding what the victim told the witnesses was not a deficiency by counsel because these statements would have been admissible under the Child Hearsay Statute, O.C.G.A. § 24-3-16, since the victim, age ten, was a witness at trial whom the defendant cross-examined. *Silcox v. State*, 241 Ga. App. 845, 528 S.E.2d 271 (2000).

Parents' testimony admissible. — When the record shows the victims testified at trial and were subject to examination and cross-examination, the trial court did not abuse the court's discretion under the Child Hearsay Statute, O.C.G.A. § 24-3-16, by admitting the parents' testimony about things the victims said to the parent's about defendant. *Kight v. State*, 242 Ga. App. 13, 528 S.E.2d 542 (2000).

Statement made to therapist admissible. — Court properly admitted hearsay testimony by a child's therapist that the defendant "put his thing" in the child's mouth where the statement was made in a child-friendly, one-on-one therapy session, not an investigative interview, and the statement was made in response to a non-leading question. *Guzman v. State*, 273 Ga. App. 819, 616 S.E.2d 142 (2005).

Statement during medical examination admissible. — Nurse's testimony as to a 13-year-old victim's statements that defendant forced intercourse upon the victim made during the medical examination was properly admissible under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Bell v. State*, 294 Ga. App. 779, 670 S.E.2d 476 (2008).

Statements admissible. — In a child molestation case, the trial court properly al-

lowed a deputy to read the statements of three of the teenagers involved into evidence; while all of the teenagers and their parents were present when the teenagers wrote out their statements for the deputy, the record reflected no evidence of undue pressure or influence, and the deputy was not directly involved in later videotaped interviews. *Krirat v. State*, 286 Ga. App. 650, 649 S.E.2d 786 (2007), cert. denied, 2007 Ga. LEXIS 745 (Ga. 2007).

After a trial court properly admitted sufficiently reliable videotaped statements made by three siblings who were the victims of a defendant's cruelty, there was no error in also admitting testimony from nurses from the hospital where the children were taken regarding statements the children made to the nurses as the matters testified to by the nurses were the same matters detailed in the videotaped statements. *Williams v. State*, 293 Ga. App. 617, 668 S.E.2d 21 (2008).

Under O.C.G.A. § 24-3-16, the trial court properly allowed a school counselor to testify about the victim's out-of-court statements to the counselor. The victim was available to testify and did in fact testify and was thoroughly cross-examined as was the counselor; furthermore, because the statements were admissible, counsel was not ineffective for failing to object to the statements. *Hilliard v. State*, 298 Ga. App. 473, 680 S.E.2d 541 (2009).

Victim's testimony alone was sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggravated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant to O.C.G.A. § 24-4-8. The testimony of the victim's cousin, two school friends, and the interviewing detective, was admissible as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Vaughn v. State*, 301 Ga. App. 391, 687 S.E.2d 651 (2009).

Plain error doctrine inapplicable. — Plain error doctrine had been limited to capital cases and to criminal cases in which the trial judge allegedly intimated an opinion of the defendant's guilt in violation of O.C.G.A. § 17-8-57 and had no application to a defendant's claims that a child molestation victim's hearsay statements served to bolster the victim's credibility and lacked sufficient indicia of reliability. *Brown v. State*, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

Harmless error. — If the trial court erroneously allowed under O.C.G.A. § 24-3-16 the testimony of the psychologist in the child molestation case, any error was harmless; although the defendant argued that the testimony was the only evidence of the defendant's mental state, there was ample evidence that the defendant had the propensity to molest children, including the victim's detailed statements, the corroborating medical examination, and the testimony of the children's parent that the defendant had molested the children's parent when the children's parent was very young. *Clemmons v. State*, 282 Ga. App. 261, 638 S.E.2d 409 (2006).

With regard to a defendant's convictions for child molestation and related crimes arising from actions the defendant took toward three children and those that the defendant forced the children to engage in by gunpoint while the defendant was a babysitter for the children, although the testimony of the mother of one of the victims that the victim was forced to have sex with the defendant was double hearsay and inadmissible, the error was not reversible since other legally admissible evidence of the same fact was introduced, therefore, the error was harmless. *Sullivan v. State*, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009).

Cited in *Sanders v. State*, 182 Ga. App. 581, 356 S.E.2d 537 (1987); *Sosebee v. State*, 357 Ga. 298, 357 S.E.2d 562 (1987); *Crump v. State*, 183 Ga. App. 43, 357 S.E.2d 863 (1987); *Grier v. State*, 257 Ga. 539, 361 S.E.2d 379 (1987); *Luckey v. State*, 185 Ga. App. 262, 363 S.E.2d 791 (1987); *Lovell v. State*, 185 Ga. App. 521, 365 S.E.2d 133 (1988); *Westbrook v. State*, 186 Ga. App. 493, 368 S.E.2d 131 (1988); *Celis v. State*, 186 Ga. App. 866, 369 S.E.2d 53 (1988); *Bess v. State*, 187 Ga. App. 185, 369 S.E.2d 784 (1988); *Williams v. State*, 188 Ga. App. 332, 373 S.E.2d 40 (1988); *In re J.E.L.*, 189 Ga. App. 203, 375 S.E.2d 490 (1988); *Morgan v. State*, 189 Ga. App. 795, 377 S.E.2d 707 (1989); *In re B.H.*, 190 Ga. App. 131, 378 S.E.2d 175 (1989); *Treadaway v. State*, 191 Ga. App. 111, 381 S.E.2d 43 (1989); *Jenkins v. State*, 191 Ga. App. 546, 382 S.E.2d 389 (1989); *In re A.H.*, 192 Ga. App. 692, 385 S.E.2d 776 (1989); *Fitzgerald v. State*, 193 Ga. App. 76, 386 S.E.2d 914 (1989); *Cimildoro v. State*,

259 Ga. 788, 387 S.E.2d 335 (1990); McCoy v. State, 194 Ga. App. 244, 390 S.E.2d 251 (1990); Miller v. State, 194 Ga. App. 338, 390 S.E.2d 291 (1990); Hunter v. State, 194 Ga. App. 711, 391 S.E.2d 695 (1990); Johnson v. State, 195 Ga. App. 385, 393 S.E.2d 712 (1990); In re C.J.S., 195 Ga. App. 741, 395 S.E.2d 35 (1990); Hicks v. State, 196 Ga. App. 311, 396 S.E.2d 60 (1990); Hall v. State, 196 Ga. App. 523, 396 S.E.2d 271 (1990); In re T.M.H., 197 Ga. App. 416, 398 S.E.2d 766 (1990); Dean v. State, 198 Ga. App. 133, 401 S.E.2d 40 (1990); Hurst v. State, 198 Ga. App. 380, 401 S.E.2d 348 (1991); Johnson v. State, 198 Ga. App. 520, 402 S.E.2d 115 (1991); Alexander v. State, 199 Ga. App. 228, 404 S.E.2d 616 (1991); Young v. State, 199 Ga. App. 520, 405 S.E.2d 338 (1991); Howard v. State, 200 Ga. App. 188, 407 S.E.2d 769 (1991); Snyder v. State, 201 Ga. App. 66, 410 S.E.2d 173 (1991); Freeman v. State, 202 Ga. App. 185, 413 S.E.2d 774 (1991); Harrell v. State, 204 Ga. App. 738, 420 S.E.2d 631 (1992); Fulton v. State, 205 Ga. App. 353, 422 S.E.2d 257 (1992); Hamilton v. State, 210 Ga. App. 398, 436 S.E.2d 522 (1993); Baker v. State, 211 Ga. App. 515, 439 S.E.2d 668 (1993); Patterson v. State, 212 Ga. App. 257, 441 S.E.2d 414 (1994); Curtis v. State, 212 Ga. App. 237, 441 S.E.2d 776 (1994); Watkins v. State, 212 Ga.

App. 296, 441 S.E.2d 801 (1994); Letlow v. State, 222 Ga. App. 339, 474 S.E.2d 211 (1996); Jones v. State, 226 Ga. App. 420, 487 S.E.2d 56 (1997); Baker v. State, 228 Ga. App. 32, 491 S.E.2d 78 (1997); Wallace v. State, 228 Ga. App. 686, 492 S.E.2d 595 (1997); Loftus v. State, 230 Ga. App. 582, 497 S.E.2d 60 (1998); Evans v. State, 233 Ga. App. 879, 506 S.E.2d 169 (1998); Pirkle v. State, 234 Ga. App. 23, 506 S.E.2d 186 (1998); Knight v. State, 239 Ga. App. 710, 521 S.E.2d 851 (1999); Vickers v. State, 241 Ga. App. 452, 527 S.E.2d 217 (1999); Phillips v. State, 241 Ga. App. 764, 527 S.E.2d 604 (2000); Myrick v. State, 242 Ga. App. 892, 531 S.E.2d 766 (2000); Robbins v. State, 243 Ga. App. 21, 532 S.E.2d 127 (2000); Scott v. State, 243 Ga. App. 383, 532 S.E.2d 141 (2000); Gissendaner v. State, 272 Ga. 704, 532 S.E.2d 677 (2000); In re J.D., 243 Ga. App. 644, 534 S.E.2d 112 (2000); Mann v. State, 244 Ga. App. 756, 536 S.E.2d 608 (2000); Fowler v. State, 251 Ga. App. 787, 554 S.E.2d 808 (2001); Schlau v. State, 282 Ga. App. 460, 638 S.E.2d 895 (2006); Chauncey v. State, 283 Ga. App. 217, 641 S.E.2d 229 (2007); Robbins v. State, 290 Ga. App. 323, 659 S.E.2d 628 (2008); Payne v. State, 290 Ga. App. 589, 660 S.E.2d 405 (2008); Nguyen v. State, 294 Ga. App. 67, 668 S.E.2d 514 (2008); Pearce v. State, 300 Ga. App. 777, 686 S.E.2d 392 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Corroboration of a Child's Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

ALR. — Witnesses: child competency statutes, 60 ALR4th 369.

Validity, construction, and application of child hearsay statutes, 71 ALR5th 637.

24-3-17. Admissibility of certified copies of records of Department of Public Safety or Department of Driver Services or comparable agencies in other states; admissibility of computer transmitted records.

(a) A certified copy of any record of the Department of Public Safety or the Department of Driver Services or comparable agency in any other state is admissible in any judicial proceedings or administrative hearing in the same manner as the original of the record.

(b) Any court may receive and use as evidence in any case information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any terminal lawfully

connected to the Georgia Crime Information Center without the need for additional certification of those records.

(c) Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal case information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information. (Code 1981, § 24-3-17, enacted by Ga. L. 1988, p. 470, § 2; Ga. L. 1989, p. 1080, § 1; Ga. L. 2005, p. 334, § 10A-1/HB 501.)

JUDICIAL DECISIONS

Records obtained from Georgia Crime Information Center. — O.C.G.A. § 24-3-17 provides for self-authentication where the document sought to be admitted was obtained from a computer terminal lawfully connected to the Georgia Crime Information Center. *Thomas v. State*, 196 Ga. App. 88, 395 S.E.2d 615 (1990).

There was an inadequate foundation for the introduction of an uncertified driver's record since the prosecutor merely represented in argument that the record was from a computer connected to the Georgia Crime Information Center, but no witness testified that it was so obtained. *Waters v. State*, 210 Ga. App. 305, 436 S.E.2d 44 (1993); *Tipton v. State*, 213 Ga. App. 764, 445 S.E.2d 860 (1994).

An uncertified copy of defendant's driving record was properly introduced in evidence since the state adduced a sworn witness to identify the printout as a report from the Georgia Crime Information Center. *Jackson v. State*, 228 Ga. App. 877, 492 S.E.2d 897 (1997).

In a prosecution for possession of vehicles with an altered vehicle identification number (VIN), the trial court properly permitted the introduction into evidence of four computer printouts that listed the make, model, VIN, and owner of four of the cars that allegedly had altered VINs where the printouts came from the Georgia Crime Information Center (GCIC) computer and the state laid a proper foundation when a certified GCIC operator testified that the computer printouts were obtained from a GCIC terminal. *Brennan v. State*, 247 Ga. App. 515, 544 S.E.2d 210 (2001).

In a case where defendant, who had been

convicted of driving with a suspended license, claimed that the state had not laid a proper legal foundation for the admission of the defendant's driving record, there was no error in the driving record's admission as there was at least circumstantial evidence that the driving record was connected to the Georgia crime information computer. *Worthy v. State*, 252 Ga. App. 852, 557 S.E.2d 448 (2001).

Defendant's challenge to the admission of a Georgia Crime Information Center (GCIC) report was rejected as the state complied with the requirements of O.C.G.A. § 24-3-17 and the caselaw; the evidence was sufficient to show identity for purposes of the admission of the GCIC report as the GCIC record bore defendant's name, and defendant did not deny that it was defendant's. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Record from Georgia Department of Public Safety. — Driving with a suspended license conviction was affirmed after the state proved that defendant received notice of defendant's license suspension by introducing defendant's driving record; an officer testified that the officer was certified to run driving histories and that the officer obtained a printout of defendant's driving history from an approved computer terminal at the Georgia Department of Public Safety. *Fannin v. State*, 267 Ga. App. 413, 599 S.E.2d 355 (2004).

National Crime Information Center printout of defendant's criminal record was competent, admissible evidence that defendant had three prior shoplifting convictions, one in Georgia and two in Arizona. *State v. Sterling*, 244 Ga. App. 328, 535 S.E.2d 329 (2000).

Printout establishing date of license suspension properly admitted. — When the defendant was charged with driving with a suspended license, a certified copy of the defendant's notice of suspension prepared in connection with an earlier driving-under-the-influence conviction and a computer printout establishing the date of the suspension were properly admitted under O.C.G.A. § 24-3-17. Before the printout was submitted to the jury, the trial court required that the prejudicial information on the printout be redacted. *Hann v. State*, 292 Ga. App. 719, 665 S.E.2d 731 (2008).

Insufficient foundation for admission of evidence. — Testimony of an employee of the county solicitor's (now district attorney) office that the employee had obtained a copy of defendant's driving record from the state patrol office was not sufficient foundation for admission of the record. *Tolbert v. State*, 227 Ga. App. 647, 490 S.E.2d 183 (1997).

Cited in *Allman v. State*, 258 Ga. App. 792, 575 S.E.2d 710 (2002).

24-3-18. Admissibility of medical reports; qualifications of person signing reports; right of adverse party to cross-examine person signing reports.

(a) Upon the trial of any civil case involving injury or disease, any medical report in narrative form which has been signed and dated by an examining or treating licensed medical doctor, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report must first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing the report may be included as part of the basis for providing the information contained therein, and the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

(b) The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence. (Code 1981, § 24-3-18, enacted by Ga. L. 1997, p. 945, § 1.)

Cross references. — Hearing before administrative law judge, § 34-9-102.

Law reviews. — For article commenting

on the enactment of this Code section, see 14 Georgia St. U. L. Rev. 163 (1997). For annual survey of evidence law, see 58 Mercer

L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007).

JUDICIAL DECISIONS

Admission of records in medical malpractice action. — Trial court did not err in admitting the podiatrist's medical records on the patient into evidence in the patient's medical malpractice case. *Kohl v. Tirado*, 256 Ga. App. 681, 569 S.E.2d 576 (2002).

Records properly excluded when 60-day notice requirement not met. — In a premises liability suit, the trial court properly excluded certified copies of some of an invitee's medical records under O.C.G.A. § 24-7-8 because the invitee had not provided the requisite 60-day notice under O.C.G.A. § 24-3-18. O.C.G.A. § 24-7-8 concerned only the authentication of medical records and did not allow the invitee to circumvent other evidentiary rules; furthermore, the invitee failed to provide a record citation for the specific medical records that the invitee claimed should have been admitted and thus it was unclear whether those records were narratives, to which § 24-3-18(a) applied, or other types of records. *Fuller v. Flash Foods, Inc.*, 298 Ga. App. 217, 679 S.E.2d 775 (2009).

Admissibility on summary judgment. — In a wrongful death suit brought by a minor child's parents, alleging negligence and police misconduct arising out of an incident in which emergency surgery on their child was delayed due to police detention of the doctor who was to perform the surgery, summary judgment was improperly granted; the medical narrative report prepared by the doctor was admissible evidence under O.C.G.A. § 24-3-18(a) and could be considered in opposition to a motion for summary judgment under O.C.G.A. § 9-11-56(c), in that the doctor's opinion in the report that the son, "in all likelihood," would have survived had the doctor not been prevented from caring for the son constituted a properly expressed medical opinion. *Dalton v. City of Marietta*, 280 Ga. App. 202, 633 S.E.2d 552 (2006).

Neurologist's notes improperly admitted. — In a personal injury suit, it was error to admit a neurologist's notes under O.C.G.A. § 24-3-18, as the notes were replete with

unexplained medical terms and test results and thus did not comprise a medical narrative "in story form" as contemplated by the statute; the error was not harmless, as the notes constituted the vast majority of appellees' medical evidence and for the most part were not cumulative of other testimony. *Lott v. Ridley*, 285 Ga. App. 513, 647 S.E.2d 292 (2007).

Report prepared by others inadmissible. — Trial court did not err in refusing to permit the manufacturer's two expert witnesses to testify to asbestos fiber counts on the manufacturer's packing in decedent's case against the manufacturer for decedent's exposure to asbestos that allegedly was in the manufacturer's packing material used in the plant where decedent worked as that testimony was inadmissible hearsay since neither of the expert witnesses were involved in preparing those counts; absent a witness from the laboratory that performed the counts of a report that complied with O.C.G.A. § 24-3-18, such testimony was inadmissible. *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 586 S.E.2d 26 (2003).

Chiropractor's report properly admitted. — In a personal injury suit, it was proper to admit a chiropractor's report under O.C.G.A. § 24-3-18; as the report was in a narrative form, summarized a patient's injuries and treatment, and presented the relevant aspects of the patient's injury, diagnosis, treatment, and prognosis in a logical form; although it contained medical terms, it attempted to explain those terms in the context of the report. *Lott v. Ridley*, 285 Ga. App. 513, 647 S.E.2d 292 (2007).

Recitation of records was not a narrative. — In a personal injury suit, a bare recitation of a doctor's unedited records was not a medical narrative in story form, as contemplated by O.C.G.A. § 24-3-18(a); therefore, a trial court committed reversible error by allowing plaintiffs' counsel to merely read into the record the doctor's notes, with no attempt to organize the doctor's notes or structure the notes to make the notes more readily understandable to the jury. *Lott v.*

Ridley, 285 Ga. App. 513, 647 S.E.2d 292 (2007).

Medical narrative in undue influence claim. — In a probate action, an oncologist's opinion, when considered along with other evidence of a testator's mental impairment and weakness after being prescribed drugs, was relevant in determining the amount of

influence necessary to dominate the testator's mind and destroy free agency and willpower. *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006).

Cited in *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006); *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

ARTICLE 2

ADMISSIONS

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

Law reviews. — For annual survey article on law of evidence, see 49 *Mercer L. Rev.* 149 (1997).

For comment, "Evidentiary Use of the Express Admissions of Infant Parties," see 3 *Ga. St. B.J.* 122 (1966).

JUDICIAL DECISIONS

Writing not required. — Fact that admissions were not reduced to writing does not make them inadmissible. *Myrick v. State*, 155 Ga. App. 496, 271 S.E.2d 637 (1980).

Justifying statements. — If the accused makes an extra judicial statement in which the accused admits the homicide of which the accused is charged, but couples the admission with a statement of facts or circumstances which shows excuse or justification, such statement is not a confession of guilt, and it is error to charge the law of confession. *Pressley v. State*, 201 Ga. 267, 39 S.E.2d 478 (1946).

Tax return is admissible in evidence to show the amount and value of the property admitted by the taxpayer to be the taxpayer's; but if such a return contains assessments made by someone other than the taxpayer, the assessments are not admissible. *Seagraves v. Seagraves*, 193 Ga. 280, 18 S.E.2d 460 (1942).

Suggestion in admission that party carries insurance does not exclude answer. — According to the generally accepted rule, the

fact that the defendant is insured or otherwise indemnified against loss in the event of a recovery against the defendant cannot be shown as an independent fact by plaintiff, although it may be shown where it is brought out as an incident to the proof of some other fact properly involved; thus, if the answer would be admissible as an admission, the fact that it also contains a suggestion that the party carries insurance would not exclude the answer. *Ideal Pool Corp. v. Champion*, 157 Ga. App. 380, 277 S.E.2d 753 (1981).

Instructions. — After certain of defendant's statements, and defendant's statement in response to a police officer's inquiry could be construed by the jury to constitute admissions, the charge on admissions was relevant and properly adjusted to the evidence. *Mangrum v. State*, 155 Ga. App. 334, 270 S.E.2d 874 (1980).

It would be error for the court to instruct on the law of confessions since defendant's statements amount to admissions only. *Royals v. State*, 155 Ga. App. 378, 270 S.E.2d 906 (1980).

RESEARCH REFERENCES

ALR. — Admissibility of extrajudicial admission by officer or employee in action

upon fidelity bond to which he is not a party, 98 ALR 763.

Admissibility as against interest of statement or report made out of court regarding accident as affected by the fact that it relates to or includes matters of opinion or conclusion, 118 ALR 1230.

Valuation for taxation purposes as admissible to show value for other purposes, 39 ALR2d 209.

Admissibility and weight of admissions and acknowledgments to rebut presumption of payment from lapse of time, 48 ALR2d 865.

Admissibility of confession, admission, or incriminatory statement of accused as af-

fected by fact that it was made after indictment and in the absence of counsel, 90 ALR2d 732.

Admissibility as evidence in civil cases of admissions by infants, 12 ALR3d 1051.

Admissibility of evidence showing payment, or offer or promise of payment, of medical, hospital, and similar expenses of injured party by opposing party, 65 ALR3d 932.

Products liability: admissibility against manufacturer of product recall letter, 84 ALR3d 1220.

24-3-30. Admissions in pleadings.

Without offering the same in evidence, either party may avail himself of allegations or admissions made in the pleadings of the other. (Civil Code 1895, § 5188; Civil Code 1910, § 5775; Code 1933, § 38-402.)

History of Code section. — This Code section is derived from the decisions in *Wood v. Isom*, 68 Ga. 417 (1882) and *East Tenn., V. & Ga. Ry. v. Kane*, 92 Ga. 187, 18 S.E. 18 (1893).

Cross references. — Request for admission of opposing party, § 9-11-36.

JUDICIAL DECISIONS

History of statute. — Statute is a codification of the principle announced in *East Tenn., V. & Ga. Ry. v. Kane*, 92 Ga. 187, 18 S.E.2d 18, 22 L.R.A. 315 (1893), and a number of prior cases, in which it was asserted that “certainly a party should be relieved from proving that which his adversary distinctly alleges,” and this a party may do “without formally tendering the pleading in evidence.” *Greene v. Gulf Oil Corp.*, 119 Ga. App. 87, 166 S.E.2d 626 (1969); *Carver v. Saye*, 198 Ga. App. 146, 400 S.E.2d 683 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 683 (1991).

An admission in the pleadings is to be taken as true, and the record should not be burdened by proof of the fact admitted. *Greene v. Gulf Oil Corp.*, 119 Ga. App. 87, 166 S.E.2d 626 (1969).

Pleader is bound by the allegations of the pleader's own pleadings, and what the pleader alleges in the pleader's pleadings to be true is evidence that the pleader is not even permitted to deny. *State Hwy Dep't v. Lumpkin*, 222 Ga. 727, 152 S.E.2d 557 (1966).

When the plaintiff never sought to amend or withdraw averments of fact made in plaintiff's declaratory judgment petition, plaintiff was bound by those admissions and could not put up evidence over objection to contradict them. *Keeley v. Cardiovascular Surgical Assocs.*, 236 Ga. App. 26, 510 S.E.2d 880 (1999).

When the trial court accepted into evidence tenants' affidavits which directly contradicted earlier admissions made by the tenants in their pleadings, those earlier admissions were considered withdrawn. Therefore, the trial court erred in granting summary judgment to the landlord as a matter of law under the termination clause of the lease based on the tenants' earlier admissions that the tenants were the ones who had terminated the lease. *Michel v. Abrahams*, 254 Ga. App. 293, 562 S.E.2d 194 (2002).

When the pleading is inconsistent, the admission, not the denial, prevails. *Taylor v. Crawford*, 119 Ga. App. 262, 167 S.E.2d 404 (1969); *Johnson v. Daniel*, 135 Ga. App. 926, 219 S.E.2d 579 (1975).

Effect of conflicting evidence on pleadings. — Party is not prevented, per se, from making an admission in *judicio* in the party's pleadings as to a fact merely because conflicting evidence may exist as to that issue of fact. If the trial court admits that conflicting evidence and either the court (e.g., when ruling on a motion for summary judgment) or the jury (when reaching a verdict) considers the conflicting evidence on the merits, the pleadings at that point become amended to conform to such evidence. *Walker v. Jack Eckerd Corp.*, 209 Ga. App. 517, 434 S.E.2d 63 (1993).

When the trial court does not allow conflicting evidence to be admitted or, when applicable, elects not to consider the issue on the merits, the admission of fact made in the pleadings remains in full force and effect as an admission in *judicio* and is conclusive of the fact admitted. *Walker v. Jack Eckerd Corp.*, 209 Ga. App. 517, 434 S.E.2d 63 (1993).

Admissions of fact in the pleadings can always be taken advantage of by the opposite party, and can be used as evidence, even though the pleadings should be stricken or withdrawn. *Improved Fertilizer Co. v. Swift & Co.*, 15 Ga. App. 601, 84 S.E. 132 (1914); *Clift & Goodrich, Inc. v. Mincey Mfg. Co.*, 41 Ga. App. 38, 152 S.E. 136 (1930); *Carver v. Carver*, 199 Ga. 352, 34 S.E.2d 509 (1945); *Stallings v. Britt*, 204 Ga. 250, 49 S.E.2d 517 (1948); *Cummings v. State*, 84 Ga. App. 698, 67 S.E.2d 156 (1951); *Spurlock v. Commercial Banking Co.*, 151 Ga. App. 649, 260 S.E.2d 912 (1979); *Lawson v. Duke Oil Co.*, 155 Ga. App. 363, 270 S.E.2d 898 (1980).

When the pleading has been stricken, the admission contained in the pleading remains to be utilized as evidence of fact which the admitting party can explain but may be unable to conclusively refute. *Strozier v. Simmons U.S.A. Corp.*, 192 Ga. App. 601, 385 S.E.2d 677, cert. denied, 192 Ga. App. 903, 385 S.E.2d 677 (1989).

In an action seeking damages from an insurance company based on a claim that the company acted in bad faith when the company failed to settle an injured party's claim against an insured, the insurance company admission, in the company's answer to the complaint, that the injured party offered to settle the case for the policy limits of the insured's policy was properly offered to the

jury as an admission that there was a policy of insurance. *VFH Captive Ins. Co. v. Cielinski*, 260 Ga. App. 807, 581 S.E.2d 335 (2003).

Defendants were bound by admissions which were never expressly withdrawn. — Defendants, who never expressly withdrew the admissions contained in the pleadings, were bound by the admissions, and even if the amendment to their answer impliedly withdrew the admissions, the defendants would still be faced with the admissions as evidence. *Strozier v. Simmons U.S.A. Corp.*, 192 Ga. App. 601, 385 S.E.2d 677, cert. denied, 192 Ga. App. 903, 385 S.E.2d 677 (1989).

Alternative pleadings. — Civil Practice Act, O.C.G.A. Ch. 11, T. 9, which permits alternative pleadings does not change the rule of evidence that a party is bound by the party's judicial admissions. *Ditch v. Royal Indem. Co.*, 205 Ga. App. 478, 422 S.E.2d 868, cert. denied, 205 Ga. App. 899, 422 S.E.2d 868 (1992).

Considered as evidence in record. — When matter is contained in a pleading, from which inferences may be drawn beneficial to the opposite party, it may be considered as evidence in the record in the party's favor. *Johnson v. Daniel*, 135 Ga. App. 926, 219 S.E.2d 579 (1975); *Lawson v. Duke Oil Co.*, 155 Ga. App. 363, 270 S.E.2d 898 (1980); *Metro Leasing, Inc. v. Health Educ. & Research Servs., Inc.*, 193 Ga. App. 157, 387 S.E.2d 399 (1989).

Can be explained or disproved. — When the answer admitted an allegation of the petition but was later amended by striking the admission, the admission, though introduced as evidence for the plaintiff, was not conclusive, and could be explained or disproved by the defendant. *Watkins v. Price Mercantile Co.*, 45 Ga. App. 272, 164 S.E. 231 (1932).

Admission must be withdrawn from record. — Party to a suit will not even be allowed to disprove an admission made in the party's pleadings without first withdrawing the admission from the record. *Clift & Goodrich, Inc. v. Mincey Mfg. Co.*, 41 Ga. App. 38, 152 S.E. 136 (1930); *Maryland Cas. Co. v. Sammons*, 67 Ga. App. 83, 19 S.E.2d 314 (1942); *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947); *Dye v. Hirsch*, 92 Ga. App. 803, 90 S.E.2d 332 (1955); *Plymouth*

Record Corp. v. Books, Inc., 92 Ga. App. 753, 90 S.E.2d 336 (1955); Grigsby v. Fleming, 96 Ga. App. 664, 101 S.E.2d 217 (1957); Greene v. Gulf Oil Corp., 119 Ga. App. 87, 166 S.E.2d 626 (1969); Sambo's of Ga., Inc. v. First Am. Nat'l Bank, 152 Ga. App. 899, 264 S.E.2d 330 (1980); Strozier v. Simmons U.S.A. Corp., 192 Ga. App. 601, 385 S.E.2d 677, cert. denied, 192 Ga. App. 903, 385 S.E.2d 677 (1989).

Rule only applies to factual admissions. —

Rule that a party cannot disprove an admission in pleadings without first withdrawing the admission from the record applies to admissions of fact, and is not applicable when the admission is merely the opinion on the part of the party making the admission as to the legal effect of the instrument sued on. Clift & Goodrich, Inc. v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136 (1930); Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1 (1985); Perry & Co. v. New S. Ins. Brokers of Ga., Inc., 182 Ga. App. 84, 354 S.E.2d 852 (1987); Ellerbee v. Interstate Contract Carrier Corp., 183 Ga. App. 828, 360 S.E.2d 280 (1987).

Pleading "admission" that a particular person was an heir at law of the deceased was not conclusive against the pleader. Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1 (1985).

Pleading that was replete with a party's opinions and legal conclusions could not be considered an admission in *judicio* that would be effectively binding upon other parties. Mountain Bound, Inc. v. Alliant Foodservice, Inc., 242 Ga. App. 557, 530 S.E.2d 272 (2000).

Appellants made admission in *judicio*, in their motion for new trial or in the alternative motion to amend judgment, of the fact that the probate court "entered a judgment styled 'Final Order'"; this admission in *judicio* expressed the fact that the order was entered on the date specified. Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Use of withdrawn pleadings. — When a part of a petition or of a plea is stricken by amendment, the stricken part may, if pertinent to any issue remaining in the case, be offered in evidence; but, unless so offered and admitted in evidence, it is not evidence for the consideration of the jury or proper matter for argument of counsel, save only

when the amendment is made after the evidence is closed. Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138, 33 S.E. 945 (1899); Alabama Midland Ry. v. Guilford, 114 Ga. 627, 40 S.E. 794 (1902); Continental Trust Co. v. Bank of Harrison, 36 Ga. App. 149, 136 S.E. 319 (1926).

Withdrawal of admission by amendment of pleadings. — In an action against a negligent driver's father, the father's initial admission that the vehicle was a family purpose vehicle was made regarding a legal opinion, i.e., agency under the family purpose doctrine, and, therefore, it could not be an admission in *judicio* or an admission against interest, because the admission was a legal opinion or conclusion that had been withdrawn by amendment from the pleadings. Wahnschaff v. Erdman, 232 Ga. 77, 502 S.E.2d 246 (1998).

Defendant could not cross-examine plaintiff on allegations in plaintiff's complaint since the complaint was amended and the contentions therein were no longer solemn admissions in *judicio*. Crosby v. Cooper Tire & Rubber Co., 240 Ga. App. 857, 524 S.E.2d 313 (1999).

If the party amended the party's pleadings to withdraw the party's judicial admissions, the party could introduce evidence contravening the admissions, and if such contradictory evidence was admitted, even over the objection of the other party, then under O.C.G.A. § 9-11-15(b), such evidence could be deemed to amend the pleadings to withdraw the admissions. SAKS Assocs., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799 (2006).

In passengers' negligence suit against a taxicab company, to the extent the company's initial answer contained an admission under O.C.G.A. § 24-3-30 that the driver was the company's employee, such admission was withdrawn by timely amendment, allowing positive evidence of the contrary to overcome it as an admission. Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460 (2009).

Averments negating existence of right claimed. — If the averments of a complaint expressly negative the existence of a right claimed therein, or show the impossibility of its existence, they are to be regarded as evidence deposited in the record in favor of the opposite party, and demand the finding

thereon in the party's favor. *New Zealand Fire Ins. Co. v. Brewer*, 29 Ga. App. 773, 116 S.E. 922 (1923).

Admissions not binding on codefendant when interests adverse. — Any admissions in judicio as to amounts owed to lenders by a corporation made by the first borrower were not binding on the corporation under O.C.G.A. § 24-3-30 as the borrowers' interests were not joint but adverse as the first borrower was not a shareholder, officer, or director of the corporation. *Walker v. Ace Auto Sales & Leasing, Inc.*, 294 Ga. App. 267, 668 S.E.2d 877 (2008).

Effect of pretrial order. — In a personal injury suit, a company explicitly preserved the company's argument that the company was not a proper party in the consolidated pretrial order which the trial court signed. Under Ga. Unif. Super. Ct. R. 7.2, this order expressly superseded the pleadings and established the issues in litigation; thus, the company was not estopped under O.C.G.A. § 24-3-30 from asserting at trial that the company was not the proper party to be sued. *First Support Servs. v. Trevino*, 288 Ga. App. 850, 655 S.E.2d 627 (2007), cert. denied, 2008 Ga. LEXIS 388 (Ga. 2008).

Judicial admission. — Trial court did not err in granting summary judgment to the materialman on the materialman's action to recover under a lien discharge bond, as the surety admitted in surety's response to the materialman's amended complaint that the materialman had performed all conditions precedent to bring the materialman's action; the surety's admission was a judicial admission that bound the surety and contradicted its defense that the materialman had not fulfilled a lien statute notice requirement. *Washington Intl Ins. Co. v. Hughes Supply, Inc.*, 271 Ga. App. 50, 609 S.E.2d 99 (2004).

Inconsistent defenses. — Defendant may, of course, file inconsistent defenses; but the plaintiff may take advantage of the contradictory nature of the defenses, and may use, as an admission against the defendant, a statement made is one of the pleas, although in another of the pleas there is set up a contradictory state of facts. The jury is not bound to accept the testimony of a witness which is contradictory to a plea one has filed. *Wheeler v. Salinger*, 33 Ga. App. 300, 125 S.E. 888 (1924); *Myers v. Woodson*, 33 Ga. App. 748, 127 S.E. 888 (1925).

Estoppel. — When upon a suit on a contract, the plaintiff obtains a judgment or relief amounting to an adjudication in the plaintiff's favor, and is afterwards sued for a subsequent breach of plaintiff's own part of the contract, the plaintiff is estopped to deny the essential terms of the contract as pleaded in the former petition under which the plaintiff recovered. *Florence, Phillips & Co. v. Newsome*, 26 Ga. App. 501, 106 S.E. 619 (1921).

Reviewing court on appeal will not consider the question of whether a plaintiff's alleged bill of sale was sufficient to constitute a valid lien or claim of title to the proceeds of the sale since the defendant had conceded in the court below, by a solemn admission in judicio, that the bill of sale of the plaintiff constituted a prior claim on the proceeds of the sale, and the defendant defended upon the sole ground of estoppel. *C.I. & M. Dingfelder v. Georgia Peach Growers Exch.*, 182 Ga. 521, 186 S.E. 425 (1936).

Estoppel not applicable in later and different action. — Statements in pleadings are considered as judicial and not as evidentiary admissions, and for these purposes, until withdrawn or amended, are conclusive; but estoppels by admissions made in pleading apply only between parties and privies to the suit or litigation in which the admissions relied on as an estoppel were made; when such admissions in pleadings are introduced as evidence in a later and different action, they no longer operate as admissions in judicio but, rather, as evidentiary admissions and, as evidence, such admissions may be explained or contradicted. *Foster v. State*, 157 Ga. App. 554, 278 S.E.2d 136 (1981).

Objection invalid. — When the defendant admits in the defendant's plea the execution by the defendant of an instrument which forms a part of the plaintiff's abstract of title, in view of the statute it is not a good objection to the admission of the instrument in evidence that the instrument's execution has not been proved. *Vizard v. Moody*, 119 Ga. 918, 47 S.E. 348 (1904).

Incorporating admission in brief of evidence. — Admissions in pleading were properly incorporated in the brief of evidence, though stricken by amendment after evidence closed. *Lydia Pinkham Medicine Co. v. Gibbs*, 108 Ga. 138, 33 S.E. 945 (1899).

Instructions. — If a party desires instructions to the jury touching admissions made

in the other party's pleadings, the party should present a proper request therefor. *Georgia Power Co. v. Rabun*, 111 Ga. App. 63, 140 S.E.2d 568 (1965).

In the absence of a proper request, a trial court does not err in failing to instruct the jury specifically that various portions of the opposite party's pleadings should be considered by the jury as admissions against that party. *Crane v. Doolittle*, 116 Ga. App. 572, 158 S.E.2d 426 (1967).

Cited in *Whelchel v. Roark*, 31 Ga. App. 75, 119 S.E. 451 (1923); *Pullman Co. v. Bullard*, 44 F.2d 347 (5th Cir. 1930); *Terrell v. Harris*, 42 Ga. App. 760, 157 S.E. 387 (1931); *Field v. Manly*, 185 Ga. 464, 195 S.E. 406 (1938); *Porter v. La Grange Banking & Trust Co.*, 187 Ga. 528, 1 S.E.2d 441 (1939); *Snider v. Snider*, 190 Ga. 381, 9 S.E.2d 654 (1940); *Kimsey v. Mickel*, 191 Ga. 158, 12 S.E.2d 567 (1940); *Smith v. Vestal Lumber & Mfg. Co.*, 202 Ga. 360, 43 S.E.2d 163 (1947); *Martin v. Home Owners Loan Corp.*, 207 Ga. 657, 63 S.E.2d 901 (1951); *Columbus Wine Co. v. Sheffield*, 83 Ga. App. 593, 64 S.E.2d 356 (1951); *Fountain v. Tidwell*, 92 Ga. App. 199, 88 S.E.2d 486 (1955); *Jefferies v. State*, 92 Ga. App. 483, 88 S.E.2d 713 (1955); *Wood v. Western & A.R.R.*, 95 Ga. App. 205, 97 S.E.2d 556 (1957); *Wells v. Metropolitan Life Ins. Co.*, 107 Ga. App. 826, 131 S.E.2d 634 (1963); *Weyandt v. Ballard*, 110 Ga. App. 362, 138 S.E.2d 591 (1964); *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966); *Hill v. General Rediscout Corp.*, 116 Ga. App. 459, 157 S.E.2d 888 (1967); *Taylor v. Buckhead Glass Co.*, 120 Ga. App.

663, 171 S.E.2d 779 (1969); *Colbert Co. v. Newsom*, 125 Ga. App. 571, 188 S.E.2d 266 (1972); *Mar-Vel, Inc. v. Counts*, 127 Ga. App. 634, 194 S.E.2d 503 (1972); *Lanier v. Foster*, 133 Ga. App. 149, 210 S.E.2d 326 (1974); *Gray v. Atlanta Transit Sys.*, 136 Ga. App. 573, 222 S.E.2d 67 (1975); *Smith v. Smith*, 145 Ga. App. 816, 244 S.E.2d 917 (1978); *Citizens & S. Realty Investors v. L.G. Balfour Co.*, 152 Ga. App. 852, 264 S.E.2d 304 (1980); *Friddell v. Rawlins*, 160 Ga. App. 44, 285 S.E.2d 779 (1981); *Panter v. Miller*, 165 Ga. App. 266, 299 S.E.2d 185 (1983); *Smithloff v. Benson*, 173 Ga. App. 870, 328 S.E.2d 759 (1985); *Whitt v. Walker County*, 176 Ga. App. 643, 337 S.E.2d 425 (1985); *Patterson v. Butler*, 200 Ga. App. 657, 409 S.E.2d 531 (1991); *KHD Deutz of Am. Corp. v. Utica Mut. Ins. Co.*, 220 Ga. App. 194, 469 S.E.2d 336 (1996); *Budget Rent-A-Car of Atlanta, Inc. v. Webb*, 220 Ga. App. 278, 469 S.E.2d 712 (1996); *Rischack v. City of Perry*, 223 Ga. App. 856, 479 S.E.2d 163 (1996); *Weekes v. Nationwide Gen. Ins. Co.*, 232 Ga. App. 144, 500 S.E.2d 620 (1998); *Wilson v. Ortiz*, 232 Ga. App. 191, 501 S.E.2d 247 (1998); *Bell v. State*, 234 Ga. App. 693, 507 S.E.2d 535 (1998); *R.D. Stallion Carpets, Inc. v. Dorsett Indus., L.P.*, 244 Ga. App. 719, 536 S.E.2d 523 (2000); *Hooper v. State*, 252 Ga. App. 574, 555 S.E.2d 842 (2001); *C & F Servs. v. First S. Bank*, 258 Ga. App. 71, 573 S.E.2d 102 (2002); *Knutsen v. Atlanta Women's Specialists Obstetrics & Gynecology*, 264 Ga. App. 87, 589 S.E.2d 588 (2003); *Am. Nat'l Prop. & Cas. Co. v. Americast, Inc.*, 297 Ga. App. 443, 677 S.E.2d 663 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d Evidence, § 787.

C.J.S. — 31A C.J.S., Evidence, § 418 et seq.

ALR. — Admissibility as evidence of pleadings as containing admissions against interest, 14 ALR 22; 90 ALR 1393; 52 ALR2d 516.

Necessity in action on judgment of sister state confessed under warrant of attorney, of alleging and proving the law of the latter state permitting such judgment, 155 ALR 921.

Admissibility in evidence of withdrawn,

superseded, amended, or abandoned pleading as containing admissions against interest, 52 ALR2d 516.

Admissibility of pleading as evidence against pleader, on behalf of stranger to proceedings in which pleading was filed, 63 ALR2d 412.

Counsel's right, in summation in civil case, to point out inconsistencies between opponent's pleading and testimony, 72 ALR2d 1304.

Admission of liability as affecting admissibility of evidence as to the circumstances of

accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

24-3-31. Admissions of parties to record admissible generally; exceptions.

The admission by a party to the record shall be admissible in evidence when offered by the other side, except in the following cases:

- (1) Admissions of a mere nominal party or naked trustee;
- (2) Admissions of one of several parties with no joint interest, unless the issue is of such a character that the effect of the admission can be confined to the one party alone;
- (3) Admissions of a trustee before he is clothed with the trust;
- (4) Admissions of defendants in execution in claim cases, after the pendency of litigation. (Orig. Code 1863, § 3707; Code 1868, § 3731; Code 1873, § 3784; Code 1882, § 3784; Civil Code 1895, § 5189; Civil Code 1910, § 5776; Code 1933, § 38-403.)

Law reviews. — For note, “Lilly v. Virginia: Answering the Williamson Question — Is the Statement Against Penal Interest Exception ‘Firmly Rooted’ Under Confrontation Clause Analysis?,” see 51 Mercer L. Rev. 1343 (2000).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
 PARTIES
 DEFENDANTS IN EXECUTION IN CLAIM CASES
 EXAMPLES

General Consideration

Nature of evidence. — Admissions by parties as to a matter relevant to the case on trial are not to be regarded as inferior evidence, but when satisfactorily proven they constitute grounds of belief on which the mind justly reposes with strong confidence. Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709 (1951).

Admission in judicio. — Claimant’s admissions in judicio against the claimant’s own interests were binding upon the claimant since a solemn admission in judicio is conclusive as a matter of law on the matter stated and cannot be contradicted by other evidence unless it is withdrawn or amended on formal motion. Piedmont Aviation, Inc. v. Washington, 181 Ga. App. 730, 353 S.E.2d 847 (1987).

Admissions in judicio as to matters of fact

against one party’s interest are binding on another party when the interests of the two are joint but not when their interests are adverse. Batchelor v. State Farm Mut. Auto. Ins. Co., 240 Ga. App. 366, 526 S.E.2d 68 (1999).

Personal knowledge not required. — To be admissible in evidence, admissions do not necessarily have to be founded on the personal knowledge of the party making the admissions. Brooks v. Sessoms, 47 Ga. App. 554, 171 S.E. 222 (1933).

Admissions do not come in, on the ground that the party making the admissions is speaking from the party’s personal knowledge, but upon the ground that a party will not make admissions against oneself unless the admissions are true; the fact that the party makes the admissions against the party’s interest can be reasonably explained

General Consideration (Cont'd)

only on the supposition that the party is constrained to do so by the force of the evidence. *Mayo v. Owen*, 208 Ga. 483, 67 S.E.2d 709 (1951).

Prior admissions of a party to an action may be offered in evidence although not against interest when made and, if believed by the jury, may be considered as substantive evidence of the fact sought to be proved. *W.T. Harvey Lumber Co. v. J.M. Wells Lumber Co.*, 104 Ga. App. 498, 122 S.E.2d 143 (1961).

Introduction of admissions contained in a stricken plea. — Such admissions when thus made are to be taken as true, because the admissions are asserted by the party personally; and while the party may withdraw the admissions formally from the pleadings, the party cannot by a mere withdrawal avoid the effect of the admissions since the admissions may still be used as evidence against the party. *Stallings v. Britt*, 204 Ga. 250, 49 S.E.2d 517 (1948).

While one may withdraw admissions formally from the pleadings, one cannot by a mere withdrawal avoid the effect of the admissions made as the admissions remain admissible into evidence. *Richmond County v. Sibert*, 218 Ga. 209, 126 S.E.2d 761 (1962).

Estimates. — An admission in the testimony of a party is not, as a matter of law, to be taken as conclusively true, when the admission is in the nature of an estimate or guess; in such case it may be overcome by evidence of the facts and circumstances which form the basis of the admission. *Hansberger Motor Transp. Co. v. Pate*, 51 Ga. App. 877, 181 S.E. 796 (1935).

Charge by court. — Court is not required to charge on the effect of admissions without a special request to that effect. *Hawkins v. Kermod*, 85 Ga. 116, 11 S.E. 560 (1890); *Wrightsville & Tennille R.R. v. Lattimore*, 118 Ga. 581, 45 S.E. 453 (1903).

Cited in *Jones, Drumright & Co. v. Thacker & Co.*, 61 Ga. 329 (1878); *Bacon v. Hinesville Bank*, 38 Ga. App. 422, 144 S.E. 125 (1928); *Jenkins v. Best Trading Co.*, 39 Ga. App. 214, 146 S.E. 512 (1929); *Jett v. Securities Inv. Co.*, 68 Ga. App. 454, 23 S.E.2d 265 (1942); *Bailey v. Warlick*, 196 Ga. 642, 27 S.E.2d 322 (1943); *Sconyers v. Pierce*, 82 Ga. App. 436, 61 S.E.2d 439 (1950);

Georgia Sav. Bank & Trust Co. v. Marshall, 207 Ga. 314, 61 S.E.2d 469 (1950); *Hubbard v. Cofer*, 98 Ga. App. 565, 106 S.E.2d 358 (1958); *Sims v. Hoff*, 106 Ga. App. 626, 127 S.E.2d 679 (1962); *Timeplan Loan & Inv. Corp. v. Moorehead*, 221 Ga. 648, 146 S.E.2d 748 (1966); *Gunnells v. Cotton States Mut. Ins. Co.*, 117 Ga. App. 123, 159 S.E.2d 730 (1968); *Hardee's Food Sys. v. Bowers*, 121 Ga. App. 316, 173 S.E.2d 439 (1970); *Overnite Transp. Co. v. Hart*, 126 Ga. App. 566, 191 S.E.2d 308 (1972); *Carter v. Madray*, 128 Ga. App. 40, 195 S.E.2d 685 (1973); *Jackson v. Riviera Dev. Corp.*, 130 Ga. App. 146, 202 S.E.2d 545 (1973); *Thomason v. Genuine Parts Co.*, 156 Ga. App. 599, 275 S.E.2d 159 (1980); *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981); *Southern Educators Assocs. v. Silver*, 245 Ga. 520, 284 S.E.2d 3 (1981); *Miller Distrib. Co. v. Rollins*, 163 Ga. App. 635, 295 S.E.2d 187 (1982); *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982); *Colbert v. Doe*, 164 Ga. App. 618, 298 S.E.2d 592 (1982); *Patterson v. Butler*, 200 Ga. App. 657, 409 S.E.2d 531 (1991); *Brown v. Super Disc. Mkts., Inc.*, 223 Ga. App. 174, 477 S.E.2d 839 (1996); *McNamee v. A.J.W.*, 238 Ga. App. 534, 519 S.E.2d 298 (1999); *Harrison v. State*, 253 Ga. App. 179, 558 S.E.2d 760 (2002); *Am. Southern Ins. Group, Inc. v. Goldstein*, 291 Ga. App. 1, 660 S.E.2d 810 (2008); *Morgan v. Howard*, 285 Ga. 512, 678 S.E.2d 882 (2009).

Parties

Joint parties. — Admissions of one of two or more parties to the record are not admissible to bind the others, until a joint interest is proven by other testimony. *Boswell v. Blackman*, 12 Ga. 591 (1853); *Kirk v. Barnes*, 147 Ga. App. 423, 249 S.E.2d 140 (1978).

Because no joint interest existed between an LLC and its sole managing member, but instead the evidence showed that the two had separate and distinct positions in a lawsuit, the interest of both were not so joint and coextensive so as to justify treating the judicial admissions of the LLC as binding on the managing member. *Milk v. Total Pay & HR Solutions, Inc.*, 280 Ga. App. 449, 634 S.E.2d 208 (2006).

Rapist's admission to entering an apartment building through a broken gate was admissible evidence that could be used

against the rapist's co-defendants, a landlord and a security company, in the victim's premises liability action against the landlord and security company. The admission could be used to establish the rapist's conduct even though the conduct could not be imputed to the landlord and security company. *Walker v. Aderhold Props.*, No. A09A1951, 2010 Ga. App. LEXIS 304 (Mar. 25, 2010).

When the personal representative of a deceased person is a substantial party to a suit, the testimony of a witness as to statements made by the deceased to the witness, concerning the vital issue in the cause, adverse to the contention of such personal representative, when offered by the opposite party, the witness not being incompetent to testify, is admissible in evidence as admissions. *Ferrell v. Wight*, 187 Ga. 360, 200 S.E. 271 (1938); *Fuller v. Fuller*, 107 Ga. App. 429, 130 S.E.2d 520 (1963).

Wills. — Admission of an executor before qualification, or of a legatee, unless the sole legatee, shall not be admissible in evidence to impeach the will. To this general rule there is an exception: if the admission be in reference to the conduct or the acts of the executor or legatee personally as to some matter relevant to the issue on trial, the same will be admitted to impeach the will, although made by the executor before qualification, or by a legatee who is not the sole legatee. *Brown v. Kendrick*, 163 Ga. 149, 135 S.E. 721 (1926).

Admissions of nominal defendant as error. — Although the reception in evidence of the admissions of a nominal defendant was error, in view of former Civil Code 1910, §§ 5776 and 6083 (see O.C.G.A. §§ 5-5-22 and 24-3-31), it will not work the grant of a new trial, since the judge below, in the exercise of the judge's discretion, refused to grant a new trial on this ground. *Jenkins v. Lane*, 154 Ga. 454, 115 S.E. 126 (1922).

When admission by person not party to action is admissible. — Rule, as to parties to a suit is that a plea of guilty may be shown as an admission against interest; admissions by persons not a party to an action, however, are admissible in evidence only when the party making the admission is the real party in interest, although not a party to the record, or when a party to the record refers another to such third party for information, or when there is an admission by a third

person against that person's interest as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause. *Cobb v. Garner*, 158 Ga. App. 110, 279 S.E.2d 280 (1981).

Defendants in Execution in Claim Cases

Term "litigation," as employed in statute, is not confined merely to the determination of a possible issue which may arise after levy, between the plaintiff in fi. fa. and some possible claimant, but the term includes also the previous suit in which the fi. fa. had its origin. *Smith v. Johnson*, 13 Ga. App. 837, 80 S.E. 1051 (1913).

Not relevant to competency. — Provision upon the subject of the admissibility of admissions of defendants in fi. fa. in claim cases has no reference to the competency of a defendant in fi. fa. as a witness in the trial of such a case, and would be no authority for excluding one's testimony on objection of the plaintiff in fi. fa. when offered by the claimant. *Cornelia Bank v. Taylor*, 37 Ga. App. 538, 140 S.E. 901 (1927).

Admissions before litigation pending. — Admissions of a defendant in execution against the defendant's interest, before the pendency of litigation, are admissible in evidence in favor of either the claimant or the plaintiff in execution. *Smith v. Cox*, 20 Ga. 240 (1856). See also *Horn v. Ross & Leitch*, 20 Ga. 210, 65 Am. Dec. 621 (1856); *James v. Taylor*, 93 Ga. 275, 20 S.E. 309 (1893); *Rountree v. Gaulden*, 128 Ga. 737, 58 S.E. 346 (1907).

Admission for impeachment purposes. — Extrajudicial statement respecting the title to the property levied on, made by the defendant in fi. fa. in a claim case, is not inadmissible as being an admission, when the statement is offered and admitted in evidence solely for the purpose of impeaching the testimony of such defendant. *Nesmith v. Nesmith*, 37 Ga. App. 779, 142 S.E. 176 (1928).

Testimony from previous trials. — Declarations of the defendant in fi. fa. made under oath as a witness at a former trial of the same case in disparagement of the claimant's title were not admissible in evidence against the claimant. *Tillman v. Fontaine*, 98 Ga. 672, 27 S.E. 149 (1896).

Declarations as to title. — Declarations by a defendant in fi. fa. against the defendant's

Defendants in Execution in Claim Cases (Cont'd)

title to property in the defendant's possession are not admissible in behalf of a claimant, if made after the judgment was obtained or while the litigation was pending and with reference thereto. *James v. Taylor*, 93 Ga. 275, 20 S.E. 309 (1893).

Declarations of the defendant in *fi. fa.* as to the ownership of the property levied on, made after the filing of the suit which resulted in the rendition of the judgment against the defendant, are admissions after the pendency of the litigation, and are excluded by the terms of statute. *Smith v. Johnson*, 13 Ga. App. 837, 80 S.E. 1051 (1913).

Evidence as to a declaration made by the defendant in *fi. fa.* after the levy that the property levied on belonged to the claimant and that the defendant in *fi. fa.* bought the property merely as the claimant's agent, was improperly admitted, since it was a declaration made by the defendant in *fi. fa.* after the pendency of the litigation. *Alford v. Sharber*, 41 Ga. App. 707, 154 S.E. 463 (1930).

Possession. — In the trial of a claim case, declarations of a defendant in execution made after the pendency of litigation and prior to the time of levy, but at a time when the defendant was not in possession of the property levied on, that the defendant owned such property, are not admissible as evidence and of no probative value even if admitted without objection. *Nelson v. Brannon*, 32 Ga. App. 455, 123 S.E. 735 (1924); *McSwain v. Estroff*, 34 Ga. App. 183, 129 S.E. 16 (1925).

Sale of property. — Declarations of the defendant in *fi. fa.* made after the suit was brought which resulted in the judgment the plaintiff was then seeking to enforce, and shortly before that judgment was rendered, to the effect that the defendant had sold the lands in question to the claimant, were not admissible in the latter's favor. *Tillman v. Fontaine*, 98 Ga. 672, 27 S.E. 149 (1896).

Recital in deed as to payment of purchase money. — While, in a deed from defendant in *fi. fa.* to claimant, the receipt or recital of the payment of purchase money may be evidence of payment, when the deed was made before the suit in which the judgment was obtained, was commenced, yet it is but

prima facie evidence, and a charge that it is not evidence will not necessitate the grant of a new trial, if the other facts of the case required the verdict as found. *Bonner v. Metcalf*, 58 Ga. 236 (1877).

Examples

Tax digest as evidence. — In a claim case the tax digest, showing the returns of the defendant in execution before the pendency of litigation, is admissible in evidence as an admission of the defendant. It is competent also to show that the claimant did not make any return of property for taxation during the year in which the judgment was rendered. *McLendon v. Dunlap Hdwe. Co.*, 3 Ga. App. 206, 59 S.E. 718 (1907).

Letters as evidence. — Letters written by the defendant in execution during the year in which the judgment was rendered, both before and after its date, to an overseer, giving directions as to the cultivation of the crop subsequently under levy and as to the management of the farm during that year, and relating to other like matters, were admissible in evidence for the plaintiff as acts of the defendant tending to show possession and control by the defendant. *Tillman v. Fontaine*, 98 Ga. 672, 27 S.E. 149 (1896). See also *Mixon v. Lacey*, 26 Ga. App. 542, 107 S.E. 259 (1921).

In an action by a customer who ate a muffin, which allegedly contained an industrial staple, against the franchisor of the restaurant and the company which allegedly manufactured the muffin mix, a letter from the franchisee's insurer to the customer's attorney, in which the attorney identified the alleged manufacturer of the muffin mix, was inadmissible hearsay as the franchisee's insurer was neither a party nor a privy of a party. *Jackson v. Dunkin' Donuts, Inc.*, 211 Ga. App. 596, 440 S.E.2d 56 (1994).

Telephone messages. — As telephone messages made following conversations between a party opponent and a testifying witness noted the contents of a conversation, not an act, transaction, occurrence, or event, the business records exception to the hearsay rule was inapplicable; for the contents of the party's telephone conversations to be admissible, the party would have to be given the opportunity to cross-examine the employees to whom the witness spoke with in regard to the potential for misrepresenting

the statements. *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006).

Recorded telephone conversations with an informant. — There was circumstantial evidence that a defendant was the participant in recorded phone conversations with an informant; therefore the conversations were admissible as admissions of a party opponent under O.C.G.A. § 24-3-31, and the entirety of the calls were admissible under O.C.G.A. § 24-3-38. *Kimble v. State*, 301 Ga. App. 237, 687 S.E.2d 242 (2009).

Admission of liability. — Upon the trial of a suit in which the plaintiff alleged that the plaintiff suffered personal injuries as a result of the negligent operation by the defendant of an automobile in which the plaintiff was traveling, which caused a collision between plaintiff's vehicle and another automobile, a statement afterwards made by the defendant to the plaintiff that the defendant wanted the plaintiff to have all the treatment and attention necessary and would pay for such, and would probably pay something extra to the plaintiff on account of the plaintiff's suffering, was relevant and admissible as tending to show admission of liability. *Rentz v. Collins*, 51 Ga. App. 782, 181 S.E. 678 (1935).

Statements against interest. — Plaintiff's statement to the police officer at the scene of an accident that the plaintiff did not see the truck before the collision was admissible as a statement against interest. *Cleveland v. Bryant*, 236 Ga. App. 459, 512 S.E.2d 360 (1999).

Because the injured party admitted, after the fact, to the coworker that the injured party did not place the hot coffee, that later spilled on the injured party's lap, on the floor because the injured party did not want anything to get on the coworker's new car, the statement was admissible under O.C.G.A. § 24-3-31 as a party's admission. *Bernath v. People Success, Inc.*, 274 Ga. App. 880, 619 S.E.2d 378 (2005).

Undercover detective's testimony regarding a conversation the detective overheard between a defendant and a confidential informant (CI) as to a drug transaction was not inadmissible hearsay as the detective could identify both parties to the conversation and the statement by the defendant fell within the hearsay exception for a statement against interest. *Escobar v. State*, 296 Ga.

App. 898, 676 S.E.2d 291 (2009).

Admissions against penal interest. — In a prosecution for burglary, evidence of defendant's admission that defendant had broken into a house on another occasion was admissible as an admission by defendant against the defendant's penal interest. *Howard v. State*, 227 Ga. App. 5, 488 S.E.2d 489 (1997).

Defendant's adoption of statements in a probation officer's disciplinary reports that defendant violated Diversion Center rules was sufficient to render the documents competent proof of the facts recited as an admission against interest by a party. *Kendrick v. State*, 240 Ga. App. 530, 523 S.E.2d 414 (1999).

Insurance. — Admissions against interest are such even though the admissions may contain a suggestion that the party making the admissions carry insurance, and the mere fact that insurance, or an insurance company, is mentioned as an inextricable part of the statement made by such party or conversation in which the party indulged, does not make the evidence inadmissible when offered by the opposite party, as the party making such statement has only the party to blame in referring to insurance, or to the insurance company, in making the admission against one's interest. *Wade v. Drinkard*, 76 Ga. App. 159, 45 S.E.2d 231 (1947).

Admissions as to gift. — Evidence of admissions by the defendant as to gift of certain property, which was involved in controversy, to the defendant's children and grandchildren, was admissible. *Poullain v. Poullain*, 76 Ga. 420, 4 S.E. 92 (1886).

Statements by a property owner against the owner's interest as to the location of a line in dispute are admissible in evidence. *Seaboard Air Line R.R. v. Taylor*, 214 Ga. 212, 104 S.E.2d 106 (1958).

Statement as to ownership of a colt. — When a horse trainer offered testimony that another trainer spoke with possessors of a colt, who admitted that the colt belonged to the trainer, such hearsay statement was admissible under O.C.G.A. § 24-3-31 as an admission of a party-opponent in the trainer's claim to possession and ownership of the colt; accordingly, a question of fact was raised on the trainer's claim which should have precluded summary judgment pursuant to O.C.G.A. § 9-11-56. *Medlin v.*

Examples (Cont'd)

Morganstern, 268 Ga. App. 116, 601 S.E.2d 359 (2004).

Statements by a dog's owner. — Affidavit by the mother of a dog-bite victim that the dog's owner told her that "she knew something like this would happen" was admissible and was evidence sufficient to preclude summary judgment for defendants. *Johnson v. Kvasny*, 230 Ga. App. 162, 495 S.E.2d 651 (1998).

Suit on insurance policy. — When suit is brought by a widow and child on a life policy, insuring the life of the husband and father, and the plaintiffs are the joint beneficiaries under the policy, the admissions of the widow are competent evidence for the defendant on the question of misrepresentation made in the application for insurance. *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

Employee's statement to an insurance adjuster was not admissible against employer as an admission of a party opponent because the individual was a "mere employee," and as such had no authority to bind the employer by the employee's statement. *HCP III Woodstock, Inc. v. Healthcare Servs. Group, Inc.*, 254 Ga. App. 242, 562 S.E.2d 225 (2002).

Advisory study prepared by private citizens together with public employees is not necessarily admissible as being a statement against the interest of the public entity authorizing the study. To be so considered, the entity must have been constrained by the force of the evidence to issue the report, rather than issuing the report as a result of mere deliberative recognition of the problems addressed in the report. *United Waste, Ltd. v. Fulton County*, 184 Ga. App. 694, 362 S.E.2d 476 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 769, 770, 819 et seq., 828, 871 et seq.

C.J.S. — 31A C.J.S., Evidence, §§ 378, 439 et seq.

ALR. — Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point, 70 ALR 94.

Admissibility of declarations of grantor or transferrer on issue as to whether conveyance or transfer was in fraud of creditors, 83 ALR 1446.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 ALR 1296.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 ALR2d 304.

Admissibility of advertisements, bro-

chures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him, 44 ALR2d 1027.

Admissibility and weight of party's admissions as to tort occurring during his absence, 54 ALR2d 1069.

Admissibility of evidence of party's silence, as implied or tacit admission, when a statement is made by another in his presence regarding circumstances of an accident, 70 ALR2d 1099.

Admissibility, on behalf of one of multiple defendants in accident case, of admission against interest made out of plaintiff's presence by another defendant to a fourth person, 73 ALR2d 1180.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

Admissibility of party's own statement under Rule 801(d)(2)(a) of the Federal Rules of Evidence, 191 ALR Fed. 27.

24-3-32. Admissions by privies.

Admissions by privies in blood, privies in estate, and privies in law shall be admissible as against the parties themselves. However, declarations by

privies in estate after the title shall have passed out of them shall not be received. (Orig. Code 1863, § 3711; Code 1868, § 3735; Code 1873, § 3788; Code 1882, § 3788; Civil Code 1895, § 5193; Civil Code 1910, § 5780; Code 1933, § 38-407.)

JUDICIAL DECISIONS

Privy must be proved beyond reasonable doubt. — Before the sayings of one person should be received in evidence against another, it ought to have become clear beyond a reasonable doubt, that the other claims under that person, or bears to that person some relation of privy. *Aiken v. Cato*, 23 Ga. 154 (1857).

Privies in estate. — Defendants, subsequent owners of a sewer system, were privies in estate only with respect to the estate at the time of their purchase from the prior owners. *Loftis v. Flowers*, 79 Ga. App. 325, 53 S.E.2d 606 (1949).

Prejudice of title conveyed. — Sayings of the former owner are inadmissible to prejudice the title conveyed, if made subsequent to the time when the title and property are parted with. *James v. Kirby*, 29 Ga. 684 (1859).

Sayings and an affidavit of a grantor, that a certain deed is a forgery, were inadmissible against parties holding under the grantor. *Byrd v. Aspinwall*, 108 Ga. 1, 33 S.E. 688 (1899).

Disclaimer of title to land by a predecessor in title of the plaintiff, which predecessor was dead at the time of the trial, but while owner of the plaintiff's tract stated to two witnesses that the acreage involved was not a part of the plaintiff's tract but was the property of another named person, one from whom the plaintiff acquired no title was binding upon the plaintiff's successors in title. *Tolnas v. Pope*, 212 Ga. 50, 90 S.E.2d 420 (1955).

Deed reformation. — In a proceeding to reform a deed, on the grounds of fraud and mistake, the declarations of the grantor, made subsequent to the execution of the

deed, and in the absence of the grantee, are not admissible to prove a mistake in the deed, which may be corrected in equity. *Adair v. Adair*, 38 Ga. 46 (1868).

Admissions of a life-tenant are not evidence against the remainderman as a life tenant is not a privy in estate. *Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68 (1859).

Under a retail installment contract, a seller is in privy with the seller's assignee and any extrajudicial admission of the seller adverse to a prima facie signed delivery receipt is admissible against the assignee of the contract as evidence of nondelivery under former Code 1933, § 38-407 (see O.C.G.A. § 24-3-32), even though the admission qualifies as hearsay under former Code 1933, § 38-301 (see O.C.G.A. § 24-3-1). *Reese v. Termplan, Inc.*, 125 Ga. App. 473, 188 S.E.2d 177 (1972).

Suit by heir against administrator. — Statute inapplicable in a suit by an heir against an administrator to recover a distributive share. *Slappey v. Sumner*, 136 Ga. 692, 71 S.E. 1075 (1911).

Cited in *Elwell v. New England Mtg. Sec. Co.*, 101 Ga. 496, 28 S.E. 833 (1897); *Atlantic Compress Co. v. Chambliss*, 15 Ga. App. 747, 84 S.E. 155 (1915); *McCrea v. Georgia Power Co.*, 179 Ga. 1, 174 S.E. 798 (1934); *Carter v. Marble Prods., Inc.*, 179 Ga. 122, 175 S.E. 480 (1934); *American Cas. Co. v. Windham*, 107 F.2d 88 (5th Cir. 1939); *Hall v. Turner*, 198 Ga. 763, 32 S.E.2d 829 (1945); *Georgia Marble Co. v. Voyles*, 74 Ga. App. 312, 39 S.E.2d 488 (1946); *Myers v. Grant*, 212 Ga. 677, 95 S.E.2d 9 (1956); *Jackson v. GMAC*, 103 Ga. App. 865, 120 S.E.2d 810 (1961); *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 838, 841.

C.J.S. — 31A C.J.S., Evidence, § 448 et seq.

ALR. — Admissions of partner as to past transactions or events as evidence against firm or other partner, 73 ALR 447.

Silence upon hearing statement by spouse

as evidence of admission in civil case, 158 ALR 465.

24-3-33. Admissions by agents.

Admissions by an agent or attorney in fact, during the existence and in pursuance of his agency, shall be admissible against the principal. (Orig. Code 1863, § 3710; Code 1868, § 3734; Code 1873, § 3787; Code 1882, § 3787; Civil Code 1895, § 5192; Civil Code 1910, § 5779; Code 1933, § 38-406.)

Cross references. — Competency of agent as witness either for or against principal, § 10-6-64.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AGENTS

ATTORNEYS

General Consideration

Former Code 1933, § 33-406 (see O.C.G.A. § 24-3-33) and former Code 1933, § 4-315 (see O.C.G.A. § 10-6-64) must be construed together, and the second effectively limits the scope of the first. *Southern Ry. v. Allen*, 118 Ga. App. 645, 165 S.E.2d 194 (1968); *Brooks v. Kroger Co.*, 194 Ga. App. 215, 390 S.E.2d 280 (1990).

O.C.G.A. § 24-3-33 must be construed together with O.C.G.A. § 10-6-64, which states an agent's declarations shall not be admissible against the principal unless the declarations were part of the *res gestae* of the transaction. *Uniflex Corp. v. Saxon*, 198 Ga. App. 445, 402 S.E.2d 67 (1991).

Cited in *Bennett v. Barr*, 49 Ga. App. 831, 176 S.E. 681 (1934); *Thornton v. King*, 81 Ga. App. 122, 58 S.E.2d 227 (1950); *Allgood v. Dalton Brick & Tile Corp.*, 81 Ga. App. 189, 58 S.E.2d 522 (1950); *Ingram v. Doss*, 217 Ga. 645, 124 S.E.2d 87 (1962); *Shapiro Packing Co. v. Landrum*, 109 Ga. App. 519, 136 S.E.2d 446 (1964); *Sisk v. Carney*, 121 Ga. App. 560, 174 S.E.2d 456 (1970); *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 175 S.E.2d 847 (1970); *Seaboard Coast Line R.R. v. Carter*, 226 Ga. 825, 177 S.E.2d 683 (1970); *Colbert Co. v. Newsom*, 125 Ga. App. 571, 188 S.E.2d 266 (1972); *Contractors Equip. Co. v. Gottfried*, 139 Ga. App. 784, 229

S.E.2d 558 (1976); *Gordon v. Athens Convalescent Ctr., Inc.*, 146 Ga. App. 134, 245 S.E.2d 484 (1978); *Hassell v. First Nat'l Bank*, 218 Ga. App. 231, 461 S.E.2d 245 (1995); *Butler v. Bolton Rd. Partners*, 222 Ga. App. 791, 476 S.E.2d 265 (1996); *Eubanks v. CSX Transp., Inc.*, 223 Ga. App. 616, 478 S.E.2d 387 (1996); *Hagan v. Goody's Family Clothing, Inc.*, 227 Ga. App. 585, 490 S.E.2d 107 (1997); *Lane v. Tift County Hosp. Auth.*, 228 Ga. App. 554, 492 S.E.2d 317 (1997).

Agents

Some proof of the agency should be submitted before declarations of an agent are admissible. *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

Establishment of agency. — Fact of agency may be established by proof of circumstances, apparent relations, and the conduct of the parties. *Ross v. Durrence*, 181 Ga. 52, 181 S.E. 581 (1935).

Agent's statements not proof. — Agent certainly cannot confer authority upon oneself, and evidence of the agent's own statements or admissions, therefore, is not admissible against the agent's principal for the purpose of establishing, enlarging, or renewing the agent's authority, nor can the agent's authority be established by showing that the

agent acted as agent, or that the agent claimed to have the powers which the agent assumed to exercise. *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

Agent's declarations may be part of res gestae. — Where extraneous circumstances, independently of and without regard to the declarations of the alleged agent personally, clearly tend to establish the fact of agency, the agent's declarations may be admitted and considered as a part of the *res gestae* of the transaction. *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

Evidence was insufficient to show executive vice president was acting as agent and officer of defendant bank. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Hearsay in an injured party's affidavit in support of summary judgment was inadmissible as the hearsay was not a statement of a party opponent; the individual never held the driver out as an agent, so there was no apparent agency. *Webb v. Day*, 273 Ga. App. 491, 615 S.E.2d 570 (2005).

Trial court's exclusion of a report by an emergency vehicle operator's supervisor regarding a collision that occurred between the emergency vehicle and a driver's vehicle was proper in the driver's personal injury action arising therefrom pursuant to O.C.G.A. §§ 10-6-64 and 24-3-33 as even if the statements contained in the report were part of the *res gestae*, the statements were inadmissible as admissions against interest because neither declarant was a party to the litigation; further, as the statements at issue were cumulative of other testimony that was admitted, the driver could not show prejudice by the trial court's exclusion thereof. *Wynn v. City of Warner Robins*, 279 Ga. App. 42, 630 S.E.2d 574 (2006).

Definite time required. — Declarations of an agent are not competent evidence against the agent's principal, when it does not appear when the declarations were made. *Williams v. Harris*, 105 Ga. App. 252, 124 S.E.2d 429 (1962).

Relevancy based on res gestae. — Relevancy of declarations or admissions of an agent cannot be based upon any idea that an ordinary agent or servant, by virtue of the relation to the principal, speaks in the place of the principal as the principal's alter ego;

but rests on the theory that what the principal does and says with reference to the act in controversy and while engaged in its performance is a part of the *res gestae* of the transaction and constitutes part of, and throws light upon, what the principal personally actually does. *Baker v. H.E. Lowe Elec. Co.*, 47 Ga. App. 259, 170 S.E. 337 (1933).

Not admissible as part of res gestae. — Declaration of an insurance agent that the agent knew the insured had a heart condition and notified the company was not admissible because the admission covered a transaction which did not constitute a part of the *res gestae* of the negotiation of the sale of insurance to the insured. *National Life & Accident Ins. Co. v. Hullender*, 86 Ga. App. 438, 71 S.E.2d 754 (1952).

Testimony of witness was not admissible as part of the *res gestae* because the declarations of the agent were not made while the agent was engaged in a business transaction or otherwise acting for company. *Swift & Co. v. Lawson*, 95 Ga. App. 35, 97 S.E.2d 168 (1957).

Statement of a city clerk that the city accepted responsibility for an accident on a sidewalk was not part of the *res gestae* and was not admissible evidence creating a genuine issue of material fact as to the city's duty to maintain the sidewalk. *Williams v. City of Social Circle*, 225 Ga. App. 746, 484 S.E.2d 687 (1997).

In a premises liability action, the declaration of an employee tending to admit negligence that would be imputable to the employer made four years after the fact was not a part of the *res gestae* and was not admissible in evidence as an admission against interest inasmuch as the employee was not a party to the litigation. *Harris v. Inn of Lake City*, 285 Ga. App. 521, 647 S.E.2d 277 (2007).

Testimony excluded. — There was no evidence that a person was acting as the grantee's agent and speaking within the agent's authority so the trial court did not err in refusing to allow testimony as to a statement made by that person in a suit regarding the grantee's easement over an owner's property. *A.A.L., Inc. v. Colonial Pipeline Co.*, 280 Ga. App. 237, 633 S.E.2d 560 (2006).

Unauthorized admissions. — Principal is not bound by the unauthorized admission of

Agents (Cont'd)

an agent unless the principal ratifies the admission. *Hardware Mut. Cas. Co. v. Collier*, 69 Ga. App. 235, 25 S.E.2d 136 (1943).

Action beyond scope of authority. — Although the admissions of an agent, made during the existence and in pursuance of the agent's power, are evidence against the principal the court erred in admitting the declarations of the defendant's bookkeeper with reference to the quality of the commodity furnished, where it appeared that the declarations were not made during the existence of any power delegated to the bookkeeper to act for the defendant in accepting the goods sued for, but were in fact made long after the time when the goods were received and accepted, and when it further was not made to appear that the bookkeeper was at any time clothed with authority to act for the defendant in accepting or rejecting the commodity furnished and sued for. *Smith v. Vaughn*, 37 Ga. App. 558, 140 S.E. 892 (1927).

Corporation can only make admissions through the corporate agents, and the admissions of such agents acting within the scope of the agent's powers and about the business of the agency are admissible. *Timeplan Loan & Inv. Corp. v. Moorehead*, 221 Ga. 648, 146 S.E.2d 748 (1966); *White v. Front Page, Inc.*, 133 Ga. App. 749, 213 S.E.2d 32 (1975).

Testimony of corporate president. — While the testimony of a party in the party's own behalf must be construed most strongly against the party, if self-contradictory or equivocal, and, without other evidence of right to recover, the party is not entitled to a finding if the party's testimony, so construed, shows that the verdict should be against the party, and this rule is applicable against a corporate party, upon the testimony of the corporate president; it has never been extended beyond the president to other officers. *McCoy v. Romy Hammes Corp.*, 99 Ga. App. 513, 109 S.E.2d 807 (1959).

Admissions of a president as the mouthpiece and alter ego of a corporation, as distinguished from an ordinary servant or agent, made even with reference to a previous transaction, are ordinarily admissible in evidence, provided the admissions are made in the due course of the president's official

duties with reference to the particular transaction in controversy. *Long Tobacco Harvesting Co. v. Brannen*, 99 Ga. App. 541, 109 S.E.2d 90 (1959).

Corporate officer's admission in one action not binding against corporation in subsequent action. — An admission by a corporate officer in the officer's individual capacity in one action is not binding against the corporation in a subsequent action brought in the name of the corporation. *Gregory v. J.T. Gregory & Son*, 176 Ga. App. 788, 338 S.E.2d 7 (1985).

Conversations between employees admissible. — It was not error to allow defendant's employee to testify as to what another employee told that employee. *Smoky, Inc. v. McCray*, 196 Ga. App. 650, 396 S.E.2d 794, cert. denied, 196 Ga. App. 909, 396 S.E.2d 794 (1990).

Statement of one agent to another admissible. — Statements of an agent of one company, made in the course of the agent's employment, to the agent of another company, received in the course of that agent's employment, regarding the business of the two is admissible pursuant to O.C.G.A. §§ 10-6-64 and 24-3-33. *Coffee Butler Serv., Inc. v. Sacha*, 208 Ga. App. 4, 430 S.E.2d 149 (1993).

Statement made by the store manager in a slip and fall action pertaining to the identity of the slippery substance which allegedly caused the fall was admissible as an admission against interest or under the *res gestae* exception and was sufficient to raise a question of fact precluding summary judgment in favor of the store. *Brown v. Piggly Wiggly S., Inc.*, 210 Ga. App. 459, 436 S.E.2d 513 (1993).

Statement of a store employee in a slip and fall action as to why the employee had not taken care of an ice patch in the parking lot was admissible as part of the *res gestae* when it was made directly after the plaintiff informed the employee of the plaintiff's fall and injuries. *Quiktrip Corp. v. Childs*, 220 Ga. App. 463, 469 S.E.2d 763 (1996).

Statement made just after plaintiff's fall by an unknown employee in the presence of the store manager that "if this floor had been mopped or kept mopped this wouldn't happen" was admissible as part of the *res gestae* and might also have been an admission against defendant store's interest.

Sutton v. Winn Dixie Stores, Inc., 233 Ga. App. 424, 504 S.E.2d 245 (1998).

Telephone conversations. — If the person on the other end of the telephone were sufficiently identified as an agent with authority to speak for the defendant company, then the conversation, which would have tended to prove that the defendant knew the plaintiff had been injured while a passenger in one of defendant's taxicabs, was admissible as an admission against interest for the reason that the defendant had denied in defendant's pleadings that the plaintiff was a passenger in one of defendant's taxicabs. *Pope v. Associated Cab Co.*, 90 Ga. App. 560, 83 S.E.2d 310 (1954).

Homeowner's statement admissible in contracting case. — In a fraud and breach of contract case, testimony by a homeowner that a contractor's project supervisor told the homeowner the contractor would not repair leaks in the house was admissible for the non-hearsay purpose of explaining the homeowner's conduct in discharging the contractor and under the exception to the hearsay rule applicable to admissions by an agent. *Lumpkin v. Deventer N. Am., Inc.*, 295 Ga. App. 312, 672 S.E.2d 405 (2008).

Erroneous admission. — Admission on the part of the agent which has the effect of imputing negligence to the principal, when

not coming within one of the stated exceptions and not made by authority of the principal, is error. *Southern Ry. v. Allen*, 118 Ga. App. 645, 165 S.E.2d 194 (1968).

Jury questions. — In a medical malpractice action, whether a nurse anesthetist was the agent of an anesthesiology partnership, whether the partnership was the agent of the hospital, and whether there were any admissions in the medical records were for the jury to determine. *Doctors Hosp. v. Bonner*, 195 Ga. App. 152, 392 S.E.2d 897 (1990).

Attorneys

Attorney is such an agent of the attorney's client that the attorney's declarations made during the course of the attorney's employment may be offered against the attorney's principal. *W.T. Harvey Lumber Co. v. J.M. Wells Lumber Co.*, 104 Ga. App. 498, 122 S.E.2d 143 (1961).

Clients are bound by statements of their attorneys made in open court. *NAACP v. Pye*, 96 Ga. App. 685, 101 S.E.2d 609 (1957).

Letters from attorney. — If writer of letter at the time was attorney for the plaintiff, the attorney's letter had probative value as an admission by the plaintiff through the attorney as plaintiff's attorney. *Everitt v. Harris*, 67 Ga. App. 64, 19 S.E.2d 545 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 814, 829.

C.J.S. — 31A C.J.S., Evidence, §§ 473 et seq., 506, 508.

ALR. — Extrajudicial admissions by principal as evidence against surety, 60 ALR 1500.

Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point, 70 ALR 94.

Extrajudicial admissions of fact by attorney as binding client, 97 ALR 374.

Extrajudicial declarations of agent as admissible in action against principal for personal injuries for purpose of showing knowledge of relevant fact or condition at or prior to time of injury, 141 ALR 704.

Admissibility of admissions made in connection with offers or discussions of compromise, 15 ALR3d 13.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 ALR3d 966.

24-3-34. Admissions of real parties in interest.

Admissions by a real party in interest shall be admissible, even if he is not of record, subject to the exceptions stated in Code Section 24-3-31. (Orig. Code 1863, § 3708; Code 1868, § 3732; Code 1873, § 3785; Code 1882,

§ 3785; Civil Code 1895, § 5190; Civil Code 1910, § 5777; Code 1933, § 38-404.)

JUDICIAL DECISIONS

In general. — Admissions by persons not a party to an action are admissible in evidence only if the party making the admission is the real party in interest, although not a party to the record, or if a party to the record refers another to such third party for information, or if there is an admission by a third person against that person's interest as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause. *Akin v. Randolph Motors, Inc.*, 95 Ga. App. 841, 99 S.E.2d 358 (1957); *Cobb v. Garner*, 158 Ga. App. 110, 279 S.E.2d 280 (1981).

Guilty pleas. — Rule, as to parties to a suit, is that, while convictions for criminal offenses are inadmissible in a civil action, a plea of guilty may be shown as an admission against interest. *Akin v. Randolph Motors, Inc.*, 95 Ga. App. 841, 99 S.E.2d 358 (1957).

Legatee under will. — Sayings of a principal legatee under a will, though not a party to the record, are admissible in evidence to affect one's own interest only. *Morris v. Stokes*, 21 Ga. 552 (1857).

Holder of benefit life insurance. — Admissions or declarations by the holder of a benefit life insurance certificate, made before the certificate was issued and affecting the certificate's validity, are admissible against the person therein named as beneficiary, when the latter has no vested interest in the contract evidenced by such certificate. *Supreme Conclave Knights of Damon v. O'Connell*, 107 Ga. 97, 32 S.E. 946 (1899).

Conversations between employees admissible. — It was not error to allow defendant's employee to testify as to what another employee told that employee. *Smoky, Inc. v. McCray*, 196 Ga. App. 650, 396 S.E.2d 794, cert. denied, 196 Ga. App. 909, 396 S.E.2d 794 (1990).

Conversations not admissible. — In an action by lessors against guarantors, the affidavit of an attorney representing the guarantors, recalling a conversation the attorney had with an officer of the lessee, was not admissible because the statements therein were not against the interest of the officer,

were self-serving and were not collateral to the main issue. *Athens Int'l, Inc. v. Venture Capital Properties, Inc.*, 230 Ga. App. 286, 495 S.E.2d 900 (1998).

Admission of party opponent admissible. — Defendant's oral statement to a Georgia Bureau of Investigation agent, which outlined defendant's presence at the scene where defendant was arrested, was admissible as the admission of a party-opponent under O.C.G.A. § 24-3-34. *Jewett v. State*, 264 Ga. App. 571, 591 S.E.2d 459 (2003), overruled on other grounds, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

Since a jury apparently decided to discount the defendant's involuntary intoxication defense, then the defendant's statement that the defendant felt drugged could have been viewed as incriminating, and was admissible as the admission of a party-opponent; nor was it relevant that the defendant's statement could have been used to show intoxication by either alcohol or drugs, since it was no valid ground of objection to the admission into evidence of an incriminating statement made by the accused in a criminal case that the language indicated that the accused had committed another offense. *Donaldson v. State*, 279 Ga. App. 407, 631 S.E.2d 443 (2006).

Admission against penal interest. — In a murder prosecution, the trial court did not err in permitting a police officer to testify as to what defendant told the officer in connection with the death of the victim; the incriminating statement was admissible as an admission against defendant's penal interest and was the admission of a party-opponent. *Stanford v. State*, 272 Ga. 267, 528 S.E.2d 246 (2000).

Physician's testimony that when the physician asked whether an animal or a person bit a murder defendant, the defendant said that the defendant's girlfriend did it, was admissible under O.C.G.A. § 24-3-34; a defendant's declaration against penal interest was the admission of a party opponent. *Teal v. State*, 282 Ga. 319, 647 S.E.2d 15 (2007).

Since defendant's voluntary, incriminat-

ing statements to third parties were admissible under an exception to the hearsay rule, as express or implied admissions against interest, defense counsel was not ineffective in failing to object to the statements. *Brown v. State*, 293 Ga. App. 633, 667 S.E.2d 899 (2008).

Cited in *Field v. Manly*, 185 Ga. 464, 195 S.E. 406 (1938); *Lewis v. American Rd. Ins. Co.*, 119 Ga. App. 507, 167 S.E.2d 729 (1969); *Citizens & S. Realty Investors v. L.G.*

Balfour Co., 152 Ga. App. 852, 264 S.E.2d 304 (1980); *Thomason v. Genuine Parts Co.*, 156 Ga. App. 599, 275 S.E.2d 159 (1980); *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981); *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982); *Panther v. Miller*, 165 Ga. App. 266, 299 S.E.2d 185 (1983); *Harrison v. State*, 253 Ga. App. 179, 558 S.E.2d 760 (2002); *Johnson v. State*, 284 Ga. App. 724, 644 S.E.2d 544 (2007).

RESEARCH REFERENCES

C.J.S. — 31A C.J.S., Evidence, § 446.

ALR. — Extrajudicial admissions by principal as evidence against surety, 60 ALR 1500.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 ALR 1296.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

24-3-35. What admissions by third parties received in evidence.

The following admissions by third persons, strangers to a suit, shall be received in evidence:

(1) Statements made when a party refers another to such third person for information;

(2) Admissions by a third person which are against his interest, as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause;

(3) Statements by an interpreter where from any cause he cannot be sworn. (Orig. Code 1863, § 3709; Code 1868, § 3733; Code 1873, § 3786; Code 1882, § 3786; Civil Code 1895, § 5191; Civil Code 1910, § 5778; Code 1933, § 38-405.)

JUDICIAL DECISIONS

In general. — Sayings of one who is not a party to the case, or in privity with a party, are not admissible as evidence against either party. *Bailey v. E.F. Wood & Co.*, 24 Ga. 164 (1858); *Chastain & Luck v. Robinson*, 30 Ga. 55 (1860).

When admission by person not a party to action is admissible. — Rule, as to parties to a suit, is that a plea of guilty may be shown as an admission against interest; admissions by persons not a party to an action, however,

are admissible in evidence only if the party making the admission is the real party in interest, although not a party to the record, or if a party to the record refers another to such third party for information, or if there is an admission by a third person against that person's interest as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause. *Cobb v. Garner*, 158 Ga. App. 110, 279 S.E.2d 280 (1981).

Referral for information. — When certain documentary evidence is offered, which upon its face is not admissible, but is claimed to be admissible, it is not error to exclude such evidence when there is no evidence to show that either party had referred the other to the author of the evidence for information. *Myers v. Adcock*, 198 Ga. 180, 31 S.E.2d 160 (1944).

Information sought to be elicited from a witness as to the location of boundary line, having been obtained from another at the suggestion of one not a party to the case, was properly rejected by the trial court as hearsay, and was not admissible. *Palmer v. Jackson*, 86 Ga. App. 642, 72 S.E.2d 130 (1952).

Collateral to main issue. — Whatever may be meant by the language “collateral to the main issue but essential to the adjudication,” it is certainly not applicable if the statement bears directly upon the main issue in the case. *Lewis v. American Rd. Ins. Co.*, 119 Ga. App. 507, 167 S.E.2d 729 (1969).

Collateral to main issue not found. — Extrajudicial admission of employee, who was not a party to the indemnity contract, nor a party to the suit, was not admissible as an admission by a stranger to the suit bearing upon a collateral issue essential to the adjudication as the admission was not collateral to the main issue involved, but bore directly upon the issue. *Glens Falls Indem. Co. v. Gottlieb*, 80 Ga. App. 634, 56 S.E.2d 799 (1949).

Letters. — There being evidence to authorize a finding by the jury that a conspiracy had existed as alleged, and it appearing from the uncontradicted testimony of the plaintiff that, during the existence of the conspiracy, one of the conspirators had referred the plaintiff to a third person, a stranger to the suit, for certain information connected with the subject matter of the conspiracy, it was not error to admit in evidence letters from the third person, pertaining to such information. *Hill v. Reynolds*, 19 Ga. App. 334, 91 S.E. 434 (1917).

Carbon copies of two letters written by parties to a case to one not a party, which are not otherwise admissible, are not admissible when there is nothing to show that either of the parties had referred the other to the letter's recipient for information. The fact that one of the parties was seeking information about the other does not bring the

letter within the statute, and the letter would merely constitute hearsay evidence. *Myers v. Adcock*, 198 Ga. 180, 31 S.E.2d 160 (1944).

Title to account. — Plaintiff's contention being that the account sued upon was plaintiff's account, and the defendants contending that it was contracted with and belonged to others who were not parties to the suit, and there being no assignment of the account in writing, it was not competent for the plaintiff to prove oral admissions made by these strangers to the suit that the account belonged to the plaintiff, and that these strangers had no interest in the account. *Churchman, Williams & Co. v. Robinson*, 93 Ga. 731, 20 S.E. 215 (1894).

Entry on minutes of third party insurance company. — In an action upon a benefit certificate, an entry upon the minutes of another association to which the deceased had applied for a benefit certificate was not, in such a trial, admissible against the plaintiff, it not being shown that the deceased had anything to do with the making of this entry. *Supreme Conclave Knights of Damon v. O'Connell*, 107 Ga. 97, 32 S.E. 946 (1899).

An affidavit by a shooting victim urging nonprosecution of her defendant husband was not competent evidence. *Freeman v. State*, 233 Ga. 745, 213 S.E.2d 643 (1975).

Criminal confessions. — Statements by a third party to the effect that the third party, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused upon the accused's trial, nor does the fact that the party, whose confession is sought to be introduced, is in another state and unavailable as a witness, or that there is testimony tending to establish the guilt of the one making such confession, change the foregoing rule. *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944).

Declarations of third persons against the declarant's penal interest to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at the accused's trial, or to procure a new trial on the basis of newly discovered evidence. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

Witness's testimony as to a conversation the witness had with a child's mother was properly excluded as the mother testified and defendant did not ask the mother about

the conversation. Georgia does not recognize a third party's admission against penal interest when that admission exculpates the defendant. *Hood v. State*, 273 Ga. App. 430, 615 S.E.2d 244 (2005).

Guilty pleas. — As to parties to a civil action, a guilty plea constitutes an admission against interest which is prima facie evidence of the facts admitted. *Tomlinson, Inc. v. Roberts*, 142 Ga. App. 134, 235 S.E.2d 721 (1977).

Party disclaiming title. — If the defendant in trover relies, amongst other things, upon paramount outstanding title in another, the acts and declarations of the third person, disclaiming title in oneself and acquiescing in the plaintiff's title, are admissible in evidence. *White v. Dinkins*, 19 Ga. 285 (1856).

Declaration of holder of negotiable instrument. — Party who acquires title to a bill or note, by endorsement, delivery, or otherwise, before due, but with express notice of any defect or incumbrance, insofar identified with the previous owner, that the previous owner's declarations or admissions while owner, may be received in evidence against such party. *Glanton v. Griggs*, 5 Ga. 424 (1848).

Affidavit of guarantor's attorney. — In an action by lessors against guarantors, the affidavit of an attorney representing the guarantors, recalling a conversation she had with an officer of the lessee, was not admissible because the statements therein were not against the interest of the officer, were self-serving, and were not collateral to the main issue. *Athens Int'l, Inc. v. Venture Capital Properties, Inc.*, 230 Ga. App. 286, 495 S.E.2d 900 (1998).

Cited in *Chandler v. Mutual Life & Indus. Ass'n*, 131 Ga. 82, 61 S.E. 1036 (1908); *Atlantic Compress Co. v. Chambliss*, 15 Ga. App. 747, 84 S.E. 155 (1915); *Peters v. Adcock*, 196 Ga. 118, 26 S.E.2d 342 (1943); *Akin v. Randolph Motors, Inc.*, 95 Ga. App. 841, 99 S.E.2d 358 (1957); *Ingalls Iron Works Co. v. Standard Accident Ins. Co.*, 107 Ga. App. 454, 130 S.E.2d 606 (1963); *Hadden v. Owens*, 154 Ga. App. 467, 268 S.E.2d 760 (1980); *Thomason v. Genuine Parts Co.*, 156 Ga. App. 599, 275 S.E.2d 159 (1980); *Southern Bell Tel. & Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 813, 841.

C.J.S. — 31A C.J.S., Evidence, §§ 447, 482.

ALR. — Admissibility in favor of accused in criminal case of extrajudicial confession by stranger, 35 ALR 441; 48 ALR 348.

Admissibility in behalf of defendant in action for libel or slander of similar charges made by other persons against plaintiff, 74 ALR 732.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 ALR 1296.

Use of interpreter in court proceedings, 172 ALR 923.

Declarations or admissions of person in control of vehicle as admissible against or binding upon owner, lien claimants, or the like, of a vehicle subjected to forfeiture proceedings, 55 ALR2d 1280.

Admissibility, in action on employee fidel-

ity bond or policy, of confessions or declarations of such employee no longer available as witness, 65 ALR2d 631.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671.

Admissibility, as against interest, in civil case of declaration of commission of criminal act, 90 ALR3d 1173.

Disqualification, for bias, of one offered as interpreter of testimony, 6 ALR4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 ALR4th 1016.

When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (28 USCS Appx), 125 ALR Fed. 477.

24-3-36. Acquiescence or silence as admission.

Acquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission. (Orig. Code 1863, § 3713; Code 1868, § 3737; Code 1873, § 3790; Code 1882, § 3790; Civil Code 1895, § 5195; Penal Code 1895, § 1003; Civil Code 1910, § 5782; Penal Code 1910, § 1029; Code 1933, § 38-409.)

Cross references. — Failure to deny averments in pleading as constituting admission, § 9-11-8(d).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CIRCUMSTANCES REQUIRING RESPONSE

PROCEDURAL CONSIDERATIONS

ILLUSTRATIONS AND APPLICATIONS

General Consideration

Statute is a principle founded on common sense and common honesty, and administered day by day in courts of justice, not only in settling questions of property, but in deciding upon matters involving liberty and life. *Markham v. O'Connor*, 52 Ga. 183, 21 Am. R. 249 (1874).

Comment on silence not permitted. — In criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative. Thus, after December 12, 1991, such a comment will not be allowed even if the defendant has not received Miranda warnings and when the defendant takes the stand in the defendant's own defense. *State v. Mallory*, 261 Ga. 625, 409 S.E.2d 839 (1991), overruling *Fraley v. State*, 256 Ga. 178, 345 S.E.2d 590 (1986). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

In a case in which ineffective assistance of counsel was claimed due to counsel's failure to object to a comment in the prosecutor's closing argument that the defendant could have given the defendant's version of the facts of a domestic dispute to the police, the appellate court improperly relied on exclusions to comments on a defendant's silence in *Morrison v. State*, 554 S.E.2d 190 (2001); the court overruled *Morrison* based on the bright-line rule in *Mallory v. State*, 409 S.E.2d 839 (1991), that, with reference to

O.C.G.A. § 24-3-36, that comment upon a defendant's silence or failure to come forward was far more prejudicial than probative. *Reynolds v. State*, 285 Ga. 70, 673 S.E.2d 854 (2009).

Mallory did not apply. — As the interpretation of O.C.G.A. § 24-3-36 in *Mallory v. State*, 409 S.E.2d 839 (1991), had only prospective application, it did not apply to the defendant's case, which was tried before *Mallory* was decided. Therefore, defense counsel's strategic decision not to object to the prosecutor's comment on the defendant's request for counsel was not prejudicial as a matter of law; in view of the overwhelming evidence of the defendant's guilt, the defendant did not establish a violation of the right to effective assistance of counsel. *Patterson v. State*, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, U.S. , 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Reason of admission. — Ground for admission of the statement of a third person in the presence of the accused is that the omission to controvert the statement affords a basis for an inference of the statement's truth. Such statement is admissible in evidence, to show that it calls for a reply, and to show the acquiescence of the accused. *Thomas v. State*, 143 Ga. 268, 84 S.E. 587 (1915).

Estoppel. — When one under a duty to speak, fails to do so, one is thereafter estopped to deny what one's silence imports.

Cheek v. J. Allen Couch & Son Funeral Home, 125 Ga. App. 438, 187 S.E.2d 907 (1972).

Proof must be affirmative. — Saying of other persons are admissible against a party when it affirmatively appears that the party assented to the statements by the party's silence, or in some other way. *Drumwright v. State*, 29 Ga. 430 (1859); *Williamson v. State*, 29 Ga. App. 283, 114 S.E. 919 (1922); *Ball v. State*, 47 Ga. App. 844, 171 S.E. 726 (1933).

Cited in *Powell v. Watts*, 72 Ga. 770 (1884); *Improved Fertilizer Co. v. Swift & Co.*, 15 Ga. App. 601, 84 S.E. 132 (1914); *Bowen v. State*, 36 Ga. App. 666, 137 S.E. 793 (1927); *Ball v. State*, 47 Ga. App. 844, 171 S.E. 726 (1933); *Butler Bros. v. Goldstein*, 49 Ga. App. 109, 174 S.E. 202 (1934); *Owens v. Shugart*, 61 Ga. App. 177, 6 S.E.2d 121 (1939); *Coates v. State*, 192 Ga. 130, 15 S.E.2d 240 (1941); *Roberts v. McBrayer*, 194 Ga. 606, 22 S.E.2d 165 (1942); *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942); *Thrasher v. State*, 68 Ga. App. 820, 24 S.E.2d 222 (1943); *Lankford v. Holton*, 195 Ga. 317, 24 S.E.2d 292 (1943); *Bird v. State*, 69 Ga. App. 1, 24 S.E.2d 692 (1943); *Colonial Oil Co. v. United States Guarantee Co.*, 56 F. Supp. 545 (S.D. Ga. 1944); *Norton v. State*, 72 Ga. App. 635, 34 S.E.2d 669 (1945); *Metropolitan Life Ins. Co. v. Shalloway*, 151 F.2d 548 (5th Cir. 1945); *Jackson v. Moultrie Prod. Credit Ass'n*, 76 Ga. App. 768, 47 S.E.2d 127 (1948); *H.J. McGrath Co. v. Mobley*, 78 Ga. App. 759, 52 S.E.2d 473 (1949); *Hobbs v. State*, 206 Ga. 94, 55 S.E.2d 610 (1949); *Walker v. State*, 80 Ga. App. 418, 56 S.E.2d 132 (1949); *Phillips v. State*, 206 Ga. 418, 57 S.E.2d 555 (1950); *Robinson v. State*, 207 Ga. 337, 61 S.E.2d 475 (1950); *Wiggins v. Lord*, 87 Ga. App. 486, 74 S.E.2d 389 (1953); *Swaim v. Barton*, 210 Ga. 24, 77 S.E.2d 507 (1953); *Ross & Ross Auctioneers v. Testa*, 96 Ga. App. 821, 101 S.E.2d 767 (1958); *Peters v. State*, 98 Ga. App. 340, 106 S.E.2d 77 (1958); *Sinclair Ref. Co. v. Consolidated Van & Storage Cos.*, 192 F. Supp. 87 (N.D. Ga. 1960); *Thurmond v. State*, 108 Ga. App. 641, 134 S.E.2d 511 (1963); *Moore v. State*, 230 Ga. 839, 199 S.E.2d 243 (1973); *Emmett v. State*, 243 Ga. 550, 255 S.E.2d 23 (1979); *Coaxum v. Graham*, 151 Ga. App. 75, 258 S.E.2d 740 (1979); *Peter E. Blum & Co. v. First Bank Bldg. Corp.*, 156 Ga. App. 680, 275 S.E.2d 751 (1980); *Gainesville Glass Co.*

v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182 (1981); *Pollard v. Faris*, 159 Ga. App. 363, 283 S.E.2d 338 (1981); *Lyons Mfg. Co. v. Cedarbaum*, 174 Ga. App. 218, 329 S.E.2d 559 (1985); *Kephart v. Kephart*, 273 Ga. 9, 536 S.E.2d 504 (2000); *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003); *Byers v. McGuire Props.*, 285 Ga. 530, 679 S.E.2d 1 (2009).

Circumstances Requiring Response

Circumstances must require an answer. — It is only when the circumstances require an answer or denial that silence may amount to an admission. *Graham v. State*, 118 Ga. 807, 45 S.E. 616 (1903).

Trial court did not err in granting summary judgment to manufacturer on the purchaser's breach of warranty claim regarding a copier that made more poor, unusable copies; although the purchaser wrote a letter to the manufacturer about the problems, the letter did not reference either express or implied warranties, or request any specific relief, and, thus, the manufacturer's lack of a reply could not be construed as an admission. *McQueen v. Minolta Bus. Solutions, Inc.*, 275 Ga. App. 297, 620 S.E.2d 391 (2005).

Accused must hear statements. — When it is sought to charge a prisoner by reason of sayings of the prisoner's spouse in regard to the crime for which the prisoner is tried, and acquiesced in by the prisoner's silence, such sayings must have been in the prisoner's immediate presence, where the prisoner could hear distinctly all that was said; otherwise the statements would be inadmissible. *Jones v. State*, 65 Ga. 147 (1880).

Before evidence can be admitted in a criminal case to show acquiescence of the accused, by silence, in statements made by the officer who arrested the accused to another officer, as to the sayings and conduct of the accused when arrested, it must affirmatively appear that the accused was present and heard the inculpatory statements made against the accused, and by silence, acquiesced in the statements. *Simmons v. State*, 115 Ga. 574, 41 S.E. 983 (1902).

Admissions should be direct and call for contradiction. — Admissions of a party, which are to be inferred from the party's acquiescence in the verbal statements of

Circumstances Requiring Response (Cont'd)

others, made in the party's presence, ought to be regarded with great caution, and unless the evidence be of such direct declarations, and of that kind which naturally call for a contradiction, or some assertions made to the party with respect to the party's right, which by the party's silence the party acquiesces in, it ought not to be received at all. *Rolfe v. Rolfe*, 10 Ga. 143 (1851).

Proof of circumstances. — Before the sayings of a third person, made in the presence of one who is subsequently charged with the commission of a criminal offense, should be admitted in evidence against the accused, there should be proof affirmatively disclosing that the circumstances were such as to call upon the accused to make some response to what was said in the accused's presence. The circumstances must require an answer or denial, or other conduct, before silence will amount to an implied admission. *Lumpkin v. State*, 125 Ga. 24, 53 S.E. 810 (1906).

Person under arrest. — When a statement tending to incriminate a person is made in the person's presence and the person remains silent, the mere fact that the person is under arrest or is in custody at the time will not render evidence of such statement and silence inadmissible as an implied admission. *Creel v. State*, 216 Ga. 233, 115 S.E.2d 552 (1960).

Police interrogation is not such a circumstance as requires an answer or denial so as to authorize charging this statute in a criminal case. *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976).

Procedural Considerations

Value of admission as evidence. — Failure to controvert an accusation is not an affirmative act on the part of the accused expressive of guilt of the crime charged. Its evidentiary value is that of an incriminating admission to be considered along with the other circumstances in inferring the guilt of the accused. *Thomas v. State*, 143 Ga. 268, 84 S.E. 587 (1915).

Question for jury. — Question of whether the defendant in fact heard the statement in question was for the jury; and if the jury found under the fact that the defendant did

hear the statement, it would be a further question for them to determine whether under the circumstances an answer or a denial or other conduct was required, and also whether the defendant's acquiescence or silence under such circumstances amounted to an admission. *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948).

It is allowable to repeat an entire conversation, which occurred between the witness and a party, which consisted, amongst other things, of distinct charges made by the witness, and which were silently acquiesced in, or answered and justified. *Morris v. Stokes*, 21 Ga. 552 (1857); *Dixon v. Edwards*, 48 Ga. 142 (1873).

Since it was not the statement of a third person which was admitted as substantive evidence, but only the fact of the accused's failure to deny the statement, the admissibility of such testimony was in no way affected by the fact that the incriminating statement was uttered by one who was incompetent to testify against defendant as a witness in a criminal prosecution. *Perry v. State*, 78 Ga. App. 273, 50 S.E.2d 709 (1948).

Scope of instructions. — In charging a jury the rule contained in statute, the court should not fail to instruct the jury, in connection with that rule, that the jury are to determine whether or not, under all the circumstances, an answer or denial was required. *Hammond v. State*, 156 Ga. 880, 120 S.E. 539 (1923).

Trial court properly charged a jury regarding the O.C.G.A. § 24-3-36 evidentiary presumption arising from a limited liability company's (LLC's) agent's failure to reply to a corporation's invoices because the LLC admitted receiving some of the corporation's goods and services, only disputing the amount due, and the failure to respond to an invoice was not a declaration against the LLC's interest pursuant to O.C.G.A. § 10-6-64; in addition, the charge was supported by O.C.G.A. § 24-4-23. *Forrest Cambridge Apts., LLC v. Redi-Floors, Inc.*, 295 Ga. App. 840, 673 S.E.2d 318 (2009).

It is reversible error to instruct the jury in a criminal case according to this statute that silence or acquiescence by a person in police custody may amount to an admission of guilt. *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976).

Evidence was sufficient to authorize instruction based on O.C.G.A. § 24-3-36 in the

following cases. — See *Eberhart v. State*, 88 Ga. App. 501, 76 S.E.2d 832 (1953); *Bloodworth v. State*, 216 Ga. 572, 118 S.E.2d 374 (1961).

Ineffective counsel not shown. — Although, under O.C.G.A. § 24-3-36, the state's witness's testimony that a defendant did not respond to a detective's questions was more prejudicial to defendant than it was probative of defendant's guilt, defendant did not show how that testimony affected the outcome of the trial such that defense counsel was ineffective for not objecting to the testimony or requesting a special instruction. *Bruce v. State*, 268 Ga. App. 677, 603 S.E.2d 33 (2004).

Illustrations and Applications

General denial by accused. — When the prisoner made a flat denial of any knowledge of or complicity in the offense, such denial is a disavowal of the act as the prisoner's act; and though the prisoner may not in detail deny each minor incriminating circumstance which may be charged against the prisoner, the prisoner's general denial is sufficient to exclude the idea of an implied admission. *Ware v. State*, 96 Ga. 349, 23 S.E. 410 (1895).

Principle that acquiescence or silence, when the circumstances require an answer or denial, may amount to an admission, has no application to a criminal cause when a person accused by another with the commission of an offense, immediately denies all knowledge of, or complicity in, its commission, even though such denial be in general terms and does not in detail extend to each of the minor incriminating circumstances charged against the person. *Westberry v. State*, 174 Ga. 646, 163 S.E. 729 (1932).

Witness's comment on defendant's pre-arrest silence not prejudicial. — With regard to convictions for aggravated assault and related crimes, defendant failed to show that trial counsel was ineffective for failing to object or move for a mistrial when a security officer commented on defendant's pre-arrest silence, namely that defendant did not speak up as to owning the type of vehicle used to perpetrate the crimes; even if testimony on defendant's pre-arrest silence had been objectionable, defendant failed to show any prejudice since other evidence showed that defendant drove to the police

station in defendant's truck and consented to a search of that vehicle. *Gibson v. State*, 291 Ga. App. 183, 661 S.E.2d 850 (2008).

Admission of agents or attorneys. — Admission by agents or attorneys are not admissible in criminal cases in the sense in which the admissions are admissible in civil cases. The admissions should not be treated as evidence against the accused, unless shown to have been authorized by the accused. *Farmer v. State*, 190 Ga. 41, 28 S.E. 26 (1896).

Misstatement of opposing counsel. — Silence is estopped when attorney failed to deny misstatement of opposing counsel, in reply to a question of court, as to whether a certain allegation was denied by plea. *Cuthbert Ice Co. v. York Mfg. Co.*, 20 Ga. App. 695, 93 S.E. 279 (1917).

Acquiescence by agent. — Where a son informs his father that his employer would prosecute unless the father signed a mortgage to secure the son's shortage, silence of the employer's agent, who was present, adopted the threat, and was duress. *Small v. Williams*, 87 Ga. 681, 13 S.E. 589 (1891).

Entries in bank pass book. — In a suit by a decedent's administrator against a bank for the recovery of a deposit claimed to be due the estate, a failure of the depositor to make objection to entries of the bank in the depositor's pass book could be accounted as an admission on the depositor's part as to the correctness of the statement. *Cheney v. Bank of Bremen*, 25 Ga. App. 114, 102 S.E. 903 (1920).

Silence regarding terms of agreement. — Physician had a duty and obligation to respond to limitations on the physician's privileges set forth in an agreement with a hospital, and when the physician silently exercised the privileges for several years, the physician waived the physician's right to insist on compliance with other procedural requirements pertaining to the physician's termination. *St. Mary's Hosp. v. Cohen*, 216 Ga. App. 761, 456 S.E.2d 79 (1995).

Advertising person as partner. — An advertisement in a local newspaper, which contained the statement that a certain person was a member of a named partnership and which was paid for by such person, was admissible to show an ostensible partnership, though such person did not authorize the statement in the advertisement that the

Illustrations and Applications (Cont'd)

person was a partner. *English v. Moore*, 28 Ga. App. 265, 110 S.E. 737, later appeal, 29 Ga. App. 307, 114 S.E. 921 (1922).

Admitting responsibility for personal injuries. — Statements made by one person in the presence of another to the effect that the latter was alone responsible for injuries the person had received, may, if silently acquiesced in by the person amount to an admission on the person's part, that such statements are true. *Holston v. Southern Ry.*, 116 Ga. 656, 43 S.E. 29 (1902).

Admission of coconspirator. — Evidence as to admissions of guilt involving the defendant, made by a coconspirator after the termination of the conspiracy, is admissible when it appears that the admissions were made in the presence of the defendant personally and were then freely and voluntarily declared by the defendant to be true. *Gunter v. State*, 19 Ga. App. 772, 92 S.E. 314 (1917).

When the evidence is sufficient on the trial of a criminal case to authorize a finding that the defendant and another were engaged in a criminal conspiracy, and the alleged codefendant thereafter makes a confession in the presence of the defendant which involves both parties, the silence of the defendant under such circumstances may amount to an implied admission. *Brown v. State*, 121 Ga. App. 228, 173 S.E.2d 470 (1970).

Codefendants. — When a joint statement was made and signed by all three defendants in the presence of each other, the statement of each was the statement of all, and so far as the writing contained statements by others than the defendant on trial, proof of such statements, together with the defendant's assent, constituted evidence of an admission by the defendant. *Morris v. State*, 177 Ga. 106, 169 S.E. 495 (1933).

When the state shows affirmatively that one jointly indicted with a defendant made statements in the presence of the defendant charging the defendant with the commission of the crime, and the defendant either stood mute or failed to deny the charge, the evidence would change in character from hearsay to that of an implied admission by the defendant. *Long v. State*, 205 Ga. 257, 53 S.E.2d 365 (1949).

Statements of wife. — Evidence of a third party as to statements of a wife that her husband had just beaten her, made in the presence of the husband without denial on his part and under such circumstances that his silence amounted to an admission, is admissible on the trial of the husband for wife-beating, although the wife declines to testify at the trial against her husband. *Joiner v. State*, 119 Ga. 315, 46 S.E. 412 (1904).

Incriminating statements by intoxicated person. — When a witness made certain incriminating statements as to defendants in their presence and which defendants did not deny, and it was shown that this man was drunk and maudlin, and that the defendants were greatly frightened by the man's conduct, such statements of the witness did not measure up to the requirements of the law necessary to show an implied confession by silence or acquiescence and it was error to admit such statements in evidence. *Jones v. State*, 2 Ga. App. 433, 58 S.E. 559 (1907).

Ratification of paper. — Mere silence of a party when a paper is handed to that party is no evidence of the ratification of the transaction evidenced by the paper, when the person handling the paper is not one to whom dissent would be appropriately expressed. *Berry v. Cooper*, 33 Ga. 155 (1864).

Silence during trial. — When a plaintiff or defendant introduces a witness in court, the acquiescence or silence of the party during the progress of the trial would not amount to an admission, the circumstances at that time not requiring an answer or denial. *McElmurray v. Turner*, 86 Ga. 215, 12 S.E. 359 (1890).

Declarations of bystanders. — Evidence as to a declaration of a bystander, accusing one then present of the commission of a criminal act, which declaration the accused person heard but failed to deny or explain, may tend to establish the accused's guilt, and is admissible on the accused's trial for such offense. *Thurman v. State*, 14 Ga. App. 534, 81 S.E. 796 (1914); *Love v. State*, 69 Ga. App. 411, 25 S.E.2d 827 (1943).

Doctor's conversation with a patient was not an admission by silence as the patient did not ask the doctor why the doctor failed to biopsy a breast lesion and no explanation was required; that the doctor stated that they should discuss the patient's concerns at a later time could not be construed as silence

or acquiescence in the face of the patient's concerns. *Davis v. Reid*, 272 Ga. App. 312, 612 S.E.2d 112 (2005).

Failure to deny inculpatory statements was held admissible in the following cases. — See *Moye v. State*, 66 Ga. 740 (1881); *Davis v. State*, 114 Ga. 104, 39 S.E. 906 (1901); *Clark v. State*, 117 Ga. 254, 43 S.E. 853 (1903); *Watson v. State*, 136 Ga. 236, 71 S.E. 122 (1911); *Nunn v. State*, 143 Ga. 451, 85 S.E. 346 (1915); *Gates v. State*, 20 Ga. App. 171, 92 S.E. 974 (1917); *Holt v. State*, 28 Ga. App. 758, 113 S.E. 49 (1922); *Smiley v. State*, 156 Ga. 60, 118 S.E. 713 (1923); *Walker v. State*, 197 Ga. 221, 28 S.E.2d 656 (1944); *Clark v. Woodward*, 76 Ga. App. 181, 45 S.E.2d 473 (1947).

Letter memorializing a conversation, to which recipient failed to respond, was admissible as an admission by silence. — Trial court did not err in allowing an attorney to read a letter memorializing a conversation between him and a decedent because the out-of-court statement of the decedent referenced in the letter was admissible as an admission by silence of the executor when the attorney mailed a package containing closing documents to the executor, including a receipt the decedent had executed, and the executor mailed a check to the attorney based on the erroneous assumption that the executor needed to do so in order

to pay off the advance that had been received and was referenced in the receipt; the attorney mailed the letter to the executor, returned the check, and set forth the conversation with the decedent concerning the intent behind the receipt, and the executor's failure to respond could be construed as an acquiescence to the construction of the receipt set forth in the letter. *Jerkins v. Jerkins*, 300 Ga. App. 703, 686 S.E.2d 324 (2009).

Evidence was properly held inadmissible in the following case. — See *Chedel v. Mooney*, 158 Ga. 297, 123 S.E. 300 (1924).

Trial court improperly instructed the jury that acquiescence or silence, when the circumstances required an answer, a denial, or other conduct, could amount to an admission because a charge in the language of O.C.G.A. § 24-3-36 could be construed as a comment on the defendant's constitutional right to remain silent; however, the improper jury instruction was harmless beyond a reasonable doubt because the charge as a whole contained sufficient clarity so as not to mislead the jury concerning the exercise of the right to remain silent, there was no reference at trial that could be construed as a comment on the defendant's exercise of his right to remain silent, the evidence of guilt was overwhelming, and the erroneous charge in no way pointed directly at the substance of the defendant's defense. *Ruiz v. State*, 286 Ga. 146, 686 S.E.2d 253 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 814.

C.J.S. — 31A C.J.S., Evidence, § 405 et seq.

ALR. — Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 55 ALR 460.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Silence upon hearing statement by spouse as evidence of admission in civil case, 158 ALR 465.

Admissibility of evidence of party's silence, as implied or tacit admission, when a statement is made by another in his presence regarding circumstances of an accident, 70 ALR2d 1099.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 ALR2d 463.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 ALR3d 706.

24-3-37. What admissions not proper evidence.

Admissions obtained by constraint, by fraud, or by drunkenness induced for the purpose or admissions or propositions made with a view to a compromise are not proper evidence. (Orig. Code 1863, § 3712; Code

1868, § 3736; Code 1873, § 3789; Code 1882, § 3789; Civil Code 1895, § 5194; Civil Code 1910, § 5781; Code 1933, § 38-408.)

Law reviews. — For survey of Georgia cases in the area of evidence from June 1979 through May 1980, see 32 Mercer L. Rev. 63

(1980). For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B.J. 12 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION AND ILLUSTRATIONS

General Consideration

Statute enlarges the common-law rule, which did not exclude the admission of distinct facts. *McElrath v. Haley*, 48 Ga. 641 (1873).

Distinction between compromise and settlement. — There is a distinction between an offer or proposition to compromise a doubtful or disputed claim, and an offer to settle upon certain terms a claim that is unquestioned. An admission made in an offer of the latter character will be admissible when one made in an offer of the former character will not. See as bearing somewhat on the point, *Hatcher v. Bowen*, 74 Ga. 840 (1885); *Cooper v. Jones*, 79 Ga. 379, 4 S.E. 916 (1887); *Akers v. Kirke*, 91 Ga. 590, 18 S.E. 366 (1893); *Teasley v. Bradley*, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900); *Austin v. Long*, 5 Ga. App. 551, 63 S.E. 640 (1909); *Wilson v. Wilder*, 23 Ga. App. 30, 97 S.E. 447 (1918). See also *Lewis v. Joyner*, 29 Ga. App. 92, 113 S.E. 829 (1922); *Broyles v. Haas*, 48 Ga. App. 321, 172 S.E. 742 (1934); *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

An admission made in an offer to settle will be admissible while one made in an offer to compromise will not be admissible. *Charter Mtg. Co. v. Ahouse*, 165 Ga. App. 497, 300 S.E.2d 328 (1983).

Trial court erred in denying a homeowner the opportunity to cross-examine the chairman of a homeowners' association's architectural control committee regarding independent facts that demonstrated the association's violation of the restrictive covenants in the subdivision as those statements were not part of admissions towards settlement negotiations that should have been excluded under O.C.G.A. § 24-3-37; the

homeowner was being sued for not having sought prior approval of the committee prior to commencing construction, and the homeowner's attempt to show that the association had violated the covenants when the homeowner submitted the proper paperwork for the construction, after the lawsuit was filed, and the association did not respond in a timely manner was relevant to the issues being litigated. *Bounds v. Coventry Green Homeowners' Ass'n*, 268 Ga. App. 69, 601 S.E.2d 440 (2004).

Benevolent gestures encouraged. — Evidence of activity constituting a voluntary offer of assistance made on the impulse of benevolence or sympathy should be encouraged and should not be considered as an admission of liability. *Deese v. Carroll City County Hosp.*, 203 Ga. App. 148, 416 S.E.2d 127 (1992).

Basis for rule. — Rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful for the jury will draw conclusions therefrom, in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing the jury as to the weight to be given such evidence. *Newton Bros. v. Shank*, 240 Ga. 471, 241 S.E.2d 231 (1978); *Central Nat'l Ins. Co. v. Dixon*, 188 Ga. App. 680, 373 S.E.2d 849 (1988).

Statute was created in order to encourage settlements by letting a party which makes an admission or proposition with a view toward compromise rest assured that the party's good-faith settlement attempt will not later be used against the party in court. *Benn v. McBride*, 140 Ga. App. 698, 231 S.E.2d 438 (1976).

Purpose of O.C.G.A. § 24-3-37 is to encourage settlements and protect parties who freely engage in negotiations directed toward resolution of lawsuits. *Computer Communications Specialists, Inc. v. Hall*, 188 Ga. App. 545, 373 S.E.2d 630 (1988).

Statute seems to be very broad and excludes the introduction in evidence of propositions with a view to compromise and also admissions made with a view to compromise. *Atlantic Coast Line R.R. v. Wells*, 78 Ga. App. 859, 52 S.E.2d 496 (1949).

Proscription of propositions made with view to compromise refers to civil, not criminal, cases. *Reed v. State*, 163 Ga. App. 364, 295 S.E.2d 108 (1982).

Exclusion of extrinsic evidence. — When parol evidence regarding a refund and repair was contained in an offer of compromise, such evidence was properly excluded. *Topeka Mach. Exch., Inc. v. Stoler Indus., Inc.*, 220 Ga. App. 799, 470 S.E.2d 250 (1996).

Defendant challenging witness's testimony based on fifth amendment. — Defendant in a civil action lacks standing to challenge the admission of testimony given in a previous criminal action on the ground that such action violated the witness's fifth amendment rights or the immunity agreement between the witness and the state. The privilege against self-incrimination is that of the person under examination as a witness and is intended for that person's protection only. *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

Cited in *Tufts v. DuBignon*, 61 Ga. 322 (1878); *Emery v. Atlanta Real Estate Exch.*, 88 Ga. 321, 14 S.E. 556 (1891); *City of Griffin v. Stewart*, 19 Ga. App. 817, 92 S.E. 400 (1917); *Ocean Accident & Guarantee Corp. v. Jones*, 56 Ga. App. 820, 194 S.E. 75 (1937); *Savannah & A. Ry. v. De Busk*, 68 Ga. App. 529, 23 S.E.2d 529 (1942); *Flannagan v. Clark*, 207 Ga. 345, 61 S.E.2d 485 (1950); *Pittsburgh-Erie Saw Corp. v. Southern Saw Serv., Inc.*, 136 F. Supp. 96 (N.D. Ga. 1955); *Seal v. Aldredge*, 100 Ga. App. 458, 111 S.E.2d 769 (1959); *Adams v. Columbus Mfg. Co.*, 180 F. Supp. 921 (M.D. Ga. 1960); *Turner v. McGee*, 217 Ga. 769, 125 S.E.2d 36 (1962); *Dependable Ins. Co. v. Gibbs*, 218 Ga. 305, 127 S.E.2d 454 (1962); *West End Cab Co. v. Collier*, 109 Ga. App. 555, 136 S.E.2d 512 (1964); *Wren Mobile Homes, Inc.*

v. Midland-Guardian Co., 117 Ga. App. 22, 159 S.E.2d 734 (1967); *J.G.T., Inc. v. Brunswick Corp.*, 119 Ga. App. 719, 168 S.E.2d 847 (1969); *Butts v. Davis*, 126 Ga. App. 311, 190 S.E.2d 595 (1972); *McDonald v. Rogers*, 229 Ga. 369, 191 S.E.2d 844 (1972); *Hodges v. Carpenter*, 127 Ga. App. 358, 193 S.E.2d 199 (1972); *Harrison v. Lawhorne*, 130 Ga. App. 314, 203 S.E.2d 292 (1973); *White v. Front Page, Inc.*, 133 Ga. App. 749, 213 S.E.2d 32 (1975); *Taylor v. Aetna Life Ins. Co.*, 235 Ga. 630, 221 S.E.2d 45 (1975); *Wilbanks v. Wilbanks*, 238 Ga. 660, 234 S.E.2d 915 (1977); *Jefferson v. Johnson*, 143 Ga. App. 879, 240 S.E.2d 234 (1977); *Tatum v. State*, 151 Ga. App. 602, 260 S.E.2d 747 (1979); *Cawthon Motor Co. v. Scheufler*, 153 Ga. App. 282, 265 S.E.2d 96 (1980); *Morgan v. Hawkins*, 155 Ga. App. 836, 273 S.E.2d 221 (1980); *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981); *Plaza Pontiac, Inc. v. Shaw*, 158 Ga. App. 799, 282 S.E.2d 383 (1981); *Southern Educators Assocs. v. Silver*, 245 Ga. 520, 284 S.E.2d 3 (1981); *Gibson v. Talley*, 162 Ga. App. 303, 291 S.E.2d 72 (1982); *Mansell v. Benson Chevrolet Co.*, 165 Ga. App. 568, 302 S.E.2d 114 (1983); *DeKalb County v. Daniels*, 174 Ga. App. 319, 329 S.E.2d 620 (1985); *Loflin v. Brown*, 179 Ga. App. 337, 346 S.E.2d 114 (1986); *Jackson v. Paces Ferry Dodge, Inc.*, 183 Ga. App. 502, 359 S.E.2d 412 (1987); *TBS v. Europe Craft Imports, Inc.*, 186 Ga. App. 286, 367 S.E.2d 99 (1988); *McClintock v. Wellington Trade, Inc.*, 187 Ga. App. 898, 371 S.E.2d 893 (1988); *Polma, Inc. v. Coastal Canvas Prods. Co.*, 199 Ga. App. 616, 405 S.E.2d 531 (1991); *Travitt v. Grand Union Co.*, 207 Ga. App. 810, 429 S.E.2d 309 (1993); *Jordan v. Trower*, 208 Ga. App. 552, 431 S.E.2d 160 (1993); *Voxcom, Inc. v. Boda*, 213 Ga. App. 257, 444 S.E.2d 165 (1994); *Tyson v. McPhail Properties, Inc.*, 223 Ga. App. 683, 478 S.E.2d 467 (1996); *Elrod v. Elrod*, 272 Ga. 188, 526 S.E.2d 339 (2000); *Dave Lucas Co. v. Lewis*, 293 Ga. App. 288, 666 S.E.2d 576 (2008).

Application and Illustrations

Statute applies to civil cases and not to criminal cases. *Moore v. State*, 230 Ga. 839, 199 S.E.2d 243 (1973); *Jones v. State*, 137 Ga. App. 612, 224 S.E.2d 473 (1976); *Williams v. State*, 178 Ga. App. 216, 342 S.E.2d 703 (1986).

Application and Illustrations (Cont'd)

O.C.G.A. § 24-3-37 applied to preclude the introduction into evidence of offers of compromise, although the evidence of such offers was propounded by the offeror. *Davidson v. American Fitness Ctrs., Inc.*, 171 Ga. App. 691, 320 S.E.2d 824 (1984).

Question made to explore compromise offer excluded. — Exclusion of the defendant's question, "What is it going to take to make you folks happy?," was appropriate. The statement was an effort to explore an offer to compromise a claim still being disputed. *Houston v. Kinder-Care Learning Ctrs., Inc.*, 208 Ga. App. 235, 430 S.E.2d 24 (1993).

Separate judicial proceeding. — Unsigned memoranda of proposals made within the confines of probate court administration proceedings were properly admissible in a later action to recover property of an estate. *Myers v. Myers*, 195 Ga. App. 529, 394 S.E.2d 374 (1990).

Rebuttal of admitted testimony. — When there was sufficient offer of proof by appellant on the issue, the trial court erred by excluding settlement negotiation evidence, which was admissible for the limited but permissible purpose of rebutting appellee's testimony about an unconditional offer. *Holbrook Contracting, Inc. v. Tyner*, 181 Ga. App. 838, 354 S.E.2d 22 (1987).

When statement not made with view to compromise. — O.C.G.A. § 24-3-37 did not apply to a statement that the appellant owned decedent's interest in land and had a deed to prove ownership because this admission was not offered with a view to a compromise or settlement proposition, and no evidence existed to show that the statement was made with a view to a compromise. *Graves v. Graves*, 252 Ga. 27, 310 S.E.2d 901 (1984).

Although civil engineer's testimony may have been construable as referring to an offer to compromise a claim, the engineer's brief reference to a discussion regarding reimbursement of defendant-homeowner for corrective measures against soil erosion produced by developer-plaintiff did not require grant of a mistrial. *Ross v. Hagler*, 209 Ga. App. 201, 433 S.E.2d 124 (1993).

Defendant's unsolicited offer to settle for the entire amount claimed by plaintiff was an

offer to settle and not a proposition to compromise and was admissible at trial. *Charter Mtg. Co. v. Ahouse*, 165 Ga. App. 497, 300 S.E.2d 328 (1983).

An admission adduced at a criminal trial pursuant to a grant of immunity from prosecution is not an admission "obtained by constraint" within the meaning of O.C.G.A. § 24-3-37. *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

Guilty plea to a reduced criminal charge is proper evidence as an admission in a subsequent civil action, despite the fact that the admission was the result of a compromise in the criminal case. *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

Admission when no effort made to compromise. — An admission of liability contained in an offer to settle, brought about by a simple demand for settlement, is not inadmissible on the ground that such admission was "made with a view to a compromise," when there is nothing whatever to indicate that there has been any effort to compromise, and when it cannot be inferred from the circumstances under which the offer was made that there has been such an effort. *Williams v. Smith*, 71 Ga. App. 632, 31 S.E.2d 873 (1944); *Campbell v. Mutual Serv. Corp.*, 152 Ga. App. 493, 263 S.E.2d 202 (1979).

No specific terms of compromise suggested. — Even if a general proposition of settlement has been made by one party, the admissions of the opposite party may be admissible if no specific terms of compromise have been suggested, and the admissions of a party who may desire a settlement are not to be excluded when, so far as appears from the evidence, the opposite party did nothing to induce the statement, and did not contemplate a compromise or abatement of the party's demand. *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

Evidence of a settlement agreement is admissible when the parties have successfully reached a posture of agreement settling the issues between the parties. *Building Assocs. v. Crider*, 141 Ga. App. 825, 234 S.E.2d 666 (1977).

Settlement negotiations are not admissible in evidence, and do not constitute a "waiver" of either party's claim or defense. *Citadel Corp. v. Sun Chem. Corp.*, 212 Ga. App. 875, 443 S.E.2d 489 (1994).

General partners' motion for a new trial was properly denied as evidence of the limited partners' attempts to liquidate their interests in the partnership was properly excluded as evidence of settlement negotiations. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Since a telephone conversation transcript between plaintiff and defendant showed that defendant made an offer as an effort to compromise a claim which was still being disputed, the trial court did not err in excluding this evidence. *Stover v. Candle Corp. of Am.*, 238 Ga. App. 657, 520 S.E.2d 7 (1999).

Application to pleadings. — An offer to compromise a disputed claim is no more allowable in pleadings than in evidence. *Malcolm v. Dobbs*, 127 Ga. 487, 56 S.E. 622 (1907).

Independent statements of fact. — Admissions which are to be rejected because "made with a view to a compromise," within the terms of the statute, are those admissions which are made as a concession to bring about a compromise or settlement; but independent statements of fact by a party, even though made while the parties are trying to settle, are not necessarily inadmissible. *Scales v. Shackleford*, 61 Ga. 170 (1879); *Austin v. Long*, 5 Ga. App. 551, 63 S.E. 640 (1909) (see O.C.G.A. § 24-3-37).

While offers of compromise, with the view to settle or prevent litigation, are inadmissible, yet an independent acknowledgement of a fact may be received, although made pending a treaty for the amicable adjustment of a controversy. *Blakely Hardwood Lumber Co. v. Reynolds Bros. Lumber Co.*, 173 Ga. 602, 160 S.E. 775 (1931).

Evidence material to other issues. — Terms of a proposition to compromise made to a party, and the party's reply thereto, are admissible in evidence against the party when the reply is material on certain issues. *Lucas v. Parsons*, 27 Ga. 593 (1859).

Conversation between an attorney for the beneficiary and a proper official of the company is admissible for the purpose of illustrating, if it does, good or bad faith of the company in refusing to pay the amount claimed when the evidence negatives an effort to compromise. *Progressive Life Ins.*

Co. v. Smith, 71 Ga. App. 157, 30 S.E.2d 411 (1944).

When there was no testimony from which an inference would arise that the offer of the defendant insurance company to pay \$1000.00 as the cash value of a barn destroyed by fire was offered in a spirit of compromise, liability to pay the amount of loss being undisputed, it was not error to allow such testimony as tending to show the value placed upon the property by the defendant, since one of the major issues of the case was whether or not the amount of the award was so grossly inadequate as to constitute a badge of fraud. *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

While evidence as to settlement negotiations ordinarily is inadmissible at a trial to determine the issue of liability, after a divorce and alimony case has been settled by agreement (except as to attorney fees), the effort needed by counsel to reach such settlement is a matter which can be considered in determining the amount of attorney fees to be awarded. *Fenters v. Fenters*, 238 Ga. 131, 231 S.E.2d 741 (1977).

Evidence material to claim for attorney's fees. — In a breach of contract action with regard to the installation of a landscape irrigation system, the trial court did not err by allowing the irrigation company to rely upon two pre-litigation letters from the customer during the customer's cross-examination as the question was not intended to solicit evidence to prove the validity of the irrigation company's claim or the amount at issue. Rather, the letters were offered to support the company's claim for attorney fees. *Christie v. Rainmaster Irrigation, Inc.*, 299 Ga. App. 383, 682 S.E.2d 687 (2009).

Introduction into evidence of an agreement to delay trial or ancillary proceedings was not prohibited because neither the agreement nor any testimony showed that the agreement was executed with a view to compromise. *Kaiser v. Simmons*, 52 Ga. App. 355, 183 S.E. 343 (1936).

Statute did not apply to a defendant's statements to the plaintiff to the effect that defendant had damaged the plaintiff's property and that defendant would pay the full amount of damage in a few days and the remainder after finding what the damage would be. *Wilson v. Wilder*, 23 Ga. App. 30, 97 S.E. 447 (1918).

Application and Illustrations (Cont'd)

When an offer is one to pay the hospital bill rather than an offer to settle or compromise the defendant's liability or the prosecutor's right to proceed with a bastardy prosecution, the evidence was admissible and does not come within the proscription of the statute. *Fowler v. State*, 111 Ga. App. 856, 143 S.E.2d 553 (1965).

Demands for settlement. — There was no error in allowing complainant's attorney to show that demands were made on the defendant for a settlement of the matters in controversy, and the refusal of the latter to comply with such demand. This differs from admitting in evidence negotiations for a compromise. *Mayor of Columbus v. Howard*, 6 Ga. 213 (1849); *Sasser v. Sasser*, 73 Ga. 275 (1884).

When the same substantial facts affect equally the claims of three clients, that the attorney has settled with one is evidence for the others on an action brought by the clients and is not excluded. *Howland v. Barlett*, 86 Ga. 669, 12 S.E. 1068 (1891).

No offer to compromise found. — In action on contract for sale of land, when vendee agrees to deliver truck to vendor as part of consideration, statement of plaintiff vendor that plaintiff had offered to leave settlement of dispute as to condition the truck was to be in "to disinterested men," after testifying that defendant vendee would do nothing toward fixing the truck, did not show such an offer or proposition made with a view to compromise as to come within the prohibition of the statute. *Walker v. Smith*, 87 Ga. App. 517, 74 S.E.2d 374 (1953).

An admission is not admissible in evidence as an admission of guilt if the admission was made with a view to compromise or to effect a postponement of the case and was, therefore, not made freely and voluntarily by the defendant. *Jester v. State*, 133 Ga. App. 652, 211 S.E.2d 909 (1975).

Evidence of a tender of money designed to prevent the rebuilding of a dam alleged to be a nuisance related to a proposition with a view to compromise, and was not admissible. *Mayor of Montezuma v. Minor*, 73 Ga. 484 (1884).

Evidence of a settlement with a third person injured in the same casualty ought to be excluded. *Firemen's Ins. Co. v. Larsen*, 52 Ga. App. 140, 182 S.E. 677 (1935).

Conservator's argument that the probate court improperly considered an offer of compromise and settlement by the conservator's surety for \$25,000 to settle the claims of the ward's estate against the conservator was rejected. The probate court was aware of the offer but nothing in the record indicated that the court assigned any probative value to the fact that the administrator and the surety had agreed to settle the estate's claim against the conservator. *In re Hudson*, 300 Ga. App. 340, 685 S.E.2d 323 (2009).

Statements by attorney. — When an attorney for the plaintiff met with a member of the plaintiff's firm and the defendant for the purpose of discussing an account in issue between the parties, and made statements including that the attorney hoped they would be able to settle it without any resort to the courts, admissions by the defendant which were induced by such suggestions were inadmissible as evidence in behalf of the plaintiff in a subsequent suit upon the account. *Hill Bros. v. Render*, 33 Ga. App. 13, 125 S.E. 79 (1924).

Letters. — Letter written by the attorney of record for plaintiff to attorney of record for defendant, containing admissions as to client's indebtedness to defendant, and offering a compromise settlement pending litigation, was not admissible in evidence. *Georgia Chem. Works v. Malcolm*, 186 Ga. 275, 197 S.E. 763 (1938).

Letter written with a view toward settlement, and cross-examination of a witness in regard to that letter are properly excluded as not being proper evidence. *Brooks v. Fincher*, 150 Ga. App. 201, 257 S.E.2d 326 (1979).

In dispossessory proceeding wherein plaintiff alleged that defendant was plaintiff's tenant and was holding over, letter written to plaintiff by defense attorney with a view toward settlement and compromise between plaintiff and bank being represented by defense attorney following defendant's bankruptcy was properly refused admission into evidence. *Hogan v. Tiger Auto Parts, Inc.*, 163 Ga. App. 448, 294 S.E.2d 655 (1982).

Plaintiff's letter which did not make a demand for an exact sum but instead set out what plaintiff believed was owed to plaintiff and invited the defendant to respond and to set forth defendant's contentions and defen-

dant's letter which set forth a figure defendant was willing to pay which amounted to a difference of less than \$400 than the amount plaintiff used in plaintiff's letter constituted evidence of offers of compromise on behalf of each of the parties and therefore was inadmissible as evidence. *Allen v. Brackett*, 165 Ga. App. 415, 301 S.E.2d 486 (1983).

Correspondence from plaintiff's former attorney, written within the context of good faith negotiations, was properly excluded. *McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc.*, 203 Ga. App. 640, 418 S.E.2d 87, cert. denied, 203 Ga. App. 906, 418 S.E.2d 87 (1992).

In the slip and fall case, the owner should have been barred under O.C.G.A. § 24-3-37 from admitting into evidence certain portions of a letter, allegedly conflicting with the occupant's position at trial, sent by the occupant to the owner setting out the reasons for the fall and seeking to enter settlement negotiations; the letter's statement as to how the occupant fell was made with a view toward compromise of the claim, and it was an offer to compromise a doubtful or disputed claim. *Nevitt v. CMD Realty Inv. Fund IV, L.P.*, 282 Ga. App. 533, 639 S.E.2d 336 (2006).

Neither O.C.G.A. § 24-3-37 nor O.C.G.A. § 24-3-37.1 prevented admitting letter from defendant medical device manufacturer because there was evidence plaintiff patient's surgeon requested that manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon's goodwill due to number of devices the surgeon implanted in patients on a yearly basis. *Trickett v. Advanced Neuromodulation Sys.*, 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Insurance claims. — In an action by the assignee of a claim under a fire insurance policy, evidence as to whether other companies, having policies covering the same property, had paid claims under those policies, is inadmissible. *Firemen's Ins. Co. v. Larsen*, 52 Ga. App. 140, 182 S.E. 677 (1935).

Evidence that the plaintiff, in attempting to discuss plaintiff's claims arising out of an automobile collision, could not get a response from the defendant, plaintiff's insurer, did not show "negotiations and offers of compromise or settlement," which are

not proper evidence under O.C.G.A. § 24-3-37, but was properly admitted under O.C.G.A. § 13-6-11 to show that the defendant acted in bad faith, or was stubbornly litigious, or put the plaintiff to unnecessary trouble or expense. *U-Haul Co. v. Ford*, 171 Ga. App. 744, 320 S.E.2d 868 (1984).

In action for abuse of process, the trial court properly allowed the plaintiff to testify as to the offers of settlement made by the defendant's attorney immediately prior to trial. The settlement offers were not made during the course of the litigation in which they were offered in evidence, but in the context of settling the original suit by the defendant. *Ostroff v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

Conditional offer to pay half of claim. — When a person holds a claim against another in a certain amount, a proposition by the latter to pay one-half of the claim provided another person pays the other half, is a proposal of compromise, and inadmissible. This is true even assuming that the person making the proposal and such other person are partners. *English v. Moore*, 28 Ga. App. 265, 110 S.E. 737, later appeal, 29 Ga. App. 307, 114 S.E. 921 (1922).

Offer to pay less than contract sum. — On an issue of whether the contract was procured by the fraudulent representation of the plaintiff of a material fact, the admission of evidence that the defendant offered to pay a less sum in compromise of any liability under the contract is harmful error. *Dance v. Mize*, 134 Ga. 646, 68 S.E. 434 (1910).

Statute was applied to reject admission made with view of compromise in the following cases. — *Duncan v. Bailey*, 162 Ga. 457, 134 S.E. 87 (1926); *Slade v. Raines*, 165 Ga. 89, 139 S.E. 805 (1927).

Erroneous admission. — Trial court erred in admitting evidence of an agreement between the prosecutor and the defendant in a bastardy case for the payment by the defendant of a sum of money in return for an agreement that the case should be dead docketed, since such evidence could have had only the purpose of showing an admission of guilt by the accused and as such it was inadmissible as not having been freely and voluntarily made. *Simmons v. State*, 98 Ga. App. 159, 105 S.E.2d 356 (1958).

When trial court informed the jury that testimony leading up to an offer of compro-

Application and Illustrations (Cont'd)

mise was being excluded, if trial court's usage of the word "compromise" was in error, such error was rendered harmless by the trial court clearly stating to the jury that offers in compromise are inadmissible, that the court was sustaining the objection to the

extent that it might have any bearing on an offer in compromise, or any element of it, that the court was offering no opinion whatever of any kind, and that if anything had been said about an offer in compromise to disregard it as it was not admissible. *South-eastern Metal Prods., Inc. v. De Vaughn*, 99 Ga. App. 569, 109 S.E.2d 305 (1959).

RESEARCH REFERENCES

C.J.S. — 31A C.J.S., Evidence, §§ 388, 395 et seq.

ALR. — Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Admissibility of admissions made in connection with offers or discussions of compromise, 15 ALR3d 13.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threat-

ening to compel, accused to view victim's corpse, 27 ALR3d 1185.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 ALR3d 1375.

Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

24-3-37.1. Offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apologies by a health care provider or the provider's employee or agent.

(a) The General Assembly finds that conduct, statements, or activity constituting voluntary offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apology between or among parties or potential parties to a civil action should be encouraged and should not be considered an admission of liability. The General Assembly further finds that such conduct, statements, or activity should be particularly encouraged between health care providers and patients experiencing an unanticipated outcome resulting from their medical care. Regulatory and accreditation agencies are in some instances requiring health care providers to discuss the outcomes of their medical care and treatment with their patients, including unanticipated outcomes, and studies have shown such discussions foster improved communications and respect between provider and patient, promote quicker recovery by the patient, and reduce the incidence of claims and lawsuits arising out of such unanticipated outcomes. The General Assembly therefore concludes certain steps should be taken to promote such conduct, statements, or activity by limiting their admissibility in civil actions.

(b) As used in this Code section, the term:

(1) "Health care provider" means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43 or any hospital, nursing home, home health agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31. The term shall also

include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

(2) “Unanticipated outcome” means the outcome of a medical treatment or procedure, whether or not resulting from an intentional act, that differs from an expected or intended result of such medical treatment or procedure.

(c) In any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relate to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest. (Code 1981, § 24-3-37.1, enacted by Ga. L. 2005, p. 1, § 6/SB 3; Ga. L. 2006, p. 72, § 24/SB 465.)

Editor’s notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: “The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote

predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.”

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

JUDICIAL DECISIONS

Application and illustrations. — Neither O.C.G.A. § 24-3-37 nor O.C.G.A. § 24-3-37.1 prevented admitting letter from defendant medical device manufacturer because there was evidence plaintiff patient’s surgeon requested that manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon’s goodwill due to the

number of devices the surgeon implanted in patients on a yearly basis. *Trickett v. Advanced Neuromodulation Sys.*, 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Evidence properly excluded. — In a medical negligence action, the trial court properly excluded statements of regret made by the doctor sued pursuant to the plain meaning of O.C.G.A. § 24-3-37.1(c), despite the suing patient’s claim that such should have

been admitted as statements against interest and under the *res gestae* exception to the hearsay rule; moreover, retroactive application was not improper as the Georgia Gen-

eral Assembly intended that the law be applied to cases pending at the time it was passed. *Airasian v. Shaak*, 289 Ga. App. 540, 657 S.E.2d 600 (2008).

24-3-38. Right to have whole conversation heard.

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence. (Orig. Code 1863, § 3714; Code 1868, § 3738; Code 1873, § 3791; Code 1882, § 3791; Civil Code 1895, § 5196; Penal Code 1895, § 1004; Civil Code 1910, § 5783; Penal Code 1910, § 1030; Code 1933, § 38-410.)

JUDICIAL DECISIONS

It is the universal rule, in both civil and criminal cases, that if part of a conversation is introduced, all that is said in the same conversation which is relevant to the issue should be admitted. *West v. State*, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946).

Admission defined. — An admission is positive or substantive proof of the facts asserted. *Seaboard Coast Line R.R. v. Duncan*, 123 Ga. App. 479, 181 S.E.2d 535 (1971).

An admission is an out-of-court statement which is inconsistent with the contention of the party. *Seaboard Coast Line R.R. v. Duncan*, 123 Ga. App. 479, 181 S.E.2d 535 (1971).

All of confession must be admitted. — On the trial of a person charged with an offense, it is error to admit part of the person's confession and exclude the other part. *Long v. State*, 22 Ga. 40 (1857); *Peterson v. State*, 47 Ga. 524, later appeal, 50 Ga. 142 (1873).

Remainder of conversation shown by cross-examination. — Generally, when part of a conversation has been introduced in evidence, the rest of the conversation may be brought out by the opposite party on cross-examination of the witness. *Cox v. State*, 64 Ga. 374, 37 Am. R. 76 (1879). See *Betts v. State*, 66 Ga. 508 (1881).

No cross-examination when no direct examination. — Trial court did not err in preventing the defendant from cross-examining the investigating officer about an incriminating statement made by the defendant after the state introduced

evidence concerning the statement. O.C.G.A. §§ 24-3-38 and 24-9-64 (“The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him”) were inapplicable because there had been no direct examination relating to any part of the statement by the state. *Davis v. State*, 261 Ga. 382, 405 S.E.2d 648 (1991).

Refusal to state remainder of conversation. — If in the examination in chief the witness should testify to anything occurring in such communications material to the witness's side of the case, the other party would have the right to inquire concerning the entire conversation. If there should be anything tending to incriminate the witness and the witness should refuse to answer as to it, the whole conversation should be excluded. *Young v. State*, 65 Ga. 525 (1880).

Use to avoid impeachment. — When witness was asked about a conversation, with a view to laying a foundation to impeach the witness, the witness had the right to give the whole conversation so far as it is pertinent. *Archer v. Gwinnett County*, 110 Ga. App. 442, 138 S.E.2d 895 (1964).

Irrelevant matters not admissible. — Matters in conversation or documents otherwise irrelevant, and wholly disconnected with the part first offered, are not thereby made admissible by statute. *Brown v. State*, 119 Ga. 572, 46 S.E. 833 (1904).

Since past sexual experiences of a victim of child molestation were not shown to be relevant, the trial court did not err by redacting such material from a taped interview of

the victim. *Roberts v. State*, 232 Ga. App. 745, 503 S.E.2d 614 (1998).

In a prosecution for rape, the omission, premised on the rape-shield statute, of defendant's reference to the victim as a "well known whore" in a statement to police was not error. *Johnson v. State*, 238 Ga. App. 677, 520 S.E.2d 221 (1999).

Admissibility into evidence of a complete one page letter to a detective that contained defendant's signature at the bottom was not affected by the fact that other pages enclosed with the letter, relating to the alleged criminal activity of other people, had been forwarded by the detective to the Georgia Bureau of Investigation. *Boatman v. State*, 272 Ga. 139, 527 S.E.2d 560 (2000).

Matters irrelevant and wholly disconnected with the conversation first offered are not rendered admissible by admission of some of the conversation. *Brown v. State*, 119 Ga. 572, 46 S.E. 833 (1904).

Self-serving declarations. — In a suit by an executrix to recover certain personal property from another, there was no error in excluding a self-serving declaration made by the surviving party to a contract under which the possession of the property in dispute was held by the surviving party, which attempted to set up an additional claim or demand against the deceased party to the contract, as a basis for the surviving party's adverse possession. *May v. Subers*, 19 Ga. App. 306, 91 S.E. 435 (1917).

Subsequent conversations. — In a subsequent conversation with the same person and upon the same subject, what was said in the first admission, in the absence of something to the contrary, is necessarily understood, and must be taken and considered as a component part of the subsequent conversation. *West v. State*, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946).

Indicative of other crimes not objection. — Testimony which constitutes an admission by the defendant regarding the offense for which the defendant is on trial is not subject to objection for the reason that the testimony likewise indicates the defendant was guilty of another offense since the language is such that it is impossible to convey the defendant's meaning without repeating the complete statement. *Crider v. State*, 98 Ga. App. 164, 105 S.E.2d 506 (1958).

Failure to hear whole conversation. — That a witness did not hear all of the conversation about which the witness is asked to testify is no ground of objection to the witness stating as much of the conversation as the witness did hear. *Westmoreland v. State*, 45 Ga. 225 (1872); *Woolfork v. State*, 85 Ga. 69, 11 S.E. 814 (1890); *Lynn v. State*, 140 Ga. 387, 79 S.E. 29 (1913).

Extracts from prior statements. — An extract, shown to be substantially correct, from a prisoner's statement made on a former trial was admissible without offering the entire statement, though it was shown that the statement made at the former trial as taken down by the official reporter had been lost. *Medlin v. State*, 149 Ga. 23, 98 S.E. 551 (1919).

Part of trial report used. — State may read in evidence a part of a stenographic report of a former trial without putting in the whole, the other party being at liberty to introduce the balance, or so much thereof as is pertinent. *Burnett v. State*, 87 Ga. 622, 13 S.E. 552 (1891).

Recorded telephone conversations with an informant. — There was circumstantial evidence that a defendant was the participant in recorded phone conversations with an informant; therefore the conversations were admissible as admissions of a party opponent under O.C.G.A. § 24-3-31, and the entirety of the calls were admissible under O.C.G.A. § 24-3-38. *Kimble v. State*, 301 Ga. App. 237, 687 S.E.2d 242 (2009).

When a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even though it is self-serving in its nature, or exculpatory, in that it justifies, excuses, or mitigates the act. *West v. State*, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946).

It was error to deny the accused the right, under cross-examination, to have a witness further testify what the accused told the witness in the first conversation which may tend to exculpate the accused after a witness had testified as to a second conversation containing an admission by the accused. *West v. State*, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946).

Incomplete return. — When a plaintiff offered in evidence an incomplete return of an administrator as an admission, and it had folded in it various receipts, accounts, etc., referred to as vouchers, plaintiff was not compelled to put the vouchers in evidence along with the returns. That was the right of the defendants, if the defendants could show that the enclosed were either a part of the admission or connected therewith. *Dowling v. Feeley*, 72 Ga. 557 (1884).

Admission of partial statement upheld. — In a prosecution for rape, despite O.C.G.A. § 24-3-38, the rape shield statute prohibited the admission of a portion of defendant's statement in which the defendant said that the victim had sexual intercourse with the victim's cousin. *Snow v. State*, 228 Ga. App. 649, 492 S.E.2d 564 (1997).

Trial court did not err by refusing the defendant's request to admit only the portions of letters written by the codefendant that cast the codefendant in a bad light relative to the crimes and excluding other portions that described the defendant's role in the crimes as being more significant than the defendant had described in a custodial interview because the defendant was not permitted to admit portions of the letters for the purportedly-limited purpose of showing the codefendant's state of mind without waiving the defendant's objections to the state's introduction of the remainder of the letters. *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010).

Death of party making statements. — Whole conversation should go in under this statute, though involving statements made by one since dead. *Powell v. Watts*, 72 Ga. 770 (1884).

Non-testifying witness's hearsay statement. — Premitting whether a complained-of hearsay statement was admissible under the rule of completeness, admission of the statement was harmless beyond a reasonable doubt given that the admission was cumulative of other positive witness identifications, defendant's own confession, and the videotaped evidence depicting defendant robbing the store, all of which overwhelmingly established defendant's guilt. *Jackson v. State*, 262 Ga. App. 451, 585 S.E.2d 745 (2003).

Refusal to utilize remainder of statements. — Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced into participating in the crimes. *Bowe v. State*, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, 2008 Ga. LEXIS 318 (Ga. 2008).

Failure to listen to all of audiotape was harmless error. — In a recorded conversation, the defendant denied committing a murder. Assuming that under O.C.G.A. § 24-3-38, the defendant should have been allowed to play the audiotape in its entirety because an accomplice had testified to a portion of the conversation, any error was harmless as the defendant's recorded denial of involvement would have been cumulative of other evidence. *Patterson v. State*, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, U.S. , 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Cited in *Cheney v. Bank of Bremen*, 25 Ga. App. 114, 102 S.E. 903 (1920); *Parrish v. State*, 88 Ga. App. 881, 78 S.E.2d 366 (1953); *Peacock v. State*, 170 Ga. App. 309, 316 S.E.2d 864 (1984); *Thomas v. State*, 196 Ga. App. 88, 395 S.E.2d 615 (1990); *Howard v. State*, 215 Ga. App. 343, 450 S.E.2d 824 (1994); *Dowdy v. State*, 215 Ga. App. 576, 451 S.E.2d 528 (1994); *Strange v. Henderson*, 223 Ga. App. 218, 477 S.E.2d 330 (1996); *Stanford v. State*, 272 Ga. 267, 528 S.E.2d 246 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 759.

C.J.S. — 31A C.J.S., Evidence, § 518.

ALR. — Proof of entire conversation containing alleged confession, 2 ALR 1017; 26 ALR 541.

Duty of court to instruct regarding exculpatory or mitigating statements in confes-

sion or admission introduced by prosecution, 116 ALR 1459.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 ALR2d 521.

Testifying in civil proceeding as waiver of privilege against self-incrimination, 72 ALR2d 830.

ARTICLE 3

CONFESSIONS

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

JUDICIAL DECISIONS

In general. — Any statement or conduct of a person, indicating a consciousness of guilt, when such person is, at the time or thereafter, charged with or suspected of a crime, is admissible against the person upon trial for committing the crime. *Bridges v. State*, 246 Ga. 323, 271 S.E.2d 471 (1980).

Fact that a confession was not reduced to writing does not render confession inadmissible. *Hayes v. State*, 152 Ga. App. 858, 264 S.E.2d 307 (1980).

Confession not inadmissible despite indicating other offenses. — Criminal confession is not rendered inadmissible because the language used therein indicates that the accused had committed another and separate offense. *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565, supplemented, 245 Ga. 882, 268 S.E.2d 349 (1980).

Harmless error. — Any possible error in admitting a confession of a codefendant after the codefendant refused to testify is rendered harmless when the confession parallels the statements of the codefendants. *Myrick v. State*, 155 Ga. App. 496, 271 S.E.2d 637 (1980).

Reversible error. — When inadmissible evidence as to a confession is offered and admitted, its admission constitutes reversible error unless the jury is expressly instructed that the evidence is admitted for the purpose of impeachment only, whether or not a request to so charge be made, and whether or not any exceptions are made to the charge as given. *Askea v. State*, 153 Ga. App. 849, 267 S.E.2d 279 (1980).

RESEARCH REFERENCES

ALR. — Necessity that confession in prosecution for homicide during perpetration of another felony be corroborated by other evidence of the commission of the other felony, 79 ALR 508.

Right of defendant in criminal case, where state has introduced incriminating portion of conversation or statements made by him, to elicit or introduce in evidence his exculpatory statements, 118 ALR 138.

Constitutional aspects of procedure for determining voluntariness of pretrial confession, 1 ALR3d 1251; 132 ALR Fed. 415.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 ALR4th 16.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Admissibility of confession or other state-

ment made by defendant as affected by delay in arraignment — modern state cases, 28 ALR4th 1121.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

24-3-50. Only voluntary confessions admissible.

To make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. (Orig. Code 1863, § 3716; Code 1868, § 3740; Code 1873, § 3793; Code 1882, § 3793; Penal Code 1895, § 1006; Penal Code 1910, § 1032; Code 1933, § 38-411.)

Law reviews. — For article surveying cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008).

For comment, "School Bullies — They Aren't Just Students: Examining School Interrogations and the Miranda Warning," see 59 Mercer L. Rev. 731 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSTITUTIONAL CONSIDERATIONS

VOLUNTARINESS

PROCEDURAL CONSIDERATIONS

1. USE AS EVIDENCE
2. PRELIMINARY PROCEEDINGS
3. INSTRUCTIONS
4. REVIEW

General Consideration

Confession defined. — A confession is an admission freely and voluntarily made by the accused whereby the accused acknowledges personally to be guilty of the offense charged, and discloses the circumstances of the act, and the share and participation the accused had in the act. *Allen v. State*, 187 Ga. 178, 200 S.E. 109 (1938); *Pressley v. State*, 201 Ga. 267, 39 S.E.2d 478 (1946); *Johnson v. State*, 204 Ga. 528, 50 S.E.2d 334 (1948); *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954).

Incriminating statements distinguished. — There is a difference between an incriminating statement and a confession of guilt. In the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. *Johnson v. State*, 204 Ga. 528, 50 S.E.2d 334 (1948); *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954).

True determinant of whether a defendant has made a confession or merely given a statement is whether the statement is offered by the accused as exculpatory or inculpatory. *Sanford v. State*, 153 Ga. App. 541, 265 S.E.2d 868 (1980).

An admission of the main fact, from which the essential elements of the criminal act charged may be inferred, amounts to a confession of the crime itself. *Sanford v. State*, 153 Ga. App. 541, 265 S.E.2d 868 (1980).

An admission of a fact not in itself involving criminal intent is not a confession. *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954).

Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against the defendant, it cannot be said to be an admission of guilt. *Allen v. State*, 187 Ga. 178, 200 S.E. 109 (1938); *Johnson v. State*,

204 Ga. 528, 50 S.E.2d 334 (1948); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954).

Prima-facie showing of the admissibility of a confession is made by evidence of compliance with O.C.G.A. § 24-3-50 in addition to evidence showing that defendant confessed after having been given defendant's Miranda rights. *Pruitt v. State*, 176 Ga. App. 317, 335 S.E.2d 724 (1985); *Adams v. State*, 186 Ga. App. 599, 367 S.E.2d 871, cert. denied, 186 Ga. App. 917, 367 S.E.2d 871 (1988).

"Hope of benefit" to which O.C.G.A. § 24-3-50 refers is usually a hope of lighter punishment. *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981); *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981).

Within the context of O.C.G.A. § 24-3-50, the slightest hope of benefit refers to a lighter sentence. *Burton v. State*, 212 Ga. App. 100, 441 S.E.2d 470 (1994).

Record did not show that the officer made any assurances to defendant that the defendant's sentence would be lighter if the defendant gave an incriminating statement and the officer's statement to the accused that substance abuse counseling was available was an offer of a collateral benefit which did not invalidate the statement. *Burton v. State*, 212 Ga. App. 100, 441 S.E.2d 470 (1994).

Promise by an officer to assist defendant in getting help through counseling did not constitute an impermissible hope of benefit under O.C.G.A. § 24-3-50. *Peinado v. State*, 223 Ga. App. 271, 477 S.E.2d 408 (1996).

An offer by officers to "help" defendant if defendant told the truth and the officer's statement that defendant would face a jury trial if defendant lied were not promises of an improper benefit that would render defendant's confession inadmissible under the "slightest hope of benefit" to which O.C.G.A. § 24-3-40 refers. *Porter v. State*, 264 Ga. App. 526, 591 S.E.2d 436 (2003).

Hope to be released does not implicate statute. — "Hope of benefit" to which O.C.G.A. § 24-3-50 refers is usually a hope of lighter punishment. Consequently, being released is not a hope of benefit that would implicate that Code section. Further, even if the court were to find that the GBI agent said that the defendant would be released if the defendant gave the agent information, this would be an offer of a collateral benefit

which does not invalidate the statement and thus the statement was admissible. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Clear intention of the statute is that a confession induced by the slightest hope of benefit or remotest fear of injury may not be used against a defendant. *Williams v. State*, 239 Ga. 327, 236 S.E.2d 672 (1977).

Construction with § 24-3-53. — Both former Code 1933, §§ 38-411 and 38-420 (see O.C.G.A. §§ 24-3-50 and 24-3-53) refer to evidence in criminal trials. The statute recognizes the distinction between admissions and confessions. In former Code 1933, § 38-420 only one or more facts entering into a criminal act were admitted, while in former Code 1933, § 38-411 the entire criminal act was confessed. *Burns v. State*, 188 Ga. 22, 2 S.E.2d 627 (1939).

Issue regarding voluntariness of confession pursuant to O.C.G.A. § 24-3-50 must be raised in the trial court. *Turner v. State*, 246 Ga. App. 49, 539 S.E.2d 553 (2000).

Oral admissions properly admitted after voluntariness determined. — Trial court does not err in admitting defendant's oral admissions contained in the testimony of the investigating officer after the trial court as the trier of fact outside the presence of the jury determined the voluntariness of the defendant's admissions. *Kelley v. State*, 160 Ga. App. 343, 287 S.E.2d 68 (1981).

Court's decision to allow confession into evidence not error. *Johnson v. State*, 261 Ga. 419, 405 S.E.2d 686 (1991); *Davis v. State*, 271 Ga. 527, 520 S.E.2d 218 (1999).

Cited in *Mills v. State*, 38 Ga. App. 125, 143 S.E. 575 (1928); *Smith v. State*, 41 Ga. App. 341, 152 S.E. 916 (1930); *Millen v. State*, 175 Ga. 283, 165 S.E. 226 (1932); *Claybourn v. State*, 190 Ga. 861, 11 S.E.2d 23 (1940); *McKennon v. State*, 63 Ga. App. 466, 11 S.E.2d 416 (1940); *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941); *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944); *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946); *Mangum v. State*, 201 Ga. 519, 40 S.E.2d 423 (1946); *Pressley v. State*, 207 Ga. 274, 61 S.E.2d 113 (1950); *Palmour v. State*, 83 Ga. App. 792, 64 S.E.2d 697 (1951); *Harris v. State*, 214 Ga. 739, 107 S.E.2d 801 (1959); *Bunckley v. State*, 215 Ga. 377, 110 S.E.2d 744 (1959); *Albert v. State*, 215 Ga.

General Consideration (Cont'd)

564, 111 S.E.2d 215 (1959); Reliford v. State, 101 Ga. App. 244, 113 S.E.2d 473 (1960); Smith v. State, 218 Ga. 216, 126 S.E.2d 789 (1962); Pugh v. State, 219 Ga. 166, 132 S.E.2d 203 (1963); Vanleeward v. State, 220 Ga. 135, 137 S.E.2d 452 (1964); Whisman v. State, 221 Ga. 460, 145 S.E.2d 499 (1965); Moore v. State, 222 Ga. 748, 152 S.E.2d 570 (1966); Dempsey v. State, 225 Ga. 208, 166 S.E.2d 884 (1969); Lindsey v. State, 227 Ga. 48, 178 S.E.2d 848 (1970); Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971); Callahan v. State, 229 Ga. 737, 194 S.E.2d 431 (1972); Carter v. State, 232 Ga. 654, 208 S.E.2d 747 (1974); R.W. v. State, 135 Ga. App. 668, 218 S.E.2d 674 (1975); Edwards v. State, 236 Ga. 486, 224 S.E.2d 361 (1976); Hickox v. State, 138 Ga. App. 882, 227 S.E.2d 829 (1976); Johnson v. State, 238 Ga. 27, 230 S.E.2d 849 (1976); Rogers v. State, 142 Ga. App. 387, 236 S.E.2d 134 (1977); Carroll v. State, 142 Ga. App. 428, 236 S.E.2d 159 (1977); Jackson v. State, 239 Ga. 449, 238 S.E.2d 31 (1977); Denson v. State, 149 Ga. App. 453, 254 S.E.2d 455 (1979); Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979); Cline v. State, 153 Ga. App. 576, 266 S.E.2d 266 (1980); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980); Altman v. State, 156 Ga. App. 185, 273 S.E.2d 923 (1980); Young v. State, 156 Ga. App. 865, 275 S.E.2d 804 (1981); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981); Williams v. State, 162 Ga. App. 363, 291 S.E.2d 89 (1982); Bragg v. State, 162 Ga. App. 264, 291 S.E.2d 112 (1982); Bell v. State, 162 Ga. App. 527, 292 S.E.2d 114 (1982); Gilstrap v. State, 162 Ga. App. 841, 292 S.E.2d 495 (1982); Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982); Bradford v. State, 166 Ga. App. 584, 305 S.E.2d 32 (1983); State v. Summers, 173 Ga. App. 24, 325 S.E.2d 419 (1984); Moore v. State, 176 Ga. App. 882, 339 S.E.2d 271 (1985); Lewis v. State, 255 Ga. 681, 341 S.E.2d 434 (1986); Evans v. State, 256 Ga. 10, 342 S.E.2d 684 (1986); Gaines v. State, 179 Ga. App. 623, 347 S.E.2d 673 (1986); Parker v. State, 256 Ga. 543, 350 S.E.2d 570 (1986); Brooks v. State, 258 Ga. 20, 365 S.E.2d 97 (1988); Graham v. State, 185 Ga. App. 617, 365 S.E.2d 482 (1988); Foster v. State, 258 Ga. 736, 374 S.E.2d 188 (1988); Newsome v. State, 189 Ga. App. 329, 375 S.E.2d 621

(1988); Burley v. State, 190 Ga. App. 75, 378 S.E.2d 328 (1989); Riviera v. State, 190 Ga. App. 823, 380 S.E.2d 353 (1989); Guimond v. State, 259 Ga. 752, 386 S.E.2d 158 (1989); Chastain v. State, 196 Ga. App. 50, 395 S.E.2d 570 (1990); Sears v. State, 262 Ga. 805, 426 S.E.2d 553 (1993); Williams v. State, 272 Ga. 335, 528 S.E.2d 518 (2000); Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000); Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000); Butts v. State, 273 Ga. 760, 546 S.E.2d 472 (2001); Tillman v. State, 251 Ga. App. 330, 554 S.E.2d 305 (2001); Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001); State v. Nash, 279 Ga. 646, 619 S.E.2d 684 (2005); Hill v. State, 281 Ga. 795, 642 S.E.2d 64 (2007).

Constitutional Considerations

In general. — Admission in evidence of a confession voluntarily made, without being induced by another by the slightest hope of benefit or the remotest fear of injury, does not contravene the provisions of the state constitution that no person shall be compelled to give testimony tending in any manner to incriminate oneself, nor is it inimical to anything contained in the fourteenth amendment to the Constitution of the United States. Wilburn v. State, 141 Ga. 510, 81 S.E. 444 (1914).

Use of threats or promises to coerce a criminal defendant to make a statement is contrary to Georgia law and to federal constitutional law. Young v. State, 243 Ga. 546, 255 S.E.2d 20 (1979).

Self-incrimination. — Confessions, if made voluntarily without hope of benefit or fear of injury, are admissible and are not rendered inadmissible as violating the constitutional inhibition against self-incrimination by the fact that the confession is in affidavit form. Elliott v. State, 87 Ga. App. 456, 74 S.E.2d 366 (1953).

It must be shown that no constitutional rights of the defendant were violated in obtaining statement when an in-custody written statement of a defendant is offered in evidence. Walker v. State, 226 Ga. 292, 174 S.E.2d 440 (1970), vacated on other grounds, 408 U.S. 936, 92 S. Ct. 2845, 33 L. Ed. 2d 754 (1972).

Interrogation by private citizen afforded no constitutional protection. — Confessions which result from coercive interrogations

conducted by private citizens are not subject to a constitutional due process analysis in determining whether or not to exclude the confession at trial. *Griffin v. State*, 230 Ga. App. 318, 496 S.E.2d 480 (1998).

Defendant's constitutional rights could not have been violated when the defendant was not under arrest or in custody at the time of the confession and no police or other law enforcement personnel were present. *Gaston v. State*, 153 Ga. App. 538, 265 S.E.2d 866 (1980).

Fifth and sixth amendments not violated. — When the evidence heard was sufficient to authorize the trial court to determine that the defendant was advised of the defendant's rights, that the defendant was not placed under any duress, that the defendant seemed to understand the defendant's rights, that the defendant was not under influence of drugs or alcohol and that the defendant seemed completely aware of what was going on around the defendant, the defendant's confession was voluntarily elicited and not in violation of the fifth and sixth amendments. *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979).

Question was not a request for counsel. — Question by a defendant as to whether the defendant would have been arrested if the defendant asked for an attorney was not a clear request for counsel that required cessation of police questioning or clarification before continuing the interrogation and there was no evidence that the statement was given in fear of injury or for a hope of benefit; additionally, while the investigator lied to the defendant throughout the interview about the existence and amount of inculpatory evidence, nothing suggested that the investigator sought to procure a false statement. *Wright v. State*, 279 Ga. App. 155, 630 S.E.2d 656 (2006).

Waiver of Miranda rights. — When a defendant objects to the admission into evidence of defendant's confession, the state must prove by a preponderance of the evidence that the confession was voluntary, and, if the confession is the product of a custodial interrogation by officers of the government, that the confession was preceded by the appellant's knowing and voluntary waiver of the appellant's Miranda rights. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), sentence vacated, 446 U.S. 961, 100

S. Ct. 2934, 64 L. Ed. 2d 819 (1980) (remanded for further consideration in light of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)).

Whether, after the Miranda warnings are given, the waiver of those rights was free and voluntary depends upon the totality of the circumstances. *Miller v. State*, 155 Ga. App. 587, 271 S.E.2d 719 (1980).

Due process clause of the fourteenth amendment to the United States Constitution requires that the trial judge determine whether a confession is voluntary before permitting the jury to consider the confession. *Stone v. State*, 155 Ga. App. 357, 271 S.E.2d 22 (1980).

Defendant's constitutional rights are violated when defendant's challenged confession is introduced without a determination by the trial judge of the confession's voluntariness after an adequate hearing. *Strickland v. State*, 226 Ga. 750, 177 S.E.2d 238 (1970).

Right to counsel violated by last but not earlier statements. — While non-custodial and custodial statements were properly admitted as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

Due process not violated. — When evidence shows that confessions were voluntarily made and were not induced by another by hope of award or fear of punishment, or when it is an issue of fact as to whether the confessions were properly obtained, defendant is not denied due process of law as guaranteed by the state and federal constitutions, by their introduction in evidence against the defendant. *Claybourn v. State*, 190 Ga. 861, 11 S.E.2d 23 (1940).

Voluntariness

Voluntary character of the confession depends on the question whether the making of the statement was voluntary, and not whether the particular communication contained in the confession was voluntary. *Turner v. State*, 203 Ga. 770, 48 S.E.2d 522 (1948).

Voluntariness (Cont'd)

Officer's knowledge of defendant. — Fact that the interrogating officer did not know the defendant's age, education, or familiarity with the "custodial experience" did not render the defendant's confession invalid or involuntary; further, the failure to advise the defendant as to the crimes about which the defendant was to be questioned before a Miranda waiver was irrelevant to whether the waiver was knowing and voluntary. *Rivera v. State*, 279 Ga. App. 1, 630 S.E.2d 152 (2006).

Totality of the circumstances. — To determine whether the state has proven that a confession was made voluntarily, the trial court must consider the totality of the circumstances. *Presley v. State*, 251 Ga. App. 823, 555 S.E.2d 156 (2001); *Harrison v. State*, 253 Ga. App. 179, 558 S.E.2d 760 (2002).

Given the totality of the circumstances, and the defendant's age, education, and knowledge of both the substance of the charge and nature of the rights to an attorney and to remain silent, because the defendant voluntarily gave a statement to a police detective about an uncharged armed robbery, absent any threats, coercion, or promises in exchange for doing so, the statement was admissible. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under O.C.G.A. § 24-3-50, not coerced or received as a result of promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion to suppress a non-custodial audio recording of a statement the defendant made to the victim that the victim obtained via a hidden recorder as a hearing was held by the trial court on the admissibility of the recording at which time the trial court concluded that, under the totality of the circumstances,

the defendant's statement was made voluntarily and the victim did not promise the defendant anything to make the statement and did not threaten the defendant into making the statement. *Flournoy v. State*, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

Implicit finding of voluntariness in admission of confession. — When the court denied the defendants' motions to suppress the defendant's confessions, implicit in the ruling was the court's finding that the statements were freely and voluntarily made, without hope of benefit or reward. *Eady v. State*, 182 Ga. App. 293, 355 S.E.2d 778 (1987).

A person who is mentally ill can be competent to make a voluntary confession. *Johnson v. State*, 256 Ga. 259, 347 S.E.2d 584 (1986).

When an admission of guilt was not product of interrogation but was spontaneous statement of the defendant the statement is admissible. *Williams v. State*, 159 Ga. App. 772, 285 S.E.2d 232 (1981).

Hope of reward or fear of punishment which renders confession inadmissible is that which is induced by another. *Jones v. State*, 18 Ga. App. 310, 89 S.E. 347 (1916); *Phinazee v. State*, 22 Ga. App. 258, 95 S.E. 878 (1918); *Hill v. State*, 148 Ga. 521, 97 S.E. 442 (1918); *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967); *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

Although the interrogating officer did tell defendant that the defendant was helping defendant by telling the truth, that judges love to hear that defendants helped the police, and that although telling the truth put defendant right in the hot seat, it also showed that the defendant cooperated, these statements, when combined with repeated statements that the officer could not promise any help, did not constitute the kind of "hope of benefit" which is contemplated by O.C.G.A. § 24-3-50. *Stephens v. State*, 164 Ga. App. 398, 297 S.E.2d 90 (1982).

Even though interrogating officer's deception may not have been intended to procure an untrue statement, since the deception was intended and indeed did induce defendant to confess in the hope of receiving a lighter punishment, the confession was not voluntary. *State v. Ritter*, 268 Ga. 108, 485 S.E.2d 492 (1997).

Defendant's claim that defendant's statement was inadmissible on the basis that the statement was obtained by a threat of an increased punishment was not valid because the challenged words could only have been construed as the officer's assessment that the defendant's credibility was being destroyed and that defendant was imperiling any claim of innocence by insisting on a version of the facts which was so dramatically contrary to the evidence gathered by the police. *Robinson v. State*, 272 Ga. 752, 533 S.E.2d 718 (2000).

While the term "hope of benefit" contained in O.C.G.A. § 24-3-50 has been interpreted generally as a reward of lighter punishment on the charges, "hope of benefit" may also include the reward of no charges at all. *Richardson v. State*, 265 Ga. App. 711, 595 S.E.2d 565 (2004).

Court of appeals erred in affirming the defendant's conviction for criminal attempt to commit armed robbery and aggravated assault and in determining that the trial court did not err by denying the defendant's motion to suppress the confession as involuntary and induced by an improper hope of benefit because the defendant's confession had to be considered involuntary and inadmissible when the record showed that the defendant gave self-incriminating statement only after being told that the defendant could receive a "shorter term" by doing so, which was exactly the hope of benefit that was prohibited under O.C.G.A. § 24-3-50; as a result, the defendant's confession was induced by a hope of benefit, it had to be presumed to be legally false, and it could not be the underlying basis of a conviction. *Canty v. State*, 286 Ga. 608, 690 S.E.2d 609 (2010).

"Hope of benefit" contemplated by O.C.G.A. § 24-3-50 must be induced by another; therefore, any hope which originated in the mind of the person making a confession would not exclude admission of the confession. *Wesley v. State*, 177 Ga. App. 877, 341 S.E.2d 507 (1986), overruled on other grounds, *Gilbert v. State*, 193 Ga. App. 283, 388 S.E.2d 18 (1989).

Hope or fear which originates in the mind of the person making the confession and which originates from seeds of the person's own planting would not exclude a confession. The hope or fear must be induced by

another. *Hall v. State*, 180 Ga. App. 366, 349 S.E.2d 255 (1986); *Shelton v. State*, 196 Ga. App. 163, 395 S.E.2d 618 (1990); *Ramos v. State*, 198 Ga. App. 65, 400 S.E.2d 353 (1990).

While O.C.G.A. § 24-3-50 prohibits the introduction of a statement induced "by the slightest hope of benefit," the hope contemplated must be induced by another. *Bryant v. State*, 193 Ga. App. 840, 389 S.E.2d 405 (1989); *Vineyard v. State*, 195 Ga. App. 788, 395 S.E.2d 49 (1990).

A hope or fear which originates in the mind of the person making a confession and which originates from seeds of one's own planting would not exclude a confession, and defendant's contention that the defendant viewed the investigative detective as a "mother figure" did not exclude defendant's confession. *Owens v. State*, 209 Ga. App. 272, 433 S.E.2d 382 (1993).

Confessions made as a tactical decision are admissible when the hope or fear is a product of the defendant's own mind rather than the result of inducement by others. *Gray v. State*, 240 Ga. App. 716, 523 S.E.2d 626 (1999).

Offer to obtain psychologist. — Police officer's offer to assist defendant in finding a psychologist and the officer's suggestions that it best behooved the defendant to tell the truth did not constitute the hope of benefit prohibited by O.C.G.A. § 24-3-50. *Clay v. State*, 209 Ga. App. 266, 433 S.E.2d 377 (1993).

Hope of benefit not created. — Officer's testimony that the officer would inform the district attorney of defendant's cooperation was not sufficient to create a hope of benefit within the meaning of O.C.G.A. § 24-3-50. *Autry v. State*, 210 Ga. App. 150, 435 S.E.2d 512 (1993); *McFadden v. State*, 251 Ga. App. 342, 554 S.E.2d 323 (2001).

Any promise made to defendant to facilitate a change in defendant's jail cell was not a promise or hope of benefit which would taint defendant's otherwise voluntary confession. *Billings v. State*, 212 Ga. App. 125, 441 S.E.2d 262 (1994).

No hope of benefit was created when the defendant asked the interrogating officer, "What should I do? Should I talk?" and the officer replied, "That's up to you, man. All you're going to do is help yourself out." *Lee v. State*, 270 Ga. 798, 514 S.E.2d 1 (1999),

Voluntariness (Cont'd)

cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Defendant's statement given during an interview by a Department of Family and Children Services (DFACS) caseworker in the presence of two police officers was voluntary and not induced by deceit because neither the police nor DFACS offered defendant anything for the testimony. *Moss v. State*, 244 Ga. App. 295, 535 S.E.2d 292 (2000).

Officer's statements during interrogation to the effect that it would look better to the judge if defendant would confess to committing the murder rather than denying committing murder when the police could prove defendant was the murderer did not constitute a hope of benefit to elicit a statement. *Taylor v. State*, 274 Ga. 269, 553 S.E.2d 598 (2001).

In defendant's trial on charges of malice murder, felony murder, and armed robbery, there was no evidence in the record that a police officer who took defendant's statement referred to any possibility of a lighter sentence when the officer questioned defendant, and the trial court properly rejected defendant's claim that defendant's statement to police should be suppressed because the officer who interviewed the defendant attempted to coerce defendant into giving a statement by informing defendant that police had defendant's fingerprints or because defendant held only a general equivalency diploma. *Evans v. State*, 277 Ga. 51, 586 S.E.2d 326 (2003).

There was no violation of O.C.G.A. § 24-3-50 regarding coercion of a statement because the officers made no promise to defendant that the defendant would not go to jail or that the defendant might receive a lighter sentence; the detectives only indicated that the detectives would note defendant's cooperation and the defendant's efforts to straighten out the defendant's life. *Jones v. State*, 270 Ga. App. 233, 606 S.E.2d 288 (2004).

Defendant's statements, wherein the defendant admitted the defendant's culpability in a victim's murder, were properly admitted as voluntary in the defendant's criminal trial as the defendants' claim that defendants were each induced by the hope of receiving

benefits pursuant to O.C.G.A. § 24-3-50 lacked merit; the claims were contradicted by other testimony given by defendant that the defendant offered the statements freely, and one statement was not given in exchange for a plea agreement, as such agreement was already in place when the statement was made. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

While the defendant testified that the officers made certain promises to free the defendant, the interviewing officers testified that the officers made no promises or threats to the defendant, and the defendant signed a document in which the defendant acknowledged that no benefits had been promised the defendant, because some evidence supported the trial court's finding that defendant's confession was voluntary, those findings were not clearly erroneous. *Bowden v. State*, 279 Ga. App. 173, 630 S.E.2d 792 (2006).

Defendant's statement to police was not rendered involuntary because the statement was given based upon a hope of benefit as there was no evidence in the record to suggest that the police offered the defendant the hope of lighter punishment in exchange for that statement. *Givens v. State*, 281 Ga. App. 370, 636 S.E.2d 94 (2006).

Statements by interrogating officers that the defendant should help oneself, that it was in the defendant's best interest to tell what the defendant knew, and that the officers would show the district attorney and the judge that the defendant did not want to help oneself, did not constitute a hope of benefit under O.C.G.A. § 24-3-50. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Defendant's confession was not rendered involuntary merely because the confession was made with the hope of benefit from the interrogating officers because the evidence demonstrated that any hope of benefit given by the officers was dispelled by one officer's statement that the officers had no influence over the defendant's possible punishment. *Valentine v. State*, 289 Ga. App. 60, 656 S.E.2d 208 (2007).

Given evidence that the defendant was not provided any assurances by law enforcement that any assistance offered to the defendant would prove beneficial, the defendant's subsequent statement to law enforcement was voluntarily made. *Garcia v. State*, 290 Ga. App. 164, 658 S.E.2d 904 (2008).

Trial court did not err in admitting an alleged confession the defendant made to an investigator because the defendant gave a statement that implicated both the defendant and the defendant's sibling, and the trial court was fully authorized to find that the statement was not induced by any hope of benefit extended by a sergeant; thus, O.C.G.A. § 24-3-50 did not prevent admission of the statement. *Mitchell v. State*, 292 Ga. App. 124, 663 S.E.2d 800 (2008).

In a prosecution for felony murder, armed robbery, and burglary, a defendant's post-Miranda statements were properly admitted at trial as a detective's telling the defendant the detective knew the defendant was not the shooter did not constitute the hope of a lighter sentence that tainted the voluntariness of the defendant's statements. *Jackson v. State*, 284 Ga. 484, 668 S.E.2d 700 (2008).

Second defendant's statements were voluntary because the statements were not obtained by deceit intended to elicit an untrue response and were not induced by the hope of benefit; the investigators' alleged deception regarding whether the investigators had articulated a belief as to the second defendant's participation in the crimes, or indeed had probable cause to obtain an arrest warrant, had no bearing on the voluntariness of the defendant's statement in the absence of any evidence that the investigative technique was designed to procure a false statement. Moreover, the description of the second defendant as "not a suspect" offered no hope of benefit because the statement offered no potential future outcome. *Daniel v. State*, 285 Ga. 406, 677 S.E.2d 120 (2009).

Trial court did not err in failing to suppress the defendant's post-Miranda confession because the confession was not induced by the hope of benefit in violation of O.C.G.A. § 24-3-50; the interrogating officer repeatedly told the defendant that the officer could not offer any deals for lighter punishment. *State v. Folsom*, 286 Ga. 105, 686 S.E.2d 239 (2009).

Trial court did not err in refusing to suppress statements the defendant made after an officer told the defendant that withholding information would make things worse for the defendant because the officer's statement to the defendant was, in context, an admonition not to damage the defen-

dant's credibility but to tell the truth, and the statement did not show the physical or mental torture or the coercion by threats that constitutes the remotest fear of injury forbidden by O.C.G.A. § 24-3-50; since no promises of lighter punishment were made, such an admonition to tell the truth did not constitute hope of benefit so as to render involuntary any statement made thereafter. *Madrigal v. State*, No. S10A0209, 2010 Ga. LEXIS 327 (Apr. 19, 2010).

Smoking does not render hope of benefit. — Permitting defendant to smoke was a collateral benefit and was insufficient hope of benefit to render defendant's statement inadmissible. *White v. State*, 266 Ga. 134, 465 S.E.2d 277 (1996).

Notifying prosecution of cooperation does not render hope of benefit. — Merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the "hope of benefit" sufficient to render a statement inadmissible. *Leigh v. State*, 223 Ga. App. 726, 478 S.E.2d 905 (1996); *Lawrence v. State*, 227 Ga. App. 70, 487 S.E.2d 608 (1997).

Officer's statement that defendant's cooperation would be made known to the prosecutor did not render defendant's confession to molesting defendant's stepdaughter involuntary. *Frei v. State*, 252 Ga. App. 535, 555 S.E.2d 530 (2001).

Notifying judge of cooperation does not render hope of benefit. — Detective's implied promises to tell the judge of defendant's cooperation did not constitute the kind of hope of benefit contemplated by O.C.G.A. § 24-3-50. *Tucker v. State*, 231 Ga. App. 210, 498 S.E.2d 774 (1998).

Though the defendant enumerated as error the admission of a custodial statement into evidence, claiming the statement was induced by hope of benefit of a lesser sentence in that a detective stated that the detective was going to be the prosecuting officer and that the detective would like to be able to tell the judge that the defendant was honest and cooperated with the detective since the detective specifically testified that the detective did not promise the defendant any hope of benefit, the statement was not coerced under O.C.G.A. § 24-3-50 and was admissible. *Cooper v. State*, 257 Ga. App. 896, 572 S.E.2d 417 (2002).

Detectives did not improperly induce or

Voluntariness (Cont'd)

promise defendant that they would talk to the judge and the prosecutor about defendant being cooperative, which might increase defendant's chances of getting a bond, as these statements did not guarantee defendant anything. *Jackson v. State*, 262 Ga. App. 451, 585 S.E.2d 745 (2003).

An officer's implied promise to tell the trial judge of the defendant's cooperation was not a "hope of benefit" making defendant's statements involuntary under O.C.G.A. § 24-3-50. *Davis v. State*, 292 Ga. App. 782, 666 S.E.2d 56 (2008).

Statement that defendant was in big trouble. — Interrogating officer's statements to defendant that defendant was in big trouble and, in effect, that the officer could help defendant if defendant cooperated were not offers of hope of benefit or threat of injury. *Davis v. State*, 245 Ga. App. 508, 538 S.E.2d 159 (2000).

Mere explanations of defendant's arrest and of the law did not constitute an improper offer of some hope of benefit. *State v. Todd*, 250 Ga. App. 265, 549 S.E.2d 821 (2001).

Officer's urging defendant to tell the truth if defendant wanted "[the officer] to be in a position to do anything to say that you cooperated" did not create a hope of a lighter sentence or any other hope of benefit. *Caldwell v. State*, 249 Ga. App. 885, 549 S.E.2d 449 (2001).

Nothing officer said implied freedom for confession. — Defendant's custodial statement to the police was admissible because it was made voluntarily as defendant did not contend that an interrogating officer mentioned a confession or sentence, only that the officer periodically stated that defendant would soon be released, while questioning continued; nothing suggested that freedom would be forthcoming if defendant confessed to committing crimes. *Brown v. State*, 278 Ga. 724, 609 S.E.2d 312 (2004).

Promise of benefit to relatives. — While the defendant claimed that a custodial statement was made to keep defendant's spouse from going to jail, and therefore was made under duress, an agent testified that the agent told the defendant that the spouse was not going to be arrested, and denied telling the spouse that the spouse was going to be

arrested, so a trial court's ruling that the defendant's statement was voluntary pursuant to O.C.G.A. § 24-3-50 was not error. *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Denial of a defendant's motion to suppress a confession was proper as a police officer testified that the confession was not given in reliance on a promise not to arrest the two women in the house; further, the defendant's testimony that the confession was given in exchange for not arresting the women did not render the confession involuntary since there was no promise to treat the defendant favorably and any promise of a benefit to the defendant's relatives was collateral to the defendant. *Jackson v. State*, 280 Ga. App. 716, 634 S.E.2d 846 (2006).

Officer's promise to help the defendant with a drug problem was a collateral benefit, and did not bear on the question of punishment; hence, the trial court did not clearly err in admitting the defendant's statement in evidence as such did not amount to a promise of leniency in exchange for the statement. *Smith v. State*, 281 Ga. App. 91, 635 S.E.2d 385 (2006).

An investigator's actions in requesting that the defendant's bond be lowered did not amount to the slightest hope of benefit under O.C.G.A. § 24-3-50. *Gonzalez v. State*, 283 Ga. App. 843, 643 S.E.2d 8 (2007).

Arranging meeting between spouses is not hope of benefit. — Accommodating a meeting between the defendant's wife and the defendant did not amount to the "slightest hope of benefit" which would have rendered the defendant's statement involuntary and inadmissible as it was not uncommon for a suspect in custody to be allowed to speak with a family member, and the record showed that the defendant reinitiated further communication with police and made a knowing and intelligent waiver of any right to counsel previously invoked. *Rivera v. State*, 282 Ga. 355, 647 S.E.2d 70 (2007).

Officer's comments about punishment did not impact confession. — Defendant's statement introduced into evidence was voluntarily given without any hope of benefit; the interrogating officer's comments about punishment amounted to no more than an explanation of the seriousness of the defendant's situation, and the officer's requests to the defendant to permit the officer to help

were the equivalent of the officer's urging the defendant to tell the truth, which would not invalidate a confession. *Preston v. State*, 282 Ga. 210, 647 S.E.2d 260 (2007).

Officer's statement regarding children when parents are in custody. — An officer's statement that if adults were arrested, their children would routinely be taken to the county department of family and children services was merely a recounting of fact, not a threat of injury or promise of hope of benefit within the meaning of O.C.G.A. § 24-3-50. *Rubia v. State*, 287 Ga. App. 122, 650 S.E.2d 797 (2007).

Coaxing by investigator did not render statement inadmissible. — With regard to a defendant's conviction for child molestation, the trial court did not err by admitting the defendant's confession at trial as although the defendant may have been coaxed into providing the statement by an investigator, in doing so, the investigator did not offer any hope of benefit or fear of injury. *Dexter v. State*, 293 Ga. App. 388, 667 S.E.2d 172 (2008).

Use of word "favors" by officer does create hope of benefit. — An officer told the defendant that one of the defendant's accomplices had told the officer the truth but the other two had not, so those accomplices would get no "favors" from the officer. As the officer's reference to "favors" did not suggest that the defendant might receive a lighter sentence by cooperating, the defendant's subsequent statement was admissible under O.C.G.A. § 24-3-50. *Simpson v. State*, 293 Ga. App. 760, 668 S.E.2d 451 (2008).

Officer informing of potential legal consequences. — Defendant's convictions for armed robbery and robbery by intimidation were appropriate because the defendant voluntarily confessed to the defendant's involvement in the crimes. A statement by police that made the defendant aware of the potential legal consequences was in the nature of a mere truism and did not constitute a threat of injury or promise of benefit within the meaning of O.C.G.A. § 24-3-50. *Cantrell v. State*, 299 Ga. App. 746, 683 S.E.2d 676 (2009).

Detective made no promises, just general statement. — When the detective told defendant that the detective could not and would not make any promises, just that any cooperation would be favorable to the investiga-

tion, defendant's statement was made voluntarily without the slightest hope of benefit. *Evans v. State*, 248 Ga. App. 99, 545 S.E.2d 641 (2001).

Codefendant's motion to suppress was properly denied as the codefendant's confession was not made with a hope of benefit in violation of O.C.G.A. § 24-3-50 since the codefendant told the detectives that the codefendant wanted to go home and a detective replied "let's straighten this out and we'll see about getting you home"; the statement did not relate to either the charge or sentence that the codefendant was facing, nor did the detective give codefendant a hope of a lighter sentence in return for the codefendant's statement. *Smith v. State*, 269 Ga. App. 133, 603 S.E.2d 445 (2004).

Promise of leniency contingent on future assistance. — Defendant's confession was admissible because the trial court could have concluded that any promise of leniency for defendant was contingent on future assistance by defendant and was unrelated to defendant's confession. *Bailey v. State*, 248 Ga. App. 120, 545 S.E.2d 659 (2001).

Victim's mother promised leniency. — Although the victim's mother allegedly agreed to have the charges dropped if the defendant confessed, pursuant to O.C.G.A. § 24-3-50, the confession was made voluntarily, and could be submitted to the jury for consideration. *Davenport v. State*, 277 Ga. App. 758, 627 S.E.2d 133 (2006).

Confessions made during plea negotiations with the prosecutor are not admissible because the confessions are made in the hope that the defendant will get a better deal than otherwise possible. *Gray v. State*, 240 Ga. App. 716, 523 S.E.2d 626 (1999).

Express language not required. — When a conviction was based upon confessions induced by the threatening acts of the parties obtaining the confessions, though no language was used expressly extending the hope of benefit or fear of injury, a new trial will be ordered. *Irwin v. State*, 54 Ga. 39 (1875).

Slightest hope or remotest fear excludes. — Confessions are not admissible if there is evidence, arising from the testimony as to the circumstances under which the confession was made, that the making of the confession was induced by the slightest hope of benefit or the remotest fear of injury. *King v.*

Voluntariness (Cont'd)

State, 155 Ga. 707, 118 S.E. 368 (1923); Goodwin v. State, 45 Ga. App. 593, 165 S.E. 453 (1932); McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935); Jordan v. State, 77 Ga. App. 656, 48 S.E.2d 756 (1948); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950); Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760 (2002).

Although inducement was held out by one person, and the confession was subsequently made to another, who has no knowledge of such inducement, and who offers none personally, such confession is involuntary. Thomas v. State, 169 Ga. 182, 149 S.E. 871 (1929).

Custody does not render confession involuntary. — Mere fact that the accused was in custody, or under arrest at the time the confession was made, did not render the confession incompetent if in fact it was made voluntarily within the legal meaning of the term. Wilburn v. State, 141 Ga. 510, 81 S.E. 444 (1914); Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943).

Even if arrest is illegal. — Voluntary confession or incriminatory statement is not inadmissible merely because it was made pending an illegal arrest. Campbell v. State, 90 Ga. App. 1, 81 S.E.2d 880 (1954).

Statements made when reason for arrest is unknown. — Statement made by an accused is not rendered inadmissible solely because the accused has not been told why the accused was under arrest at the time of the making of the statement. Moses v. State, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993).

Failure to inform defendant. — Fact that the state did not show that the defendant prior to making certain incriminatory statements had been apprised by the interrogating officers of the nature of the investigation and its possible consequences did not affect the admissibility or voluntary character of the statements made by the defendant. Gossett v. State, 105 Ga. App. 17, 123 S.E.2d 322 (1961).

Surroundings by which the declarant may be environed may be more ominous and more potential in inducing a confession

than the use of threats. Moon v. State, 12 Ga. App. 614, 77 S.E. 1088 (1913).

Legality, duration, and conditions of detention are relevant in the determination of voluntariness of an accused's statement. Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842 (1977).

Statement that it is always better to tell the truth is not such a hope of benefit as would render a confession inadmissible. Wilson v. State, 19 Ga. App. 759, 92 S.E. 309 (1917); Hicks v. State, 178 Ga. 561, 173 S.E. 395 (1934); McKennon v. State, 63 Ga. App. 466, 11 S.E.2d 416 (1940); Turner v. State, 203 Ga. 770, 48 S.E.2d 522 (1948); Daniel v. State, 150 Ga. App. 798, 258 S.E.2d 604 (1979); Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279 (1980); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168 (1980); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981); Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981); Kettman v. State, 257 Ga. 603, 362 S.E.2d 342 (1987); Stowers v. State, 205 Ga. App. 518, 422 S.E.2d 870 (1992), cert. denied, 205 Ga. App. 901, 422 S.E.2d 870 (1992); Henry v. State, 265 Ga. 732, 462 S.E.2d 737 (1995); Duke v. State, 268 Ga. 425, 489 S.E.2d 811 (1997); Gilliam v. State, 268 Ga. 690, 492 S.E.2d 185 (1997); Collis v. State, 252 Ga. App. 659, 556 S.E.2d 221 (2001).

Statements neither coerced nor hope induced. — Trial court did not err by admitting into evidence defendant's pretrial statements in response to allegations of physical child abuse by officers from another jurisdiction and officials' statements telling defendant defendant's cooperation would be conveyed to the prosecuting attorney because the defendant personally never claimed defendant's statement was given either under the force of coercion or in the hope of a benefit. Helton v. State, 206 Ga. App. 600, 426 S.E.2d 172 (1992).

Officer discussing right to bury relatives after suspect invoking right to counsel. — Officer's statement to the defendant, given after the defendant invoked the right to counsel, in which the officer expressed the officer's knowledge of the request for a lawyer, urged the defendant not to say anything, and told the defendant that everyone should have the opportunity to bury their loved ones, as did the officer recently when the officer's father and brother died, was not calculated to procure an untrue statement,

and because the defendant was not threatened with fear of injury nor promised hope of benefit, because there was no deception, nor did the police inject religion into the exchange, and because the officer's speech was not coercive police activity, the police did not violate the defendant's fifth amendment right against coerced self-incrimination; however, while the defendant's statements themselves, in which the defendant confessed to killing the defendant's uncle and told the police where the defendant disposed of the body, were inadmissible based on the defendant's invocation of the right to counsel, nevertheless the fruits of the statements were admissible. *State v. Woods*, 280 Ga. 758, 632 S.E.2d 654 (2006).

Statement by officer that the officer was considering charging defendant's girlfriend was a mere "truism" or recounting of facts, rather than a threat of injury or promise of benefit. *Anderson v. State*, 224 Ga. App. 608, 481 S.E.2d 595 (1997).

Advice from officer that suspect will feel better if the suspect tells the truth will not render confession inadmissible. *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981).

Officer's statement that "it would mean a lot in the end." — Juvenile's statement was not induced in the hope of benefit based on an officer's comment that the juvenile needed to tell the truth "because it would mean a lot in the end." *In re J.L.*, 229 Ga. App. 447, 494 S.E.2d 274 (1997).

Officer's statement after arrest that "no lawyer can do you any good at this point" did not render defendant's statements involuntary. *Gober v. State*, 264 Ga. 226, 443 S.E.2d 616 (1994).

Officer's statement that spouse was target of investigation. — When an officer interviewing the defendant told the defendant that the defendant's spouse was the target of an investigation, this did not make the defendant's confession involuntary under O.C.G.A. § 24-3-50. The officer, who sought to deflect attention from the spouse's role as the tipster who led police to the defendant, had not created a fear of injury invalidating the confession as the defendant had not exonerated the spouse during the interview but implicated the spouse in other illegal activity. *Smith v. State*, 291 Ga. App. 535, 662 S.E.2d 305 (2008).

Fact that a confession was procured by the employment of falsehood by a police officer, detective, or other person does not alone exclude the confession, where not calculated to do other than elicit the truth and does not prevent the confession from being free and voluntary. *Moore v. State*, 230 Ga. 839, 199 S.E.2d 243 (1973).

Confession otherwise admissible is not inadmissible because the confession was prompted by advice of a relative of the defendant. *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357 (1981); *Cunningham v. State*, 248 Ga. 835, 286 S.E.2d 427 (1982).

Confession obtained through trickery. — Defendant's custodial statement to the police was admissible because the statement was made voluntarily as even if an interrogating officer allowed defendant to overhear a coconspirator's implication of defendant, there was no evidence that the officer was attempting to procure an untrue statement from defendant. *Brown v. State*, 278 Ga. 724, 609 S.E.2d 312 (2004).

Hope of lighter punishment, induced by other person, is usually "hope of benefit" referred to in O.C.G.A. § 24-3-50. *Wesley v. State*, 177 Ga. App. 877, 341 S.E.2d 507 (1986), overruled on other grounds, *Gilbert v. State*, 193 Ga. App. 283, 388 S.E.2d 18 (1989); *State v. Barber*, 197 Ga. App. 353, 398 S.E.2d 419 (1990); *In re R.J.C.*, 210 Ga. App. 286, 435 S.E.2d 759 (1993).

Confession inadmissible after sheriff promised prosecution on only one count. — Defendant's confessions made to a sheriff were based on a promise that the defendant would be prosecuted on only one count of burglary and were therefore involuntary under O.C.G.A. § 24-3-50. However, the defendant had identified defendant's connection with the defendant's accomplices prior to the involuntary statements, and the defendant's accomplices' testimony against the defendant was still admissible. *Stidham v. State*, 299 Ga. App. 858, 683 S.E.2d 906 (2009).

Statement induced by written promise not to press additional charges held involuntary. — Defendant was granted new trial for convictions for felony murder and other crimes after it was determined that defendant's statement to detectives as to the location of

Voluntariness (Cont'd)

the gun used in the murder and defendant's provision of the gun to two co-indictes was involuntary and inadmissible under O.C.G.A. § 24-3-50 as the statement was induced by a written promise not to press any additional weapons charges against defendant. *Foster v. State*, 283 Ga. 484, 660 S.E.2d 521 (2008).

Statement that others will remain under arrest until possessor of contraband determined. — When the officers told the defendant that defendant's stepfather and girlfriend, who were also arrested at the trailer, were going to remain under arrest pending a determination of who was in possession of the contraband, such a statement falls into the category of a mere "truism" or "recounting of the facts," rather than an offer of benefit or threat of injury. *Sampson v. State*, 165 Ga. App. 833, 303 S.E.2d 77 (1983).

Statement that cooperation would be noted in court not hope of benefit. — Police officer's statement to a 17-year-old defendant that it would be better if the defendant cooperated with the police, and if the defendant does so, the officer will have to say in court that the defendant cooperated, does not constitute a "hope of benefit" making a subsequent confession inadmissible. *Rounds v. State*, 166 Ga. App. 212, 303 S.E.2d 543 (1983).

Offering to make known a suspect's confession to the district attorney and the trial judge is not an offer of benefit. *McKenzie v. State*, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988); *Sims v. State*, 197 Ga. App. 214, 398 S.E.2d 244 (1990).

Agreeing to tell the trial judge of the defendant's cooperation if the defendant confesses does not constitute the "hope of benefit" contemplated by O.C.G.A. § 24-3-50. *Moore v. State*, 179 Ga. App. 488, 347 S.E.2d 318 (1986); *Butler v. State*, 194 Ga. App. 208, 390 S.E.2d 278 (1990); *Carswell v. State*, 268 Ga. 531, 491 S.E.2d 343 (1997); *Martin v. State*, 271 Ga. 301, 518 S.E.2d 898 (1999).

Encouraging cooperation by a defendant and promising to bring defendant's cooperation to the attention of the prosecutor or the trial judge does not constitute the "hope

of benefit" contemplated by O.C.G.A. § 24-3-50. *Bussey v. State*, 202 Ga. App. 483, 414 S.E.2d 710 (1992).

Investigator's statement to defendant that if the defendant cooperated, the investigator would let the district attorney know and it might help the defendant did not impermissibly hold out some hope of benefit so as to make defendant's confession inadmissible. *Lyles v. State*, 221 Ga. App. 560, 472 S.E.2d 132 (1996).

Evidence that investigator suggested defendant could be charged with lesser offense. — An investigating officer's admission that the officer discussed bringing a lesser charge of theft by taking rather than armed robbery with a defendant, and the specific language in the defendant's written statement expressly admitting to the lesser offense, along with the statement to another officer that the crime was theft by taking, supported the trial court's factual finding that the defendant gave the custodial statement with the hope of benefit. Thus, the trial court properly granted the defendant's motion to suppress the statement. *State v. Klepper*, 301 Ga. App. 753, 688 S.E.2d 673 (2009).

Officer's statement that the officer wanted to "help" the defendant was not an offer of reward which tainted the confession by inducing a hope of benefit in the defendant making the statement involuntary under O.C.G.A. § 24-3-50. *Cooper v. State*, 256 Ga. 234, 347 S.E.2d 553 (1986).

Officer's statement to a suspect that the officer was trying to help the suspect did not constitute the "slightest hope of benefit" under O.C.G.A. § 24-3-50 and did not require the exclusion of an inculpatory statement the defendant made in response to the officer's statement. *Stringer v. State*, 285 Ga. 842, 684 S.E.2d 590 (2009).

Admission of defendant's statement after inducement by officer was harmless error. — Trial court committed harmless error in admitting defendant's statement under O.C.G.A. § 24-3-50 after a police officer induced defendant to make defendant's statement by hope of benefit when the officer falsely implied that whether defendant would be arrested depended upon how the interview went. *Richardson v. State*, 265 Ga. App. 711, 595 S.E.2d 565 (2004).

Promises to obtain psychiatric help and medical attention for defendant were not the

kind of “hope of benefit” which would invalidate defendant’s subsequent confession. *Head v. State*, 180 Ga. App. 901, 350 S.E.2d 854 (1986).

Hope of benefit raised initially by defendant does not render confession inadmissible. — When the officer who took defendant’s statement testified that it was defendant who first raised the notion of a reduction of bail bond, defendant’s hope of benefit was not induced by another and would not serve to render defendant’s confession inadmissible. *Heard v. State*, 165 Ga. App. 252, 300 S.E.2d 213 (1983); *Pounds v. State*, 189 Ga. App. 809, 377 S.E.2d 722 (1989).

Attorney’s advice that statement might lead to plea negotiation not inducement by state. — Even though attorney’s advice to defendant was that if the defendant made a statement the state might negotiate a plea, defendant’s statement was not the result of inducement by others since the questioning police officer made it clear that no promises were to be made in exchange for the statement. *Williams v. State*, 250 Ga. 553, 300 S.E.2d 301, cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1356 (1983).

Codefendant’s prior confession does not affect voluntariness. — That one party to the commission of a crime has confessed to that party’s participation in the crime does not render the defendant’s later confession involuntary. *Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73 (1984).

Promise to help keep defendant out of certain prison. — Confession is not rendered inadmissible by an assurance that whatever help could be given would be given in keeping the defendant out of a certain prison, since this is similar to a promise to inform the court of a defendant’s cooperation. *Patrick v. State*, 169 Ga. App. 302, 312 S.E.2d 385 (1983), aff’d, 252 Ga. 509, 314 S.E.2d 909 (1984).

Promise to end adverse publicity. — When an inculpatory statement was made by the fire department lieutenant in return for the investigator’s alleged promise to “stop all the publicity against the fire and police department and not arrest and persecute anyone else,” the promise pertained to collateral benefits and the trial court did not err in ruling the statement to be voluntary and admissible. *Johnson v. State*, 170 Ga.

App. 71, 316 S.E.2d 160 (1984).

Promise of collateral benefit. — An investigator’s statement that the investigator would talk to the district attorney’s office at a later time about having a warrant against the defendant dismissed was no more than a promise of a collateral benefit and thus did not make the defendant’s custodial statement inadmissible under O.C.G.A. §§ 24-3-50 and 24-3-51. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Statement that the defendant “needed” to tell the police officers if defendant knew anything about the crime does not render the confession involuntary. *Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73 (1984).

Confession not induced by fear. — Trial court’s determination that defendant’s confession was not rendered involuntary because the confession was induced by fear because of a deputy’s statement during the post arrest interview purportedly threatening the defendant with a life sentence was supported by sufficient evidence. *Baker v. State*, 211 Ga. App. 515, 439 S.E.2d 668 (1993).

Hollering by interrogating officer not “fear of injury” negating voluntariness. — Defendant’s fear when the detective interrogating defendant “hollered” at defendant was self-induced and not the “fear of injury” contemplated by O.C.G.A. § 24-3-50 since there was no evidence that the police had threatened to harm the defendant if the defendant did not make a statement. *Mungin v. State*, 183 Ga. App. 290, 358 S.E.2d 673, cert. denied, 183 Ga. App. 906, 358 S.E.2d 673 (1987), cert. denied, 485 U.S. 908, 108 S. Ct. 1083, 99 L. Ed. 2d 242 (1988).

Intimidation not established. — Defendant’s claim that defendant’s confession was the product of intimidation was not established by defendant’s testimony that one of the interrogating officers became angry and brushed the officer’s jacket back, revealing the officer’s gun. *Raulerson v. State*, 268 Ga. 623, 491 S.E.2d 791 (1997), cert. denied, 523 U.S. 1127, 118 S. Ct. 1815, 140 L. Ed. 2d 953 (1998).

Withholding medical attention from defendant until after an interrogation was concluded does not render the defendant’s statement to the police involuntary and having been induced by the hope of benefit since the evidence upholds the voluntariness

Voluntariness (Cont'd)

of the statement. *Cannon v. State*, 257 Ga. 475, 360 S.E.2d 592 (1987).

Absence of counsel. — It is not the law of this state that when a prisoner is known by police to be represented by counsel, anything the prisoner says to police in absence of counsel is per se inadmissible, whether voluntary or not. *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975).

Considering the totality of the circumstances a confession may be shown to be voluntary even though made in the absence of counsel after counsel has been retained or appointed. *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975).

Offer of settlement. — Confession freely and voluntarily made is admissible in evidence against the defendant, although such confession is coupled with the proposition on defendant's part to settle or compromise the case or charge against the defendant; such an offer of settlement not being induced by another. *Hecox v. State*, 105 Ga. 625, 31 S.E. 592 (1898); *Grubbs v. State*, 53 Ga. App. 377, 186 S.E. 140 (1936).

Defendant's confession made to the victim's parents was not involuntary on the basis that the confession was induced by the hope of benefit—specifically, the victim's parents' representation that the parents would not involve the police. *Wiley v. State*, 245 Ga. App. 580, 538 S.E.2d 483 (2000).

Defendant must object to confession. — When evidence of a confession is offered by the state in a criminal case, and there is no objection by the defendant upon the ground that the alleged confession was not voluntarily made, the confession is admissible as a voluntary confession. *Washington v. State*, 24 Ga. App. 65, 100 S.E. 31 (1919).

Presumption of waiver. — If a prima facie case of admissibility of a confession is sought to be improperly established, but no proper objections are made to its insufficiency at the trial, the right to object will be presumed to have been waived. *McLemore v. State*, 181 Ga. 462, 182 S.E. 618 (1935).

If a prima facie case of admissibility is sought to be improperly established, but no proper objections are made to its sufficiency at the trial, the right to object will be presumed to have been waived, and where timely objection or motion is made to ex-

clude such testimony which at best still leaves in doubt whether statements were made which may have induced the confession or inculpatory statement, it is error not to reject such testimony of the confession or inculpatory statement. *Lemon v. State*, 80 Ga. App. 854, 57 S.E.2d 626 (1950).

Failure to object when confession involuntary. — When not made freely and voluntarily, a confession is presumed to be legally false, and cannot be the underlying basis of a conviction; the failure to object to such evidence does not give the confession probative value where it is shown without dispute that the confession was not freely and voluntarily made. *McKennon v. State*, 63 Ga. App. 466, 11 S.E.2d 416 (1940).

If the confession is admitted without timely objection and the evidence shows without dispute that the confession was not voluntary, then, whether the confession is objected to or not it is not legal evidence and has no probative value. The evidence, exclusive of the confession, must be sufficient to authorize a verdict of guilty after it appears that the confession was not voluntary, for the failure to object to the confession would not give the confession probative value; and since, without the confession, the verdict is unsupported by the evidence, the case, if not reversed on some other special ground, must be reversed solely on the general grounds. *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942).

Absence of a signed waiver of rights does not render a confession inadmissible if the evidence otherwise authorized a finding of voluntariness. *Patterson v. State*, 149 Ga. App. 438, 254 S.E.2d 445 (1979).

Fact that no signed waiver was obtained from defendant did not militate against the finding that defendant's confession was freely and voluntarily given. *Miller v. State*, 155 Ga. App. 587, 271 S.E.2d 719 (1980).

Objection after verdict. — Confessions are legal evidence. Unless the circumstances under which the confessions were made show the confessions were not voluntary, the confessions are admissible. If they are given in, and not objected to, it is too late after the verdict to say there was not sufficient inquiry into the circumstances. *Hill v. State*, 214 Ga. 794, 107 S.E.2d 662 (1959).

Capacity to waive. — Mere fact that the defendant was 21 years old with a sixth grade

education does not lead to the conclusion that the defendant was incapable of knowingly, voluntarily, and intelligently waiving defendant's constitutional rights. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); *Cunningham v. State*, 248 Ga. 835, 286 S.E.2d 427 (1982).

Lack of literacy does not dictate determination that there has been no voluntary knowledgeable waiver. *Watson v. State*, 159 Ga. App. 618, 284 S.E.2d 636 (1981).

A statement may be voluntary even if the suspect has a limited education. *Harrison v. State*, 253 Ga. App. 179, 558 S.E.2d 760 (2002).

Subsequent waiver valid. — Although defendant had refused to sign a written acknowledgment that defendant had been informed of defendant's right to remain silent and right to representation, defendant's subsequent acknowledgment in writing two hours later that the defendant had been informed of these rights supported the trial court's findings that defendant's statement was freely and voluntarily given. *Pierce v. State*, 209 Ga. App. 366, 433 S.E.2d 641 (1993).

Time lapse. — Ten-hour lapse between the time of the waiver of rights and the actual confession at which time previous warnings were reiterated does not render a confession inadmissible. *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357 (1981).

Erroneous promise by police did not make confession inadmissible. — Detective erroneously promised during an interview that a defendant would not be charged with an offense that required sex offender registration because a conviction for electronically furnishing obscene material to a minor under O.C.G.A. § 16-12-100.1 would require registration as a sex offender under O.C.G.A. § 42-1-12(e)(2); prior to the erroneous promise, the defendant's confession was voluntarily made under O.C.G.A. § 24-3-50 as the confession was made without the slightest hope of benefit. *State v. Lee*, 295 Ga. App. 49, 670 S.E.2d 879 (2008).

Question to witness as to voluntariness of confession does not call for conclusion. — When a witness testified to the circumstances surrounding the confession, showing clearly

that the confession was voluntary, a question then posed to the witness regarding the confession's voluntariness does not call for a conclusion. *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981).

Juvenile's confession voluntary despite officer's statement to drive home. — Because a police officer's statement to defendant juvenile that the officer would drive defendant home once they were through, even if construed as the promise of a benefit for defendant's confession, was only a collateral benefit that would not implicate the provisions of O.C.G.A. § 24-3-50; thus, the trial court did not clearly err in finding the juvenile's statements to police were voluntary. *In re D. T.*, 294 Ga. App. 486, 669 S.E.2d 471 (2008).

Facts sufficient to support voluntariness. — When a police officer testified that the officer twice read defendant the defendant's rights, that the defendant indicated that the defendant did not want a lawyer but wanted to make a statement, that the defendant did not appear to be under the influence of alcohol or drugs, and that the defendant's statement was made without threat or coercion or under any offer of hope or benefit, there was no error in admitting the defendant's statement. *Jones v. State*, 194 Ga. App. 746, 391 S.E.2d 663 (1990).

Defendant's interrogation in the office of a retail store by as many as five police officers at different times did not evince an unduly coercive environment since the main interrogating officer testified and denied the making of any promises or threats to defendant. *Pinson v. State*, 207 Ga. App. 734, 429 S.E.2d 106 (1993).

In defendant's trial on charges of child molestation and statutory rape, the trial court found that defendant's waiver of Miranda rights applied to statements defendant made after defendant took a polygraph examination and not just to statements defendant made while taking the test, and the appellate court sustained that finding and held that the trial court properly admitted defendant's statements. *Little v. State*, 260 Ga. App. 87, 579 S.E.2d 84 (2003).

Prisoner's habeas petition under 28 U.S.C. § 2254 was properly denied because the state habeas court correctly applied controlling federal precedent in finding that there was no ineffective assistance of counsel under the sixth amendment in that the prison-

Voluntariness (Cont'd)

er's confession was made while the prisoner was sober and there was nothing to support an argument of involuntariness or intoxication. Therefore, the confession was admissible both under the due process clause of the fourteenth amendment and O.C.G.A. § 24-3-50. *Newland v. Hall*, 527 F.3d 1162 (11th Cir. 2008), cert. denied, U.S. , 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009).

Defendant's statements to a local detective regarding the defendant's role in three robberies were voluntary and, thus, admissible under O.C.G.A. § 24-3-50 because the defendant was told that the defendant was not in custody when initially interviewed, defendant was not a suspect at that time, and defendant did not make a confession in the hope of some benefit; defendant was thought to be a witness to a robbery. *Dean v. State*, 292 Ga. App. 695, 665 S.E.2d 406 (2008).

Defendant's custodial statements were properly deemed voluntary under O.C.G.A. § 24-3-50. The defendant was advised of defendant's Miranda rights; signed a waiver of those rights; admitted no threats or promises were made; and, although the defendant claimed not to understand the Miranda rights due to limited mental capacity, there was no evidence the defendant was mentally or cognitively impaired. *Inman v. State*, 295 Ga. App. 461, 671 S.E.2d 921 (2009).

In a statutory rape case, as the record showed that police had not misrepresented the 12-year-old victim's status to the defendant or promised that the defendant would be charged with rape only if the investigation established that the defendant had committed forcible rape, the defendant's confession and DNA test results which showed that the defendant was the parent of the victim's child were not inadmissible as having been obtained through trickery and deceit. *Henry v. State*, 295 Ga. App. 758, 673 S.E.2d 120 (2009).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the trial court did not err by admitting into evidence the defendant's confession that acknowledged that the baby was breathing and whimpering after birth since, given the totality of the circumstances, the trial court's

ruling that the confession was given freely and voluntarily after the court viewed the videotapes of the police interviews was not clearly erroneous and there was no merit to the defendant's contention that the confession was encouraged by threats, including that the investigation would turn to a romantic friend, since under O.C.G.A. § 24-3-50, the remotest fear of injury that rendered a confession involuntary and inadmissible was physical or mental torture, which was not claimed. *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, U.S. , 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

Defendant was not in custody for purposes of Miranda at the time the defendant gave the defendant's statement, and the statement was properly admitted into evidence, because defendant went to the police station voluntarily and was allowed to leave once the questioning was finished; thus, a reasonable person in defendant's position would have concluded that the defendant was not under formal arrest and that the defendant's freedom was not restrained. *Jones v. State*, 270 Ga. App. 233, 606 S.E.2d 288 (2004).

Defendant's statement was not involuntary under O.C.G.A. § 24-3-50 because the defendant agreed to be interviewed at the police station, with an attorney, before the defendant was charged, and before the interview, the defendant and the attorney were told by the interviewer that the interviewer wanted to hear the defendant's side of the story relating to allegations of sexual battery and child molestation; no promises were made to the defendant regarding arrest or sentencing. *Pollio v. State*, 278 Ga. App. 729, 629 S.E.2d 583 (2006).

Promise not to seek divorce. — Because the promise made by the defendant's spouse not to seek a divorce if the defendant talked to police regarding the crimes charged did not bear on the question of punishment, and served as merely a collateral benefit, the trial court did not err in finding the defendant's statement to be voluntary and in denying a motion to suppress the statement. *Robbins v. State*, 290 Ga. App. 323, 659 S.E.2d 628 (2008).

Confessions were found to be involuntary in the following cases. — See *Frain v. State*, 40 Ga. 529 (1869); *Earp v. State*, 55 Ga. 136 (1875); *Burns v. State*, 61 Ga. 192 (1878);

Byrd v. State, 68 Ga. 661 (1882); Johnson v. State, 76 Ga. 76 (1885); Green v. State, 88 Ga. 516, 15 S.E. 10, 30 Am. St. R. 167 (1891); Smith v. State, 125 Ga. 252, 54 S.E. 190 (1906); Johnson v. State, 1 Ga. App. 129, 57 S.E. 934 (1907); Adams v. State, 129 Ga. 248, 58 S.E. 822, 17 L.R.A. (n.s.) 468, 12 Ann. Cas. 158 (1907); Hawkins v. State, 6 Ga. App. 109, 64 S.E. 289 (1909); Morris v. State, 33 Ga. App. 53, 125 S.E. 508 (1924); Lee v. State, 168 Ga. 554, 148 S.E. 400 (1929); Brown v. State, 52 Ga. App. 536, 183 S.E. 848 (1936); Turner v. State, 203 Ga. 770, 48 S.E.2d 522 (1948); Bidby v. State, 127 Ga. App. 212, 193 S.E.2d 31 (1972); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975); Porter v. State, 143 Ga. App. 640, 239 S.E.2d 694 (1977); State v. Ray, 272 Ga. 450, 531 S.E.2d 705 (2000); Patterson v. State, 274 Ga. 713, 559 S.E.2d 472 (2002).

Confessions were properly admitted in the following cases. — See Smith v. State, 139 Ga. 230, 76 S.E. 1016 (1913); Sledge v. State, 24 Ga. App. 698, 102 S.E. 31 (1920); Whitworth v. State, 155 Ga. 395, 117 S.E. 450 (1923); Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930); White v. State, 177 Ga. 115, 169 S.E. 499 (1933); Riley v. State, 180 Ga. 869, 181 S.E. 154 (1935); Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1936); Mincey v. State, 187 Ga. 281, 200 S.E. 144 (1938); Bryant v. State, 191 Ga. 686, 13 S.E.2d 820 (1941); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943); James v. State, 86 Ga. App. 282, 71 S.E.2d 568 (1952); Blackwell v. State, 113 Ga. App. 536, 148 S.E.2d 912 (1966); Williams v. State, 244 Ga. 485, 260 S.E.2d 879 (1979); Gray v. State, 151 Ga. App. 684, 261 S.E.2d 402 (1979); Riden v. State, 151 Ga. App. 654, 261 S.E.2d 409 (1979); Clayton v. State, 156 Ga. App. 285, 274 S.E.2d 682 (1980); Lane v. State, 247 Ga. 19, 273 S.E.2d 397 (1981); Copeland v. State, 162 Ga. App. 398, 291 S.E.2d 560 (1982); McLeod v. State, 170 Ga. App. 415, 317 S.E.2d 253 (1984); Smith v. State, 190 Ga. App. 702, 379 S.E.2d 643 (1989); Sparks v. State, 232 Ga. App. 179, 501 S.E.2d 562 (1998); Gidden v. State, 234 Ga. App. 268, 506 S.E.2d 448 (1998); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000), cert. denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771 (2001); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002).

Trial court's determination that a law enforcement agent's claim that the defendant orally confessed to selling crack cocaine was more credible than the defendant's claim that there was no such oral confession was not clearly erroneous, such that the confession was properly admitted pursuant to O.C.G.A. § 24-3-50. Harris v. State, 297 Ga. App. 589, 677 S.E.2d 763 (2009).

Defendant's testimony supported findings of coercion and duress. — Trial court did not err in suppressing the defendant's pre-trial statement on voluntariness grounds because the defendant's testimony regarding statements made by police officers fully supported the trial court's findings of coercion and duress, and the testimony regarding statements police officers made, expressing anger at the defendant and blaming the defendant for damage to a police car and the death of police dogs, did not constitute inadmissible hearsay when those statements were not offered to prove the truth of the facts asserted therein but to show the defendant's fear of injury by the officers; the trial court did not err in believing the defendant's testimony over that of a detective because a portion of the detective's testimony was successfully impeached, none of the officers testified, and the state did not offer the officers as witnesses until its motion for reconsideration was filed. State v. Lynch, 286 Ga. 98, 686 S.E.2d 244 (2009).

Procedural Considerations

1. Use as Evidence

Voluntariness not a defense. — Accused cannot defend against a criminal charge on the basis that a confession was not voluntary. Robinson v. State, 272 Ga. 752, 533 S.E.2d 718 (2000).

Involuntary statement may not be used for any purpose at trial. — It is a denial of due process of law for the state to use an involuntary statement against a defendant at trial for any purpose. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Even though defendant exposed existence of statement. — Fact that defendant exposed the existence of a statement does not render the substance of the statement immune from the requirement for admissibility that the statement be given voluntarily. Fain

Procedural Considerations (Cont'd)**1. Use as Evidence (Cont'd)**

v. State, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Hearing required before state seeks to use statement for impeachment or rebuttal. — Once defendant raises the issue of voluntariness of a statement the state wishes to use for impeachment purposes and with a rebuttal witness, the defendant is entitled to a determination of the issue by the trial court before the statement can be used, although not to a separate “Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)” hearing. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Reversible error. — It is always reversible error to allow a confession or incriminatory admission in evidence against the maker thereof when the confession or admission is not free and voluntary or made with the hope of reward or immunity. *Bryant v. State*, 132 Ga. App. 186, 207 S.E.2d 671 (1974).

Not illegal evidence. — Without doubt, confessions must be voluntary, that is, if the confessions are made under the hope of reward or fear of hurt the confessions are not competent; but confessions are not illegal evidence, standing alone. *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942); *Harrison v. State*, 83 Ga. App. 367, 64 S.E.2d 83 (1951).

Probative value. — If it does not appear that the confessions were not voluntary, and the confessions are introduced without objection, the confessions or incriminating statements are admissible and have probative value. *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942).

Confession made involuntarily within the meaning of this statute is without probative value. *Allen v. State*, 85 Ga. App. 355, 69 S.E.2d 638 (1952) (see O.C.G.A. § 24-3-50).

If a confession is inadmissible because not voluntarily made, the confession may not be used for impeachment. *Green v. State*, 154 Ga. App. 295, 267 S.E.2d 898 (1980).

Confessions of a principal felon, as to the felon’s own guilt, are competent evidence to show that fact on the trial of the accessory, but the confessions must be such as would be competent evidence on the trial of the principal, and must not be induced by another with the slightest hope of benefit or remotest

fear of injury to the party making the confessions. *Smith v. State*, 46 Ga. 298 (1872).

Codefendant’s confession. — Defendant has no standing to complain of the voluntariness of the codefendant’s confession. *Myrick v. State*, 155 Ga. App. 496, 271 S.E.2d 637 (1980).

When oral confession was incorporated in written confession, any error in the confession’s admission for jury consideration is harmless. *Hammond v. State*, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

New trial not required. — Admission into evidence of testimony as to a confession by defendant given in hope of reward did not require a new trial since another witness testified without objection to the same facts. *Jones v. State*, 181 Ga. 19, 181 S.E. 80 (1935).

Videotaped confession not admissible after plea agreement void. — When a plea agreement was conditioned on defendant’s giving a videotaped statement and, after defendant accepted the deal and gave the statement, defendant decided to plead not guilty, the statement was not admissible at defendant’s trial. *Corthran v. State*, 268 Ga. 443, 491 S.E.2d 66 (1997).

Defendants taped telephone conversation properly admitted. — Admission of the defendant’s secretly-taped telephone conversation with a coconspirator did not violate O.C.G.A. §§ 24-3-50 and 24-9-20; the elicitation of the defendant’s unguarded response to a perceived confidante regarding the circumstances of the crimes in which they had both participated was clearly designed to procure an unfiltered, genuine statement from the defendant. Further, absent any evidence that the police investigative techniques were designed to induce the slightest hope of benefit or fear of injury, the resulting statements were not rendered involuntary. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

Admonishment to tell the truth and that defendant safer in custody. — With regard to a defendant’s convictions for felony murder, with the underlying felony being rape, among other crimes, the trial court did not err by admitting the defendant’s statements made to the police into evidence since the statements were not induced by fear of injury and hope of benefit. Specifically, the detectives’ admonishing the defendant to be truthful was not a hope of benefit rendering

the defendant's confession inadmissible nor did the detectives' suggestion that the defendant would be safer in custody induce fear of injury. *Mangrum v. State*, 285 Ga. 676, 681 S.E.2d 130 (2009).

Voluntariness established. — A defendant's contention that the defendant's custodial statements, made without counsel present, should have been suppressed under O.C.G.A. § 24-3-50 because the defendant was read the defendant's rights, confirmed that those rights were understood, and signed a waiver of rights, and the officer repeatedly told the defendant that the officer could not promise the defendant any benefit. *Stevens v. State*, 286 Ga. 692, 690 S.E.2d 816 (2010).

2. Preliminary Proceedings

Statute requires as an indispensable foundation to the introduction of an alleged confession a showing that the confession was freely and voluntarily made and that the confession was not induced by another by the slightest fear of punishment nor the remotest hope of reward. *Sims v. State*, 221 Ga. 190, 144 S.E.2d 103 (1965), rev'd on other grounds, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593, later appeal, 223 Ga. 465, 156 S.E.2d 65, rev'd on other grounds, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967).

Equal application to state and private actions. — Requirement of O.C.G.A. § 24-3-50 for a hearing on the voluntariness of confessions applies equally to state and private actions. *Griffin v. State*, 230 Ga. App. 318, 496 S.E.2d 480 (1998).

Separate hearing required. — When a confession is challenged, as by objection to the confession's introduction in evidence, a separate hearing on the question of voluntariness must be held before the trial judge but when no challenge is made or ruling invoked, there is no requirement for such a hearing. *Smith v. State*, 131 Ga. App. 605, 206 S.E.2d 708 (1974).

When the voluntariness of a confession is questioned it is necessary under the decision in *Jackson v. Denno*, 378 U.S. 368, 378 U.S. 368, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964) to have a separate hearing as to the confession's voluntariness before the confession is finally presented to the jury for consideration as to the confession's

voluntariness. In the absence of a proper objection, however, there is no requirement for such a hearing. *James v. State*, 223 Ga. 677, 157 S.E.2d 471 (1967); *Royals v. State*, 155 Ga. App. 378, 270 S.E.2d 906 (1980).

In a prosecution for theft by taking, defendants were entitled to a preliminary hearing and threshold determination by the trial court on the voluntariness of written confessions defendants gave to an employee of a retail store. *Griffin v. State*, 230 Ga. App. 318, 496 S.E.2d 480 (1998).

Requirement for a hearing on the issue of voluntariness applies only if the evidence presents a fair question as to the confession's voluntariness. *Carter v. State*, 239 Ga. App. 549, 521 S.E.2d 590 (1999).

Burden of proof as to the voluntariness of a confession is upon the state. *McLemore v. State*, 181 Ga. 462, 182 S.E. 618 (1935); *Smith v. State*, 132 Ga. App. 491, 208 S.E.2d 351 (1974); *Jones v. State*, 245 Ga. 592, 266 S.E.2d 201 (1980); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Burden of proof can shift. When such confession is shown to have been freely and voluntarily made, the burden is then on the defendant to show that the confession was not so made. *Bradberry v. State*, 170 Ga. 859, 154 S.E. 344 (1930).

Standard for determining the admissibility of confessions is the preponderance of the evidence. *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Jones v. State*, 245 Ga. 592, 266 S.E.2d 201 (1980); *Lee v. State*, 154 Ga. App. 562, 269 S.E.2d 65 (1980); *Etterle v. State*, 155 Ga. App. 210, 270 S.E.2d 376 (1980); *Whitacre v. State*, 155 Ga. App. 359, 270 S.E.2d 894 (1980); *Bridges v. State*, 155 Ga. App. 369, 271 S.E.2d 25 (1980); *Fowler v. State*, 246 Ga. 256, 271 S.E.2d 168 (1980); *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981).

Prima facie showing as to a confession's voluntary character must be made before the confession is admissible into evidence, and if this preliminary proof fails to make such a showing, the confession or statement must be excluded. *Bryant v. State*, 191 Ga. 686, 13 S.E.2d 820 (1941); *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942); *Garrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948); *Phillips v. State*, 206 Ga. 418, 57 S.E.2d 555

Procedural Considerations (Cont'd)
2. Preliminary Proceedings (Cont'd)

(1950); *Lemon v. State*, 80 Ga. App. 854, 57 S.E.2d 626 (1950).

Grounds for exclusion. — Until it affirmatively appears from testimony, without question, that proposed confession was freely and voluntarily made, without any extraneous inducement, the statement alleged to have been a confession must be excluded. *McLemore v. State*, 181 Ga. 462, 182 S.E. 618 (1935); *Russell v. State*, 196 Ga. 275, 26 S.E.2d 528 (1943).

Requirements for prima facie case. — Alleged confession should be affirmatively shown to have been made without the slightest hope of benefit or remotest fear of injury before the state has succeeded in making a prima facie case as will establish that the confession was free from extraneous inducement. *McLemore v. State*, 181 Ga. 462, 182 S.E. 618 (1935); *Russell v. State*, 196 Ga. 275, 26 S.E.2d 528 (1943); *Lemon v. State*, 80 Ga. App. 854, 57 S.E.2d 626 (1950).

Trial court must consider the totality of the circumstances to determine whether the state has proven that a confession was made voluntarily. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); *Lee v. State*, 154 Ga. App. 562, 269 S.E.2d 65 (1980); *Fowler v. State*, 246 Ga. 256, 271 S.E.2d 168 (1980); *Bassett v. State*, 154 Ga. App. 829, 285 S.E.2d 260 (1981); *Franklin v. State*, 249 Ga. App. 834, 549 S.E.2d 794 (2001).

Inferences not acceptable. — On preliminary examination by the court, a witness should be permitted, over objection, to state an inference drawn from “collective facts” or to state in a shorthand way that a confession was freely and voluntarily made, without stating the circumstances under which the confession was made. *Lemon v. State*, 80 Ga. App. 854, 57 S.E.2d 626 (1950).

Defendant’s evidence. — If the evidence for the state makes out a prima facie case for the admission of such a confession, the court is not bound, before admitting the confession, to hear evidence on behalf of the accused, tending to show coercion or improper inducement in the confession’s procurement. *McLemore v. State*, 181 Ga. 462, 182 S.E. 618 (1935); *Lemon v. State*, 80 Ga. App. 854, 57 S.E.2d 626 (1950).

A hearing at which the defendant is not allowed to present testimony on the surrounding circumstances affecting the voluntariness of the defendant’s statements does not meet the standards of *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); *Pittman v. State*, 245 Ga. 453, 265 S.E.2d 592 (1980).

In making a determination of the voluntariness of a confession the defendant’s testimony is relevant and such proof must be allowed if the defendant elects to testify in this regard. *Stone v. State*, 155 Ga. App. 357, 271 S.E.2d 22 (1980).

When the voluntariness of a statement is not challenged, no violation of O.C.G.A. § 24-3-50 is asserted, and no hearing under *Jackson v. Denno*, 378 U.S. 368 (84 SC 1774, 12 L. Ed. 2d 908) (1964) is required. *Ward v. State*, 242 Ga. App. 246, 529 S.E.2d 378 (2000), appeal dismissed, 299 Ga. App. 63, 682 S.E.2d 128 (2009).

Question for jury. — Once the state had made a prima facie showing of voluntariness, the question of whether or not defendant’s statement was freely and voluntarily given is one of fact for the jury’s determination. *Griner v. State*, 121 Ga. 614, 49 S.E. 700 (1905); *Cantrell v. State*, 141 Ga. 98, 80 S.E. 649 (1913); *Thomas v. State*, 169 Ga. 182, 149 S.E. 871 (1929); *Bradberry v. State*, 170 Ga. 859, 154 S.E. 344 (1930); *Goodwin v. State*, 45 Ga. App. 593, 165 S.E. 453 (1932); *McLemore v. State*, 181 Ga. 462, 182 S.E. 618 (1935); *Bryant v. State*, 191 Ga. 686, 13 S.E.2d 820 (1941); *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942); *Russell v. State*, 196 Ga. 275, 26 S.E.2d 528 (1943); *Stroup v. Mount*, 197 Ga. 804, 30 S.E.2d 477 (1944); *Byars v. State*, 73 Ga. App. 727, 38 S.E.2d 53 (1946); *Garrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948); *Jackson v. State*, 77 Ga. App. 635, 49 S.E.2d 198 (1948), cert. denied, 335 U.S. 905, 69 S. Ct. 403, 93 L. Ed. 439 (1949); *Moore v. State*, 221 Ga. 636, 146 S.E.2d 895 (1966); *Walker v. State*, 226 Ga. 292, 174 S.E.2d 440 (1970), vacated on other grounds, 408 U.S. 936, 92 S. Ct. 2845, 33 L. Ed. 2d 754 (1972); *Trask v. State*, 132 Ga. App. 645, 208 S.E.2d 591 (1974); *Frazier v. State*, 150 Ga. App. 343, 258 S.E.2d 29 (1979); *Meyer v. State*, 150 Ga. App. 613, 258 S.E.2d 217 (1979); *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979); *Doucet v. State*, 153 Ga. App. 775, 266 S.E. 554

(1980); *Myrick v. State*, 155 Ga. App. 496, 271 S.E.2d 637 (1980).

3. Instructions

Omission to charge on the law of confessions, in the absence of a timely request, is not error. *Allen v. State*, 187 Ga. 178, 200 S.E. 109 (1938); *Mims v. State*, 188 Ga. 702, 4 S.E.2d 831 (1939); *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942); *Murray v. State*, 214 Ga. 350, 104 S.E.2d 905 (1958); *Staggers v. State*, 101 Ga. App. 463, 114 S.E.2d 142 (1960); *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976); *Welch v. State*, 235 Ga. 243, 219 S.E.2d 151 (1975).

Charge on the law of confessions, when unauthorized by the evidence, constitutes reversible error. *Allen v. State*, 187 Ga. 178, 200 S.E. 109 (1938); *Johnson v. State*, 240 Ga. 528, 50 S.E.2d 334 (1948); *Carter v. State*, 90 Ga. App. 61, 81 S.E.2d 868 (1954); *Sanford v. State*, 153 Ga. App. 541, 265 S.E.2d 868 (1980).

Charge embodying the principles of law contained in former Code 1933, §§ 38-411 and 38-420 (see O.C.G.A. §§ 24-3-50 and 24-3-53) is not error because of the failure to charge the principles of law which deal with the admissibility of such statement into evidence. *Walker v. State*, 226 Ga. 292, 174 S.E.2d 440 (1970), vacated on other grounds, 408 U.S. 936, 92 S. Ct. 2845, 33 L. Ed. 2d 754 (1972).

Law on confessions was properly charged in the following cases. — See *Oglesby v. State*, 80 Ga. App. 493, 56 S.E.2d 637 (1949); *Philpot v. State*, 212 Ga. 79, 90 S.E.2d 577 (1955); *Weatherby v. State*, 213 Ga. 188, 97 S.E.2d 698 (1957); *Kennedy v. State*, 156 Ga. App. 792, 275 S.E.2d 339 (1980); *Kirton v. State*, 246 Ga. App. 670, 541 S.E.2d 673 (2000).

If the defendant wanted an elaboration of the charge actually given on confessions, the defendant should have submitted a timely written request. *Webb v. State*, 73 Ga. App. 748, 38 S.E.2d 54 (1946).

Trial court not required to give instruction absent specific request. — Because the defendant failed to request a charge on voluntariness of confessions and consideration of statements, admissions, and confessions, the defendant was precluded from

asserting error on that basis; the trial court did not need to give an instruction on voluntariness of confessions absent a specific request therefor. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

4. Review

Failure of defendant to request hearing. — When the defendant did not request a hearing under O.C.G.A. § 24-3-50 as to the admissibility and voluntariness of defendant's non-custodial admission, the appellate court had no jurisdiction to address the failure of the trial court to conduct a hearing as to that issue. *Hawkins v. State*, 236 Ga. App. 346, 512 S.E.2d 59 (1999).

Since there was no evidence a confession was false, the conclusion that the confession was voluntary was not clearly erroneous. *Pinckney v. State*, 259 Ga. App. 309, 576 S.E.2d 574 (2003).

Failure to include videotaped statement within appellate record. — Defendant failed to include the videotape or a transcript of the audio portion in the appellate record and the appellate court was unable to review defendant's contention that the trial court erred by denying the motion to suppress the videotaped statement to the police on the ground that certain comments by the interviewing detective constituted a hope of benefit. *Clark v. State*, 279 Ga. 243, 611 S.E.2d 38 (2005).

Judge's conclusion that the confession is voluntary must appear from the record with unmistakable clarity, although the judge need not make formal findings of fact or write an opinion. When there has been no ruling on the issue of voluntariness made with the required "unmistakable clarity," remand with instruction to conduct a further hearing and make a determination of voluntariness may be appropriate. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

It is the duty of the Supreme Court of Georgia to independently review the evidence to determine whether the state has carried the state's burden of proving the admissibility of the accused's confession by a preponderance of the evidence. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), sentence vacated, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Appellate court upholds Jackson v. Denno findings. — Trial court sits as the factfinder

Procedural Considerations (Cont'd)**4. Review (Cont'd)**

in a Jackson-Denno hearing (*Jackson v. Denno*, 378 U.S. 368 (1964)) regarding the voluntariness of a confession and its resolution of factual issues will be upheld by an appellate court unless it is clearly erroneous. *Harrison v. State*, 253 Ga. App. 179, 558 S.E.2d 760 (2002).

Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); *Green v. State*, 154 Ga. App. 295, 267 S.E.2d 898 (1980); *Etterle v. State*, 155 Ga. App. 210, 270 S.E.2d 376 (1980); *Phipps v. State*, 155 Ga. App. 229, 270 S.E.2d 393 (1980); *Whitacre v. State*, 155 Ga. App. 359, 270 S.E.2d 894 (1980); *Fowler v. State*, 246 Ga. 256, 271 S.E.2d 168 (1980); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981); *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549 (1981); *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981).

Determinations regarding the facts and witness credibility are entirely within the purview of the trial court and will not be disturbed unless such determinations are clearly erroneous. *Ward v. State*, 234 Ga. App. 610, 507 S.E.2d 506 (1998).

Trial court's denial of defendant's motion to suppress defendant's statement to police was proper and not clearly erroneous because the statement was found to have been made voluntarily, without the slightest hope of benefit or remotest fear of injury under O.C.G.A. § 24-3-50; as the police officer's statements to defendant were nothing more than routine police questioning, aimed at eliciting a response from defendant in custody, and statements from the officer that defendant may not have intended to kill the victim did not amount to a hope of benefit, nor did a statement that defendant would not be prosecuted on drug charges give defendant any hope of benefit, as it was made because there was no evidence of the drugs. *Pittman v. State*, 277 Ga. 475, 592 S.E.2d 72 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 720.

Am. Jur. Proof of Facts. — Involuntary Confession — Psychological Coercion, 22 POF2d 539.

Custodial Interrogation Under *Miranda v. Arizona*, 23 POF2d 713.

Invalidity of Suspect's Waiver of *Miranda* Rights, 42 POF2d 617.

Invalidity of Confession or Waiver of *Miranda* Rights by Mentally Retarded Person, 42 POF3d 147.

ALR. — Confession by one who has been subjected to or threatened with physical suffering, 24 ALR 703.

Voluntariness of confession admitted by court as question for jury, 85 ALR 870; 170 ALR 567.

Admissibility, on question as to voluntariness of confession, of events occurring, or statement made after the confession by defendant or others not as witnesses at trial, 85 ALR 942.

Offer of defendant in criminal case to concede or stipulate fact, or his admission of

same, as affecting prosecution's right to introduce evidence thereof, 91 ALR 1478.

Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession, 102 ALR 605.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 102 ALR 641.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 ALR 974.

Presence of jury during preliminary inquiry of court as to voluntariness of confession as prejudicial, 148 ALR 546.

Suppression before indictment or trial of confession unlawfully obtained, 1 ALR2d 1012.

Admissibility in evidence of unsigned confession, 23 ALR2d 919.

Right of accused to show body to jury as evidence of violence by police in securing confession, 72 ALR2d 1322.

Voluntariness and admissibility of minor's confession, 87 ALR2d 624.

Impeachment of accused as witness by use

of involuntary or not properly qualified confession, 89 ALR2d 478.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 ALR2d 772.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused to view victim's corpse, 27 ALR3d 1185.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation, 31 ALR3d 565.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 ALR3d 1375.

Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

Confession as defense in action for malicious prosecution, 66 ALR3d 95.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 ALR3d 230.

Admissibility of polygraph evidence at trial on issue of voluntariness of confession made by accused, 92 ALR3d 1317.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 ALR4th 180.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment — modern state cases, 28 ALR4th 1121.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement — modern cases, 132 ALR Fed. 415.

24-3-51. Confessions under spiritual exhortation or promise of secrecy or collateral benefit admissible.

The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it. (Orig. Code 1863, § 3717; Code 1868, § 3741; Code 1873, § 3794; Code 1882, § 3794; Penal Code 1895, § 1007; Penal Code 1910, § 1033; Code 1933, § 38-412.)

JUDICIAL DECISIONS

Reason for rule. — Keeping in view the true reason upon which confession evidence is excluded, and the test by which the courts have sought to determine whether or not the truthfulness of the confession is sufficiently evidenced to admit the evidence thereof to the jury, it is clear that a confession should not be excluded because made under spiritual exhortation, or promise of secrecy, or promise of collateral benefit, since these means, or none of them, have the slightest tendency in a proper sense to induce one to confess falsely. *Wilson v. State*, 19 Ga. App. 759, 92 S.E. 309 (1917).

Confessions otherwise admissible are not rendered inadmissible because the accused was told by another in substance that it was

always best to tell the truth. *Turner v. State*, 203 Ga. 770, 48 S.E.2d 522 (1948); *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981).

Prayers overheard. — Testimony that the defendant while alone in defendant's cell was overheard to say, "Lord, have mercy upon me for what I have done; the only thing I regret is killing my father," was not incompetent because the witness was the jailer in charge of the defendant, the law not disqualifying a jailer from testifying as to voluntary acts and confessions of prisoners under the jailer's charge. Testimony as to prayers in which the defendant declared defendant's innocence of the crime, al-

though offered in reply to the above, was properly rejected, the rule being to admit inculpatory declarations or confessions, and to exclude those which are exculpatory, when disconnected therewith. *Woolfolk v. State*, 85 Ga. 69, 11 S.E. 814 (1890).

Spiritual exhortations. — Confession made by the defendant to a fellow-prisoner, who was in jail for stealing, and grossly irreligious, as appears from defendant's own evidence, but who read the Bible and sang Psalms to the defendant, and told the defendant that if the defendant were guilty the defendant had better confess and seek the defendant's God, was admissible. *Stafford v. State*, 55 Ga. 591 (1876).

Fact that the statements made by the defendant were in response to an appeal made by the defendant's sister, in which she alluded to the death of defendant's brother and incarceration of defendant's mother as results of the crime, would not render the statements inadmissible. The appeal was not stronger than "spiritual exhortations," which the Code declares shall not exclude a confession. *White v. State*, 177 Ga. 115, 169 S.E. 499 (1933).

Promise to help keep defendant out of certain prison. — Confession is not rendered inadmissible by an assurance that whatever help could be given would be given in keeping the defendant out of a certain prison, since this is similar to a promise to inform the court of a defendant's cooperation. *Patrick v. State*, 169 Ga. App. 302, 312 S.E.2d 385 (1983), *aff'd*, 252 Ga. 509, 314 S.E.2d 909 (1984).

Investigator offered collateral benefit by talking to DA office. — An investigator's statement that the investigator would talk to the district attorney's office at a later time about having a warrant against the defendant dismissed was no more than a promise of a collateral benefit and thus did not make the defendant's custodial statement inadmissible under O.C.G.A. §§ 24-3-50 and 24-3-51. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Promises to obtain psychiatric help and medical attention for defendant were not the kind of "hope of benefit" which would invalidate defendant's subsequent confession. *Head v. State*, 180 Ga. App. 901, 350 S.E.2d 854 (1986).

Promise to secure counseling. — With regard to an alleged promise by a detective

to help secure counseling for the defendant when the defendant got to prison, the benefit involved was no hope of lighter punishment (induced by a person other than the defendant) but was a collateral benefit which did not render defendant's confession inadmissible. *Hall v. State*, 180 Ga. App. 366, 349 S.E.2d 255 (1986).

Promise to end adverse publicity. — When an inculpatory statement was made by the fire department lieutenant in return for the investigator's alleged promise to "stop all the publicity against the fire and police department and not arrest and persecute anyone else," the promise pertained to collateral benefits and the trial court did not err in ruling the statement to be voluntary and admissible. *Johnson v. State*, 170 Ga. App. 71, 316 S.E.2d 160 (1984).

Promise to get help for drug problem. — Officer's promise to help the defendant with a drug problem was a collateral benefit and did not bear on the question of punishment; hence, the trial court did not clearly err in admitting the defendant's statement in evidence as such did not amount to a promise of leniency in exchange for the statement. *Smith v. State*, 281 Ga. App. 91, 635 S.E.2d 385 (2006).

Reduction in bond. — Reduction of bond is in the same class of collateral benefits as the promises of a solitary cell, a psychiatric examination, and communication to the judge of the defendant's cooperation. *Heard v. State*, 165 Ga. App. 252, 300 S.E.2d 213 (1983); *Pounds v. State*, 189 Ga. App. 809, 377 S.E.2d 722 (1989).

Long relationship as confidential informant. — Statements of an inculpatory nature made while in custody were not inadmissible under O.C.G.A. § 24-3-51 on the theory that defendant worked with law enforcement officers as a confidential informant for many years and that it was understood that the defendant would be "taken care of" and the sheriff admitted that in the sheriff's own mind the sheriff felt the sheriff owed defendant something, since there were no overt promises made and the understanding was subjective in nature. *Tyson v. State*, 165 Ga. App. 22, 299 S.E.2d 69 (1983).

Cited in *Blackwell v. State*, 113 Ga. App. 536, 148 S.E.2d 912 (1966); *Johnson v. State*, 238 Ga. 27, 230 S.E.2d 849 (1976); *Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978);

Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981); Tucker v. State, 231 Ga. App. 210, 498 S.E.2d 774 (1998); Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000); Harris v. State, 274 Ga. 422, 554 S.E.2d 458

(2001); Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745 (2003); Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008); Garcia v. State, 290 Ga. App. 164, 658 S.E.2d 904 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 740, 741, 745.

ALR. — Voluntariness of confession admitted by court as question for jury, 85 ALR 870; 170 ALR 567.

Suppression before indictment or trial of confession unlawfully obtained, 1 ALR2d 1012.

Voluntariness and admissibility of minor’s confession, 87 ALR2d 624.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 ALR2d 772.

Voluntariness of confession as affected by police statements that suspect’s relatives will benefit by the confession, 51 ALR4th 495.

Voluntary nature of confession as affected by appeal to religious beliefs, 20 ALR6th 479.

24-3-52. Against whom confession of conspirator admissible.

The confession of one joint offender or conspirator made after the enterprise is ended shall be admissible only against himself. (Orig. Code 1863, § 3719; Code 1868, § 3743; Code 1873, § 3796; Code 1882, § 3796; Penal Code 1895, § 1009; Penal Code 1910, § 1035; Code 1933, § 38-414.)

Law reviews. — For article surveying cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978,

see 30 Mercer L. Rev. 27 (1978). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONFESSIONS

END OF ENTERPRISE

PROCEDURAL CONSIDERATIONS

General Consideration

Former Code 1933, § 38-414 (see O.C.G.A. § 24-3-52) defined an exception to the general rule of former Code 1933, § 38-301 (see O.C.G.A. § 24-3-1) which discouraged the use of hearsay evidence. Hill v. State, 239 Ga. 278, 236 S.E.2d 626 (1977).

Former Code 1933, § 38-414 (see O.C.G.A. § 24-3-52) was a limitation upon former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5). Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975); Price v. State, 239 Ga. 439, 238 S.E.2d 24 (1979).

Former Code 1933, §§ 38-306 and 38-414 (see O.C.G.A. §§ 24-3-5 and 24-3-52) were

mutually exclusive so a conspirator’s statement is made either “during” or “after” the conspiracy. Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976).

An incriminatory declaration made by one conspirator is either made “during the pendency of the criminal project,” and is thus admissible against the other conspirators under former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5), or it is made “after the enterprise is ended,” and is thus inadmissible against the other conspirators under former Code 1933, § 38-415 (see O.C.G.A. § 24-3-52). Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979).

General Consideration (Cont'd)

Confession to a crime is not considered hearsay under Georgia law when admitted against a declarant. *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), cert. denied, 450 U.S. 936, 101 S. Ct. 1403, 67 L. Ed. 2d 372 (1981).

Application of statute. — Statute is applicable only when there is testimony by a third party as to a declaration, admission, or confession of a coconspirator and has no application when no such testimony is offered, but the accomplice merely testifies against the defendant on the trial of the case. *Banks v. State*, 113 Ga. App. 661, 149 S.E.2d 415 (1966).

Statute has application only if confessions or pleas of coconspirators are admitted in evidence. *Boggus v. State*, 136 Ga. App. 917, 222 S.E.2d 686 (1975).

When the confessing joint offender testifies and is subject to cross-examination, O.C.G.A. § 24-3-52 will not bar admission of prior inconsistent statements. *Brown v. State*, 266 Ga. 723, 470 S.E.2d 652 (1996).

Declarations of either of the conspirators are admissible against the other so long as the concealment phase of the conspiracy continues. *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

Intercepted conversation between coconspirators in the back seat of a patrol car was admissible in the trial of one of the coconspirators because the other took the stand and was subject to cross-examination, and because the conversation took place when the coconspirators were actively attempting concealment. *Burgeson v. State*, 267 Ga. 102, 475 S.E.2d 580 (1996).

Statute had no application in a case in which no confession of a joint offender or conspirator is offered, but when such joint offender or conspirator takes the stand and is subject to cross-examination. *Pippin v. State*, 205 Ga. 316, 53 S.E.2d 482 (1949); *Daniels v. State*, 136 Ga. App. 854, 222 S.E.2d 673 (1975).

Admission of a confession made by a coconspirator after termination of the conspiracy is quite a different thing from the admission of sworn testimony by a coconspirator, in which case, the coconspirator held to be a competent witness to testify as to any relevant matter concerning the charge, and

this statute has no application. *Brown v. State*, 132 Ga. App. 200, 207 S.E.2d 682 (1974) (see O.C.G.A. § 24-3-52).

O.C.G.A. § 24-3-52 has no application when the joint offender or conspirator is sworn and testifies as a witness. *Oliver v. State*, 159 Ga. App. 154, 282 S.E.2d 767 (1981); *Jones v. State*, 169 Ga. App. 4, 311 S.E.2d 485 (1983); *Fleeman v. State*, 176 Ga. App. 447, 336 S.E.2d 45 (1985); *Horne v. State*, 177 Ga. App. 765, 341 S.E.2d 243 (1986).

O.C.G.A. § 24-3-52 is inapplicable when the joint offender or conspirator (the codefendant) takes the stand and is subject to cross-examination by the defendant's attorney. *Lattimore v. State*, 175 Ga. App. 756, 334 S.E.2d 701 (1985).

Statute does not prohibit an accomplice from testifying at trial as a witness for the state. *Rawlins v. State*, 124 Ga. 31, 52 S.E. 1 (1905), aff'd, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906); *Hill v. State*, 239 Ga. 278, 236 S.E.2d 626 (1977).

Confession admissible when confessor available to testify. — Although the confession of a codefendant cannot usually be admitted against another defendant at a joint trial, the rule applies only where the codefendant does not testify and is not available for cross-examination. *Akins v. State*, 173 Ga. App. 797, 328 S.E.2d 413 (1985).

Recorded statement of coconspirator properly admitted. — Defendant alleged that the trial court erred by allowing the state to introduce a recorded statement which the defendant contended incriminated the defendant in violation of the rule announced in *Bruton v. United States*, 391 U. S. 123 (1968). Premitting whether the statement was admissible as a statement of a coconspirator, there was no error because the person giving the statement testified and was subject to cross examination. Further, *Bruton* only excludes statements by a non-testifying codefendant that directly inculpate the defendant. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Right to confrontation. — Eyewitness narration from the witness stand given by a co-offender and implicating defendants involvement in the crime was subjected to cross-examination by defendant and did not

violate defendant's confrontation rights, nor did the testimony require an exception to the hearsay rule to gain admission into evidence. *Hill v. State*, 239 Ga. 278, 236 S.E.2d 626 (1977).

When the statement of the codefendant was made in front of the defendant, the defendant had been arrested and the fact of the choate crime had been revealed and there was absolutely no showing by the state that a conspiracy to cover up the crime still existed, the criminal project was not still pending, it had been completed, and the introduction of the statements of the codefendant through the testimony of the detective before whom the statement was made was in violation of this statute and violated the defendant's sixth amendment right to confrontation. *Price v. State*, 239 Ga. 439, 238 S.E.2d 24 (1977) (see O.C.G.A. § 24-3-52).

Introduction of a confession of a codefendant who was never offered as a witness denies to the other codefendant the constitutional right to confrontation. *Sewell v. State*, 153 Ga. App. 177, 264 S.E.2d 708 (1980).

Because of the substantial risk that the jury, despite instructions to the contrary, shall look to the incriminating extrajudicial statements in determining a defendant's guilt, admission of the confession of a codefendant in a joint trial violated petitioner's right of cross-examination secured by the confrontation clause of the sixth amendment. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

Confession of co-indictee. — Co-indictee's confession, made outside defendant's presence to a police officer after arrest, violated defendant's sixth amendment right to confront and cross-examine witnesses against the defendant, as well as the provisions of O.C.G.A. § 24-3-52. *Crawford v. State*, 203 Ga. App. 215, 416 S.E.2d 820 (1992).

Codefendant's guilty plea. — It was not unreasonable for the prosecutor to reveal that one of defendant's two codefendants pled guilty as a way to explain to the jury why only two of the three individuals named in the indictments involved in this case were being tried. *Welch v. State*, 207 Ga. App. 27, 427 S.E.2d 22 (1992).

Since a co-indictee did not testify, the

defendant's uncle's recitation of the co-indictee's purported confession would fall squarely within the hearsay rule (O.C.G.A. §§ 24-3-1 and 24-3-52) and was not admissible pursuant to any hearsay exception. *Gardner v. State*, 263 Ga. 197, 429 S.E.2d 657 (1993).

The rule that a guilty plea of a joint offender is not admissible in evidence at the trial of another joint offender does not apply when the joint offender is present at trial and testifies as a witness subject to cross-examination, or when the joint offender's guilty plea is admitted with instructions that it not be used as evidence of the defendant's guilt. *Pinckney v. State*, 236 Ga. App. 74, 510 S.E.2d 923 (1999).

When a joint offender briefly took the stand as a witness for the state and testified only concerning the offender's guilty plea, but the trial court did not allow the defendant to conduct any cross-examination, the exception to the general rule that the guilty plea of a joint offender is not admissible at the trial of another joint offender was not triggered, and the danger of prejudice to the defendant was great. *Pinckney v. State*, 236 Ga. App. 74, 510 S.E.2d 923 (1999).

When the trial court gave no limiting instruction at the time the testimony of a joint offender regarding the offender's guilty plea was given without cross-examination being permitted, and during the charge did not instruct the jury that the testimony could not be used as substantive evidence of the defendant's guilt, but merely that the jury was not required to use the fact that the co-indictee pled guilty against the defendant, the instruction was not sufficient to provide the defendant with a fair trial. *Pinckney v. State*, 236 Ga. App. 74, 510 S.E.2d 923 (1999).

Although defendant's trial counsel failed to object to the testimony concerning a guilty plea of a codefendant pursuant to O.C.G.A. § 24-3-52 arising from the same incident that defendant was on trial for, as well as a reference to that plea by the prosecutor during closing argument, the decision not to object was a matter of trial strategy and, accordingly, deference was provided such that there was no finding of ineffective assistance. *Johnson v. State*, 279 Ga. App. 182, 630 S.E.2d 778 (2006).

Co-indictee's guilty plea. — While a non-testifying co-indictee's guilty plea is gen-

General Consideration (Cont'd)

erally inadmissible as evidence of a defendant's guilt, the prohibition is inapplicable when the co-indictee testifies at trial and is subject to cross examination. *Bailey v. State*, 273 Ga. 303, 540 S.E.2d 202 (2001).

Statements to or heard by witness. — When there is ample evidence of conspiracy among defendants, statements of any of the defendants to, or overheard by, a witness are admissible against all of the defendant's under O.C.G.A. § 24-3-52. *Fortner v. State*, 248 Ga. 107, 281 S.E.2d 533 (1981).

Codefendant's extrajudicial statement. — Admission of codefendant's extrajudicial statement held not to be reversible error, see *Hope v. State*, 164 Ga. App. 665, 297 S.E.2d 88 (1982).

Cited in *Nobles v. State*, 98 Ga. 73, 26 S.E. 64 (1896); *Howard v. State*, 109 Ga. 137, 34 S.E. 330 (1899); *Hicks v. State*, 11 Ga. App. 265, 75 S.E. 12 (1912); *Gibbs v. State*, 144 Ga. 166, 86 S.E. 543 (1915); *Brandon v. State*, 169 Ga. 808, 151 S.E. 493 (1930); *Johnson v. State*, 46 Ga. App. 494, 167 S.E. 900 (1933); *Thompson v. State*, 58 Ga. App. 593, 199 S.E. 568 (1938); *Harris v. State*, 191 Ga. 555, 13 S.E.2d 459 (1941); *Garrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948); *Pressley v. State*, 205 Ga. 197, 53 S.E.2d 106 (1949); *Phillips v. State*, 206 Ga. 418, 57 S.E.2d 555 (1950); *Elliott v. State*, 87 Ga. App. 456, 74 S.E.2d 366 (1953); *Green v. State*, 115 Ga. App. 685, 155 S.E.2d 655 (1967); *Starr v. State*, 229 Ga. 181, 190 S.E.2d 58 (1972); *Morgan v. State*, 231 Ga. 280, 201 S.E.2d 468 (1973); *Bryant v. State*, 132 Ga. App. 186, 207 S.E.2d 671 (1974); *Hill v. State*, 232 Ga. 800, 209 S.E.2d 153 (1974); *Poston v. State*, 233 Ga. 828, 213 S.E.2d 686 (1975); *Woodall v. State*, 235 Ga. 525, 221 S.E.2d 794 (1975); *Crawford v. State*, 236 Ga. 491, 224 S.E.2d 365 (1976); *Barner v. State*, 139 Ga. App. 50, 227 S.E.2d 874 (1976); *Phillips v. State*, 142 Ga. App. 581, 236 S.E.2d 519 (1977); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Edge v. State*, 144 Ga. App. 213, 240 S.E.2d 765 (1977); *Corson v. State*, 144 Ga. App. 559, 241 S.E.2d 454 (1978); *Ervin v. State*, 144 Ga. App. 504, 241 S.E.2d 650 (1978); *Miller v. State*, 145 Ga. App. 653, 244 S.E.2d 608 (1978); *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980); *Altman v. State*, 156 Ga. App. 185, 273 S.E.2d 923 (1980); *Boswell v.*

State, 158 Ga. App. 727, 282 S.E.2d 196 (1981); *Gay v. State*, 249 Ga. 747, 294 S.E.2d 476 (1982); *Brown v. State*, 164 Ga. App. 505, 296 S.E.2d 215 (1982); *Fitzgerald v. State*, 166 Ga. App. 307, 304 S.E.2d 114 (1983); *Christmas v. State*, 171 Ga. App. 4, 318 S.E.2d 682 (1984); *Davis v. State*, 255 Ga. 598, 340 S.E.2d 869 (1986); *Whitehead v. State*, 255 Ga. 526, 340 S.E.2d 885 (1986); *Hughes v. State*, 257 Ga. 200, 357 S.E.2d 80 (1987); *Knight v. State*, 266 Ga. 47, 464 S.E.2d 201 (1995); *Adkinson v. State*, 245 Ga. App. 178, 537 S.E.2d 474 (2000); *Wilbanks v. State*, 251 Ga. App. 248, 554 S.E.2d 248 (2001); *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008); *Verdree v. State*, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

Confessions

Confession referred to in this statute is one which is recounted at trial by a third person, such as a police officer, not one made in person at trial by one of the perpetrators. *Hill v. State*, 239 Ga. 278, 236 S.E.2d 626 (1977) (see O.C.G.A. § 24-3-52).

Incriminating statements which are not confessions. — Statements made by an individual, who was not a witness at trial, implicating the individual and the defendant in the indicted crime did not fall within this statute, because the individual was making no "confession" within the meaning of this statute, nor had the enterprise "ended." *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 101 S. Ct. 179, 62 L. Ed. 2d 116 (1979) (see O.C.G.A. § 24-3-52).

Declaration that declarant only guilty one. — In the trial of one of two persons jointly indicted, the declarations of the other that the other alone committed the offense with which they are charged are not admissible in evidence in favor of the accused on trial. *Robinson v. State*, 114 Ga. 445, 40 S.E. 253 (1901); *Parks v. State*, 24 Ga. App. 243, 100 S.E. 724 (1919).

Nontestifying joint offender's confession not admissible. — Admission into evidence of a videotaped confession by defendant's brother was reversible error. *Brooks v. State*, 271 Ga. 698, 523 S.E.2d 866 (1999).

Statement after conspiracy confirmed by defendant. — Evidence as to admissions of guilt involving the defendant, made by a coconspirator after the termination of the

conspiracy, was admissible since it appeared that the admissions were made in the presence of the defendant personally and were then freely and voluntarily declared by the defendant to be true. *Gunter v. State*, 19 Ga. App. 772, 92 S.E. 314 (1917); *Creel v. State*, 216 Ga. 233, 115 S.E.2d 552 (1960); *Graham v. State*, 111 Ga. App. 542, 142 S.E.2d 287 (1965).

Hearsay testimony of purported coconspirators. — Admission of hearsay testimony of police officers recounting the confessions of purported coconspirators who did not testify violated defendant's constitutional right to confront witnesses. *Livingston v. State*, 268 Ga. 205, 486 S.E.2d 845 (1997).

Codefendant's confession admissible when supported by defendant's confession. — Testimony presented in a codefendant's confession which is supported by the complaining defendant's own confession is admissible against the defendant. *Matthews v. State*, 167 Ga. App. 28, 305 S.E.2d 846 (1983); *Moore v. State*, 176 Ga. App. 882, 339 S.E.2d 271 (1985).

Excluding a codefendant's statement to the police was proper since the codefendant did not testify at the trial and was not available for cross-examination, and since the statement lacked sufficient reliability to be admissible. *Douglas v. State*, 228 Ga. App. 368, 491 S.E.2d 821 (1997).

Admission of interlocking confessions. — Error in the admission of codefendant's custodial statements in which each implicated the other by name and act was harmless since each defendant admitted to each defendant's participation in the criminal plan, and the objectionable portion of each statement implicating the other codefendant was cumulative of separate evidence that defendants bragged to others about what the defendant's had done. *Sawyer v. State*, 217 Ga. App. 406, 457 S.E.2d 685 (1995). But see *Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998); *Hodges v. State*, 229 Ga. App. 475, 494 S.E.2d 223 (1997).

Unless a statement is otherwise directly admissible against a defendant, the confrontation clause is violated by the admission of a nontestifying codefendant's statement which inculpatates the defendant by referring to the defendant's name or existence, regardless of the existence of limiting instructions and of whether the incriminated defendant has

made an interlocking incriminating statement. *Cosby v. State*, 254 Ga. App. 372, 562 S.E.2d 765 (2002).

Trial court erred in admitting codefendant's confession in which the codefendant implicated defendant and another codefendant in a burglary that involved stealing a shotgun from an acquaintance so that the three people could go and confront a drug dealer as statutory law made the confession of the codefendant only admissible against the codefendant and not against defendant. *Myers v. State*, 256 Ga. App. 135, 567 S.E.2d 742 (2002).

End of Enterprise

Statute clearly contemplates a point in time when the conspiracy, including the concealment stage, is at an end so as to render a subsequent confession by an alleged coconspirator inadmissible in the trial of a defendant who continues to deny the defendant's guilt. *Hill v. State*, 232 Ga. 800, 209 S.E.2d 153 (1974).

Crucial question in determining whether the statement of one conspirator may be used as evidence of guilt against another conspirator is whether the conspiracy had ended at the time the statement was made. *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975).

Confession of one joint offender, made after the enterprise has ended, is admissible only against the offender, and cannot be used against the other defendant at a joint trial when the joint offender does not testify and is not available for cross-examination. *Matthews v. State*, 167 Ga. App. 28, 305 S.E.2d 846 (1983).

Post-arrest confession of coconspirator who does not testify at trial, which confession is not made in the presence of the defendant, is inadmissible because such a confession is a "desertion" by the coconspirator and thus operates to terminate the conspiracy. *Pritchard v. State*, 160 Ga. App. 105, 286 S.E.2d 338 (1981).

Ultimate purpose must be accomplished. — Phrase "after the enterprise is ended," necessarily makes admissible any statements made by any of the conspirators until the ultimate purpose of the conspiracy has been accomplished. *Rawlings v. State*, 163 Ga. 406, 136 S.E. 448 (1926).

Conspiracy is deemed to progress until the

End of Enterprise (Cont'd)

conspirator's ultimate purpose is accomplished and may include acts performed and declarations made after the commission of the crime, and conspiratorial efforts to conceal the facts of the crime and the identity of the perpetrators are a continuance of a conspiracy. *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

In legal contemplation, the enterprise may not be at an end so long as the concealment of the crime or the identity of all the conspirators has not been disclosed. Acts and declarations of such undisclosed conspirators, looking to the concealment of identity and the suppression of evidence, are admissible against other conspirators. *Mitchell v. State*, 86 Ga. App. 292, 71 S.E.2d 756 (1952); *Chatterton v. State*, 221 Ga. 424, 144 S.E.2d 726 (1965), cert. denied, 384 U.S. 1015, 86 S. Ct. 1964, 16 L. Ed. 2d 1036 (1966); *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Proof that a crime has been committed does not necessarily prove the end of the conspiracy so as to render acts and declarations of conspirators after that time inadmissible against the other coconspirators for the conspiracy may be kept open for various purposes, such as, securing the proceeds of the crime, the division of such proceeds, the concealment of evidence tending to criminate the conspirators, procuring witnesses, influencing witnesses with respect to their testimony, the fabrication of evidence tending to exculpate the conspirators, the fabrication of a defense, or in any way avoiding prosecution or punishment. *Thompson v. State*, 58 Ga. App. 593, 199 S.E. 568 (1938).

Arrest of participants does not necessarily end conspiracy. — Conspiracy or the concealment phase of a conspiracy does not necessarily end just because one or more participants have been arrested and jailed. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 101 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

When motive for the crime is not just the crime's commission, but the crime's commission is a prerequisite to a further act, then conspiracy is not ended until this end is achieved, since concealment is a part of the conspiracy, and the crime itself is only an

incident necessary for the success of the purpose of the conspiracy. *Pritchard v. State*, 160 Ga. App. 105, 286 S.E.2d 338 (1981).

Actions after commission of crime. — Acts, conduct, and sayings of any of the conspirators other than the accused, after the commission of the crime, are admissible when the acts sought to be proved were contemplated by the terms of the conspiracy to be performed after the perpetration of the crime was completed. *Rawlins v. State*, 124 Ga. 31, 52 S.E. 1 (1905), aff'd, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906); *Baker v. State*, 17 Ga. App. 279, 86 S.E. 530 (1915).

Statements to police. — Confession made to police by a conspirator in which other conspirators are identified and their participation is described is not made during the pendency of the criminal project, but is made after the enterprise is ended. *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *Welch v. State*, 237 Ga. 665, 229 S.E.2d 390 (1976).

Statements made by a conspirator to the police after the conspirator's arrest, which statements incriminate another conspirator, terminate the conspiracy and are, therefore, inadmissible against the other conspirators. *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

In a prosecution for possession of methamphetamine, as a codefendant's statement to a police officer, attributing the defendant's unconscious state to the fact that the defendant had been drinking or smoking, had been made after the conspiracy ended, pursuant to O.C.G.A. § 24-3-52, the statement was not admissible against the defendant. *O'Neill v. State*, 285 Ga. 125, 674 S.E.2d 302 (2009).

Procedural Considerations

Failure to prove conspiracy. — When the fact of conspiracy has not been proved by independent evidence, a coconspirator's testimony that another coconspirator committed the murders is admissible at the second conspirator's trial as an admission of guilt just as a confession by a conspirator to a law enforcement officer would be admissible in that conspirator's trial. *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976).

Codefendant's guilty plea admissible for purposes other than substantive evidence. —

One person's guilty plea or conviction may not be used as substantive evidence of the guilt of another, but the introduction of a codefendant's guilty plea is permissible when the plea's use is limited to proper evidentiary purposes such as to impeach trial testimony or to reflect on a witness's credibility. *Foster v. State*, 178 Ga. App. 478, 343 S.E.2d 745 (1986); *Strickland v. State*, 198 Ga. App. 570, 402 S.E.2d 532 (1991).

Deletion of references to appellant in codefendant's statement. — When any reference to appellant in codefendant's statement was deleted, and the statement as testified to in court did not in any way implicate appellant, it was not, in the absence of a request, reversible error to fail to charge that such statement could not be considered against appellant pursuant to O.C.G.A. § 24-3-52. *Mock v. State*, 163 Ga. App. 319, 294 S.E.2d 361 (1982).

It was not error to admit interlocking confessions of codefendants since the trial court instructed the jury that the jury could consider the statement of each accused only against the person who made the statement and each accused had confessed to the commission of the crime in writing. *Cochran v. State*, 177 Ga. App. 471, 339 S.E.2d 749 (1986).

Defendant's attempt to cross examine the accomplice was an improper attempt at impeachment. — Defendant did not properly comply with the procedure for introducing an accomplice's conviction into evidence. *Castleberry v. State*, 274 Ga. 290, 553 S.E.2d 606 (2001).

Admission of video-taped pretrial statements of two of three codefendants was proper since the statements were interlocking and supportive of each other, the evidence against each defendant was overwhelming, and the jury was properly charged to consider the statements only against the respective makers. *Wright v. State*, 263 Ga. 810, 440 S.E.2d 7 (1994).

This statute should be given to the jury when a confession or incriminating statement is admitted against one codefendant in the trial of joint defendants. However, testimony of a codefendant, having been sworn in as a witness, is to be received and weighed as other evidence in the trial. *Rhodes v.*

State, 135 Ga. App. 484, 218 S.E.2d 159 (1975) (see O.C.G.A. § 24-3-52).

If no objections are made to statements of codefendants at trial, and no special instruction requested, such objections are waived. However, statements of codefendants made after the enterprise is ended are not admissible as to other codefendants. *Gallman v. State*, 127 Ga. App. 849, 195 S.E.2d 187 (1973).

Failure to charge statute. — When there was no evidence of a confession made after a conspiracy has come to an end, it is not error for the court to fail to charge the provisions of this statute. *Robinson v. State*, 229 Ga. 14, 189 S.E.2d 53 (1972) (see O.C.G.A. § 24-3-52).

Court does not err in permitting a witness for the state to read the in-custody statements of the three defendants on trial to the jury without charging the jury the provisions of this statute, but the statements of the codefendants have no probative value against the other codefendants. *Gallman v. State*, 127 Ga. App. 849, 195 S.E.2d 187 (1973) (see O.C.G.A. § 24-3-52).

Failure to charge O.C.G.A. § 24-3-52 without request was not error since defendants conferred with each other before making the taped confession, and since the issue was presented directly to the jury as to whether statements which defendants first testified about were voluntary and true or the result of coercion and false. *Dunbar v. State*, 163 Ga. App. 243, 292 S.E.2d 897 (1982).

Although the out-of-court confession of a codefendant or coconspirator made after the enterprise is ended is admissible in evidence only against that one, if such codefendant appears as a witness at trial, that codefendant may testify against the other codefendant or coconspirator and such testimony is to be treated as all other evidence. *Wimberly v. State*, 205 Ga. App. 818, 423 S.E.2d 728 (1992).

Harmless error. — Failure to instruct jury with regard to O.C.G.A. § 24-3-52 is harmless error when the codefendant is sworn as a witness and testified to the same facts as those contained in the codefendant's statement. *Oliver v. State*, 159 Ga. App. 154, 282 S.E.2d 767 (1981).

Although the confession of one joint offender, made after the enterprise has ended, is admissible only against that offender, since

Procedural Considerations (Cont'd)

the confession of the defendant was introduced into evidence and such confession clearly showed the defendant's guilt, the error in reading defendant's name while presenting the confession of the defendant's joint-indictee to the jury was harmless error. *Mahone v. State*, 237 Ga. 120, 227 S.E.2d 16 (1976).

Eventual testimony and cross-examination vitiates charge of harmfulness. — Defense counsel's failure to object to testimony of accomplice at time of introduction was not harmful because accomplice eventually testified at hearing and was subject to cross-examination; and as such the testimony objected to on appeal was cumulative of the accomplice's in-court testimony. In re J.B., 223 Ga. App. 429, 477 S.E.2d 874 (1996).

Because a coconspirator testified under oath at trial and was subject to cross examination, the concerns of O.C.G.A. § 24-3-52 were satisfied and the statements were properly admitted. *Harrison v. State*, 298 Ga. App. 870, 681 S.E.2d 252 (2009).

New trial required. — All writings introduced in evidence in lieu of testimony from the witness stand, such as interrogatories, depositions, dying declarations, and confessions of guilt of a defendant or of an alleged coconspirator, which depend entirely for their value on the credibility of the maker, should not be in the possession of the jury

during the jury's deliberations; thus, when the defendants' and alleged coconspirators' signed statements are delivered to the jury, over timely objections, a new trial must be granted. *Royals v. State*, 208 Ga. 78, 65 S.E.2d 158 (1951).

Motion for mistrial should be granted when after a joint enterprise is terminated, testimony is elicited to corroborate testimony of the accomplice tending to implicate the defendant which is violative of this statute and extremely prejudicial to the defendant, and unless stricken from the record and the defect in some way cured, a motion for mistrial should be granted. *Dudley v. State*, 148 Ga. App. 560, 251 S.E.2d 815 (1978) (see O.C.G.A. § 24-3-52).

Review of relevancy motions. — Defendant's objection to the admission of testimony on grounds of irrelevancy, whether valid or not without more specification, is subject to review when the trial court ruled on the objection and treated the objection as valid. *Mindock v. State*, 187 Ga. App. 508, 370 S.E.2d 670 (1988).

Limiting instruction need not be contemporaneous with admission of coconspirator's statement. — Under O.C.G.A. § 24-3-52, there was no error in the trial court's decision not to give a limiting instruction contemporaneously with the admission of a coconspirator's post-conspiracy custodial statement because the trial court gave a proper limiting instruction in the general jury charge. *Short v. State*, 276 Ga. App. 340, 623 S.E.2d 195 (2005).

RESEARCH REFERENCES

ALR. — Detective or other person participating in crime to obtain evidence as accomplice within rule requiring corroboration of, cautionary instruction as to, testimony of accomplice, 119 ALR 689.

Suppression before indictment or trial of

confession unlawfully obtained, 1 ALR2d 1012.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 ALR3d 990.

24-3-53. Admissions and confessions received with care; no conviction on uncorroborated confession.

All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction. (Orig. Code 1863, § 3715; Code 1868, § 3739; Code 1873, § 3792; Code 1882, § 3792; Civil Code

1895, § 5197; Penal Code 1895, § 1005; Civil Code 1910, § 5784; Penal Code 1910, § 1031; Code 1933, § 38-420.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CORROBORATION

INSTRUCTIONS

General Consideration

History generally. — The opinion of Judge Lumpkin in *Miller v. Cotten*, 5 Ga. 341 (1848), has been since followed, and from it and its successors on the same line the provisions of this statute have been drawn; in fact this statute embodies principles, long previously established by the common-law courts, and are merely declaratory of these principles. *Beall v. Clark*, 71 Ga. 818 (1883) (see O.C.G.A. § 24-3-53).

Reason for the rule. — All confessions should be received with care and caution, not on account of the character of the testimony, but on account of the fact of their transmission through one or two different channels with consequent liability of mistake as to what was said, and liability of mistake in repeating. *Calvin v. State*, 118 Ga. 73, 44 S.E. 848 (1903).

That a witness is liable to misunderstand the language of the one making the confession is another reason for the rule. *Minton v. State*, 99 Ga. 254, 25 S.E. 626 (1896).

Discretion of court. — While admissions should be scanned with care, admissions are evidence; and when a jury bases a verdict thereon, and the trial judge approves the finding, the reviewing court will not interfere with the judge's discretion in refusing a new trial. *Burk v. Hill*, 119 Ga. 38, 45 S.E. 732 (1903).

When trial judge resolves issues in favor of admissibility, such factual and credibility determinations must be accepted by appellate courts unless such determinations are clearly erroneous. *Cunningham v. State*, 248 Ga. 835, 286 S.E.2d 427 (1982).

It is not required that admissions be corroborated by other evidence in the case, as are confessions of the crime. *Sheffield v. State*, 188 Ga. 1, 2 S.E.2d 657 (1939); *Lowe v. State*, 267 Ga. 180, 476 S.E.2d 583 (1996).

While admissions are to be scanned with

care and considered, along with other evidence, for what the admissions are worth, it is not required that the admissions be corroborated by other evidence as are confessions to a crime. *Brown v. State*, 167 Ga. App. 851, 307 S.E.2d 737 (1983); *Williams v. State*, 246 Ga. App. 347, 540 S.E.2d 305 (2000).

Defendant's statement in which the defendant did not admit every essential element of the charged offense constituted an admission rather than a confession for which no corroboration was required. *Stowers v. State*, 205 Ga. App. 518, 422 S.E.2d 870 (1992), cert. denied, 205 Ga. App. 901, 422 S.E.2d 870 (1992); *Herrington v. State*, 243 Ga. App. 265, 533 S.E.2d 133 (2000), appeal dismissed, 265 Ga. App. 454, 594 S.E.2d 682 (2004).

Standard for determining admissibility of confessions is preponderance of the evidence. *Bassett v. State*, 159 Ga. App. 829, 285 S.E.2d 260 (1981).

Applicable rules when state relies on defendant's statements to show intent. — When the state solely relies upon the extrajudicial statements of the accused alone to show intent to commit the crime charged and no other evidence is introduced to show such intent there are two rules which apply: one rule holds that the defendant's explanation of the crime charged must be accepted since the defendant's statement is consistent with the physical facts shown, and the other rule holds that the defendant's explanation may be rejected by the trial court when the defendant's statement is not consistent with and does not explain the other direct and circumstantial evidence. *Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

Fact that language of confession indicates commission of other offense. — It is no valid ground of objection to the admission in

General Consideration (Cont'd)

evidence of an incriminatory statement or confession made by the accused in a criminal case that the language indicated that the accused had committed also another and separate offense. *Laney v. State*, 159 Ga. App. 609, 284 S.E.2d 114 (1981).

Admission is not inadmissible on grounds that it was written by someone else from defendant's dictation, even if defendant had not signed the statement as defendant's own because the officer who interviewed defendant would be permitted to testify to the content of the verbal statement voluntarily given the officer by defendant. *Graves v. State*, 180 Ga. App. 446, 349 S.E.2d 519 (1986).

Admission defined. — Admissions relate to any fact material to the issue, and are to be scanned with care and considered, with any other evidence, for what the admissions are worth. *Sheffield v. State*, 188 Ga. 1, 2 S.E.2d 657 (1939).

An admission as applied to criminal cases, is the avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt. *Oliphant v. State*, 52 Ga. App. 105, 182 S.E. 523 (1935).

Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against the defendant, it cannot be said to be an admission of guilt. *Johnson v. State*, 204 Ga. 528, 50 S.E.2d 334 (1948).

An admission as applied to a criminal case is the statement made by the defendant of a fact or facts pertinent to the issue, and tending, in connection with other facts and circumstances, to prove the guilt of the accused, but which does not contain all the essential elements of the crime. *Johns v. State*, 79 Ga. App. 429, 54 S.E.2d 142 (1949).

An admission of the main fact from which the essential elements of the criminal act may be inferred amounts to an admission of the crime itself. *Jones v. State*, 223 Ga. 157, 154 S.E.2d 228, rev'd on other grounds, 389 U.S. 24, 88 S. Ct. 4, 19 L. Ed. 2d 25 (1967).

Confession defined. — Confession is a voluntary admission of guilt. *Oliphant v. State*, 52 Ga. App. 105, 182 S.E. 523 (1935).

The requirements to constitute a confes-

sion are that the facts admitted must comprise all the essential elements necessary to make out the case against the defendant, yet a confession is sufficiently plenary in substance, and responsive to the requirement that it contain all the essential elements necessary to make out the case, when the confession, though lacking in a recital of the many details constituting the crime, does disclose certain facts from which the main fact of guilt is revealed. *Meriwether v. State*, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Confession is a person's admission of declaration of the person's agency or participation in a crime, and is restricted to admissions of guilt. *Johnson v. State*, 204 Ga. 528, 50 S.E.2d 334 (1948).

Confession is an admission of the main fact in a charge of crime, without any exculpatory explanation. *Johns v. State*, 79 Ga. App. 429, 54 S.E.2d 142 (1949).

Incriminating statements and confessions distinguished. — There is a difference between an incriminating statement and a confession of guilt. In the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. *Cumberlander v. State*, 53 Ga. App. 276, 185 S.E. 379 (1936); *Johnson v. State*, 204 Ga. 528, 50 S.E.2d 334 (1948).

A confession is a voluntary statement acknowledging guilt of a criminal offense, and the term admission ordinarily signifies the avowal or acknowledgment of a fact or of circumstances from which guilt may be inferred and only tending to prove the offense charged, but not amounting to a confession of guilt. *Norrell v. State*, 116 Ga. App. 479, 157 S.E.2d 784 (1967).

An incriminating statement, to be the equivalent of a confession of guilt, must be so comprehensive as to include every essential element of the offense. *Johnson v. State*, 204 Ga. 528, 50 S.E.2d 334 (1948); *Norrell v. State*, 116 Ga. App. 479, 157 S.E.2d 784 (1967).

Admission as constituting high degree of evidence. — There is nothing in the provisions of this statute, nor in any other statute of the state, which declares that when an admission is established to the satisfaction of the jury the admission constitutes a high degree of evidence and the jury should give it great weight. *Raleigh & G.R.R. v. Allen*,

106 Ga. 572, 32 S.E. 622 (1899) (see O.C.G.A. § 24-3-53).

Confession alone may be evidence. — Since it is unnecessary that a confession be corroborated by independent proof in all its details and particulars, and since a confession is direct evidence and not circumstantial evidence, a confession is sufficient to prove the manner and means of death as charged in an indictment, without independent corroborating evidence, just as it is the rule that once the requirements of the *corpus delicti* are met, the confession of the accused is available to identify the person confessing as the criminal agent. *McVeigh v. State*, 205 Ga. 326, 53 S.E.2d 462 (1949).

Ambiguous admissions. — Admissions contained in a letter are to be scanned with care if the admissions are susceptible of more than one construction, and if, in order to discover their true meaning, attention should be directed to the precise terms employed by the writer. *Richmond & D.R.R. v. Kerler*, 88 Ga. 39, 13 S.E. 833 (1891).

Admissions in pleas. — Fact that an admission made; by the defendant in a plea which had been stricken by amendment and was put in evidence by the introduction of the plea containing the admission had, before the plea was amended, possessed the character of an admission in *judicio*, does not relieve the admission from the application of the rule of law (generally applicable to all admissions) that admissions should be scanned with care and it was not error for the court so to charge. *Griffin v. Browning*, 51 Ga. App. 743, 181 S.E. 801 (1935).

Admissions by infants. — In general, infants are not bound by their admissions. *Howard v. Hall*, 112 Ga. App. 247, 145 S.E.2d 70 (1965).

While the decision of whether a child, or “infant,” is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child’s years, the admission in evidence of an infant’s admission against interest must be very carefully scanned because of the child’s immaturity and the deleterious effect such admissions would have. *Howard v. Hall*, 112 Ga. App. 247, 145 S.E.2d 70 (1965).

Confessions of juveniles are scanned with more care and received with greater caution. *Crawford v. State*, 240 Ga. 321, 240 S.E.2d

824 (1977); *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983).

Conviction not required to admit similar transaction evidence. — While O.C.G.A. § 24-3-53 did not allow a conviction based solely on an uncorroborated confession, such a limitation did not apply to the admission of prior similar transaction evidence regarding a defendant’s involvement in a similar uncharged robbery as the defendant did not have to be convicted for such evidence to be admissible. *Dean v. State*, 292 Ga. App. 695, 665 S.E.2d 406 (2008).

Accomplices. — Confession made by the accused and supported by evidence of the *corpus delicti* will serve as sufficient corroboration of the evidence of an accomplice. *Westbrook v. State*, 91 Ga. 11, 16 S.E. 100 (1892); *Allen v. State*, 91 Ga. 189, 16 S.E. 980 (1893); *Schaefer v. State*, 93 Ga. 177, 18 S.E. 552 (1893).

Proof of the *corpus delicti*, even though independent of the confession or evidence of an accomplice, does not at all corroborate the testimony of the confessing accomplice so as to authorize a conviction of another accomplice who has not confessed. *Newman v. State*, 63 Ga. App. 417, 11 S.E.2d 248 (1940).

Mere fact that the defendant had accomplices in the commission of a crime does not change the rule that proof of the *corpus delicti* may be sufficient corroboration of a confession of guilt to sustain a verdict of guilty, as it relates to the amount of evidence, other than the testimony of an accomplice, necessary to corroborate the confession in order to support a verdict of guilty. Moreover, evidence of the confessions is sufficient to corroborate the testimony of an accomplice so as to support a verdict of guilty against the confessor. *Motes v. State*, 66 Ga. App. 543, 18 S.E.2d 497 (1942).

While it is the rule that the testimony of an accomplice must be corroborated by circumstances definitely connecting the accused with the perpetration of the crime, this is not the rule in reference to the corroboration of a confession. *Lastinger v. State*, 84 Ga. App. 760, 67 S.E.2d 411 (1951).

Trial court’s findings upheld on appeal. — Unless clearly erroneous, a trial court’s findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. *Bassett v.*

General Consideration (Cont'd)

State, 159 Ga. App. 829, 285 S.E.2d 260 (1981).

Cited in Daniel v. State, 63 Ga. 339 (1879); Paul v. State, 65 Ga. 152 (1880); Murchison v. Sergeant, 69 Ga. 206, 47 Am. R. 751 (1882); Anderson v. State, 72 Ga. 98 (1883); Roberts v. State, 75 Ga. 863 (1885); Mims v. Brook & Co., 3 Ga. App. 247, 59 S.E. 711 (1907); West v. State, 6 Ga. App. 105, 64 S.E. 130 (1909); Hart v. State, 141 Ga. 672, 81 S.E. 1108 (1914); Wilson v. State, 19 Ga. App. 759, 92 S.E. 309 (1917); McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935); Moore v. State, 59 Ga. App. 456, 1 S.E.2d 230 (1939); Burns v. State, 188 Ga. 22, 2 S.E.2d 627 (1939); Claybourn v. State, 190 Ga. 861, 11 S.E.2d 23 (1940); McKennon v. State, 63 Ga. App. 466, 11 S.E.2d 416 (1940); Bailey v. Warlick, 196 Ga. 642, 27 S.E.2d 322 (1943); Logue v. State, 198 Ga. 672, 32 S.E.2d 397 (1944); Grimes v. State, 79 Ga. App. 489, 54 S.E.2d 302 (1949); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950); Huff v. State, 81 Ga. App. 461, 59 S.E.2d 43 (1950); Richardson v. State, 207 Ga. 373, 61 S.E.2d 489 (1950); Palmour v. State, 83 Ga. App. 792, 64 S.E.2d 697 (1951); Wright v. State, 210 Ga. 212, 78 S.E.2d 494 (1953); Williams v. State, 210 Ga. 207, 78 S.E.2d 521 (1953); Swain v. State, 91 Ga. App. 561, 86 S.E.2d 642 (1955); Wilson v. State, 212 Ga. 412, 93 S.E.2d 354 (1956); Hobbs v. New England Ins. Co., 212 Ga. 513, 93 S.E.2d 653 (1956); Davis v. State, 215 Ga. 788, 113 S.E.2d 458 (1960); Reliford v. State, 101 Ga. App. 244, 113 S.E.2d 473 (1960); Mobley v. State, 101 Ga. App. 317, 113 S.E.2d 654 (1960); Gossett v. State, 105 Ga. App. 17, 123 S.E.2d 322 (1961); Wilcher v. State, 124 Ga. App. 534, 184 S.E.2d 505 (1961); Williams v. State, 106 Ga. App. 544, 127 S.E.2d 492 (1962); Thurmond v. State, 108 Ga. App. 641, 134 S.E.2d 511 (1963); Gates v. State, 110 Ga. App. 303, 138 S.E.2d 473 (1964); Thompkins v. State, 222 Ga. 420, 151 S.E.2d 153 (1966); Elder v. Smith, 121 Ga. App. 461, 174 S.E.2d 239 (1970); Walker v. State, 226 Ga. 292, 174 S.E.2d 440 (1970); Neal v. State, 121 Ga. App. 817, 175 S.E.2d 920 (1970); Harper v. Plunkett, 122 Ga. App. 63, 176 S.E.2d 187 (1970); Cross v. State, 122 Ga. App. 208, 176 S.E.2d 517 (1970); Aldridge v. State, 125 Ga. App. 691, 188 S.E.2d 835 (1972); Carter v. Madray, 128 Ga. App. 40,

195 S.E.2d 685 (1973); Griffin v. State, 230 Ga. 449, 197 S.E.2d 723 (1973); Smith v. State, 230 Ga. 876, 199 S.E.2d 793 (1973); Poston v. State, 233 Ga. 828, 213 S.E.2d 686 (1975); Pierce v. State, 235 Ga. 237, 219 S.E.2d 158 (1975); Zirkle v. State, 235 Ga. 289, 219 S.E.2d 389 (1975); Lane v. State, 238 Ga. 407, 233 S.E.2d 375 (1977); Rutledge v. State, 142 Ga. App. 399, 236 S.E.2d 143 (1977); Jackson v. State, 239 Ga. 449, 238 S.E.2d 31 (1977); Southern Heritage Mgt. Co. v. Elrod's Custom Drapery Workroom, Inc., 144 Ga. App. 139, 240 S.E.2d 607 (1977); Gainer v. State, 144 Ga. App. 703, 242 S.E.2d 286 (1977); Mason v. State, 147 Ga. App. 179, 248 S.E.2d 302 (1978); Meyer v. State, 150 Ga. App. 613, 258 S.E.2d 217 (1979); Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979); Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981); Garner v. State, 159 Ga. App. 244, 282 S.E.2d 909 (1981); Berry v. State, 160 Ga. App. 240, 286 S.E.2d 525 (1981); Hicks v. State, 160 Ga. App. 893, 288 S.E.2d 604 (1982); Rose v. State, 249 Ga. 628, 292 S.E.2d 678 (1982); Richardson v. State, 250 Ga. 506, 299 S.E.2d 715 (1983); Roberts v. State, 167 Ga. App. 38, 306 S.E.2d 43 (1983); Patrick v. State, 252 Ga. 509, 314 S.E.2d 909 (1984); Williams v. State, 170 Ga. App. 20, 316 S.E.2d 28 (1984); Mitchell v. State, 174 Ga. App. 594, 330 S.E.2d 798 (1985); Jones v. State, 174 Ga. App. 783, 331 S.E.2d 633 (1985); Moore v. State, 176 Ga. App. 882, 339 S.E.2d 271 (1985); Nation v. State, 180 Ga. App. 460, 349 S.E.2d 479 (1986); Graves v. State, 180 Ga. App. 446, 349 S.E.2d 519 (1986); Smith v. State, 258 Ga. 181, 366 S.E.2d 763 (1988); McEver v. State, 258 Ga. 768, 373 S.E.2d 624 (1988); Byram v. State, 189 Ga. App. 627, 376 S.E.2d 909 (1988); Williams v. State, 191 Ga. App. 913, 383 S.E.2d 344 (1989); Spencer v. State, 192 Ga. App. 822, 386 S.E.2d 705 (1989); Bowley v. State, 261 Ga. 278, 404 S.E.2d 97 (1991); United States v. Thompson, 928 F.2d 1060 (11th Cir. 1991); Plumm v. State, 201 Ga. App. 154, 410 S.E.2d 352 (1991); Powell v. State, 201 Ga. App. 188, 410 S.E.2d 378 (1991); Stacy v. State, 201 Ga. App. 256, 410 S.E.2d 812 (1991); McClain v. State, 267 Ga. 378, 477 S.E.2d 814 (1996); Wiley v. State, 238 Ga. App. 334, 519 S.E.2d 10 (1999); Casanova v. State, 285 Ga. App. 554, 646 S.E.2d 754 (2007).

Corroboration

Corroboration of admission not required.

— A defendant's statement to an officer that the defendant's license was suspended was an admission and not a confession requiring corroboration under O.C.G.A. § 24-3-53, because the defendant's statement did not include an admission to driving on a highway of the state, which was an essential element of the offense of driving with a suspended license under O.C.G.A. § 40-5-121(a). *Griffin v. State*, 302 Ga. App. 807, 692 S.E.2d 7 (2010).

Sufficiency of corroboration. — Corroborating testimony need not show the fact beyond a reasonable doubt, but is adequate if the testimony tends materially to corroborate the confession and to connect the defendant with the crime. *Douglas v. State*, 6 Ga. App. 157, 64 S.E. 490 (1909); *Navarra v. State*, 51 Ga. App. 321, 180 S.E. 375 (1935); *Logue v. State*, 198 Ga. 672, 32 S.E.2d 397 (1944).

Sufficient corroboration of defendant's confession existed in the form of additional evidence regarding the manner in which the victim was killed and the victim's body disposed. *Walsh v. State*, 269 Ga. 427, 499 S.E.2d 332 (1998).

Store owner's testimony and the videotape concerning the commission of the burglary corroborated defendant's confession to entering the store with a shirt over defendant's head, stealing beer and cigarettes, and then selling them. *Ward v. State*, 242 Ga. App. 246, 529 S.E.2d 378 (2000), appeal dismissed, 299 Ga. App. 63, 682 S.E.2d 128 (2009).

Defendant's cocaine possession conviction was affirmed as the defendant's statement that the defendant and two other men went to the victim's house to buy cocaine, that the victim came out of the victim's house with the cocaine and gave it to the defendant, and that the defendant split the cocaine with the defendant's accomplices was corroborated by proof that cash was found on the victim's bed next to several bags of a substance that later tested positive for crack cocaine. *Williams v. State*, 270 Ga. App. 424, 606 S.E.2d 871 (2004).

Defendant's statement to the police was in the nature of an admission and defendant's conviction for malice and felony murder was corroborated by showing that the gun that

defendant carried to the scene was the same gun that fired the fatal shot, that the defendant had access to the weapon, and that the defendant arranged the meeting with the victim. *Flanders v. State*, 279 Ga. 35, 609 S.E.2d 346 (2005).

Because defendant's confession was videotaped and defendant admitted to attacking the victim because defendant wanted money to buy drugs, the admission of defendant's confession via videotape was held to have been sufficiently corroborated because the two interviewing police officers both testified at the trial and established the corpus delicti of each crime, thereby providing the requisite corroboration to sustain the convictions for aggravated assault, armed robbery, kidnapping, and hijacking a motor vehicle. *Cummings v. State*, 272 Ga. App. 886, 614 S.E.2d 121 (2005).

Defendant's confessions were sufficiently corroborated by the victim and the officer's testimony, and a confession to eight armed robberies was corroborated by testimony confirming when the crimes occurred, defendant's conduct during the crimes, and the use of a stolen car to flee. *Robinson v. State*, 276 Ga. App. 502, 623 S.E.2d 711 (2005).

Trial court properly denied a defendant's motion for a directed verdict regarding at least five counts of the indictment charging four counts of aggravated child molestation and three counts of child molestation because the verdicts were not based solely on the defendant's uncorroborated confession. The evidence corresponded to the defendant's confession and was sufficient to establish the corpus delicti, namely that the crimes actually occurred, because it showed more than two improper sexual acts by the defendant against the defendant's child: the (1) testimony of a social worker; (2) the victim's audiotaped statement, in which the victim described how the defendant abused the victim; (3) the victim's trial testimony that the victim told the social worker the truth; and (4) evidence that the victim's behavior was typical of an abused child, were sufficient for the jury to find that the victim had been abused on numerous occasions. *Hargrove v. State*, 289 Ga. App. 363, 657 S.E.2d 282 (2008), cert. denied, 2008 Ga. LEXIS 500 (Ga. 2008).

Evidence that the defendant possessed the

Corroboration (Cont'd)

murder weapon was sufficient under O.C.G.A. § 24-3-53 to corroborate the defendant's confession that the defendant pointed a gun at a clerk in a convenience store and ultimately murdered the clerk. *Moore v. State*, 285 Ga. 157, 674 S.E.2d 315 (2009).

Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. *Cantrell v. State*, 299 Ga. App. 746, 683 S.E.2d 676 (2009).

All essential facts must be proved. — Amount of corroboration necessary to support the conviction is in every case a question of fact for the jury. But even if incriminatory admissions, supplemented by other circumstances, be equivalent to a confession, evidence that the accused confessed the commission of an offense would not be sufficient to authorize a conviction, unless all of the facts essential to establish that the alleged offense was in fact committed are satisfactorily proved. *Boyd v. State*, 4 Ga. App. 58, 60 S.E. 801 (1908); *West v. State*, 6 Ga. App. 105, 64 S.E. 130 (1909); *Harvey v. State*, 8 Ga. App. 660, 70 S.E. 141 (1911); *Davenport v. State*, 12 Ga. App. 102, 76 S.E. 756 (1912).

When juvenile defendants confessed to entering a vacant home and causing damage therein, and a police officer testified to the condition of the home and the damage the officer found upon investigation, together with witness statements from people who were with defendants prior to and after the acts, wherein the witnesses testified that defendants indicated the defendants' intent to damage the house, there was sufficient evidence to support an adjudication of delinquency pursuant to O.C.G.A. § 15-11-2; there was sufficient corroborative evidence under O.C.G.A. § 24-3-53 to support the conviction as well. In the Interest of Q.D., 263 Ga. App. 293, 587 S.E.2d 336 (2003).

Corroboration of confession in any particular. — Although an uncorroborated confession cannot support a conviction under O.C.G.A. § 24-3-53, corroboration of a confession in any particular satisfies the requirements of the statute. *Sands v. State*, 262 Ga. 367, 418 S.E.2d 55 (1992); *Miller v. State*, 268 Ga. 1, 485 S.E.2d 752 (1997).

Although an uncorroborated confession cannot support a conviction under O.C.G.A. § 24-3-53, corroboration of a confession in any particular satisfies the requirements of the statute; thus, when defendant's detailed confessions to two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault, three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime were corroborated by the testimony of one of the victims who ultimately identified defendant as the person who placed a knife to the victim's neck during the robbery of the victim's spouse's store and forced the victim to the back of the store and secured the victim with duct tape, such evidence more than amply authorized the convictions. *Phanamixay v. State*, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Failure to corroborate. — When the evidence pertaining to one count of the indictment was supported only by a confession, which was not corroborated by any evidence, the court committed reversible error in denying the motion for a new trial as to that count. *Chapman v. State*, 90 Ga. App. 845, 84 S.E.2d 485 (1954).

Even though the defendant confessed to the crime of possession of cocaine, since the state did not offer the alleged cocaine in evidence or offer any other evidence that the substance found was cocaine, the trial court erred in denying defendant's motion for a directed verdict of acquittal. *Johnson v. State*, 205 Ga. App. 760, 423 S.E.2d 702 (1992).

Question for jury. — Statute does not fix the amount of evidence necessary to corroborate a confession but leaves the question of its corroborative sufficiency entirely with the jury, who may consider the confession along with other facts and circumstances independent of and separate from the confession in determining whether or not the corpus delicti has been established to the jury's satisfaction. *Murray v. State*, 43 Ga. 256

(1871); *Holsenbake v. State*, 45 Ga. 43 (1872); *Smith v. State*, 64 Ga. 605 (1880); *Cook v. State*, 9 Ga. App. 208, 70 S.E. 1019 (1911); *Perdue v. State*, 24 Ga. App. 50, 99 S.E. 797 (1919); *Hinson v. State*, 152 Ga. 243, 109 S.E. 661 (1921); *Gilder v. State*, 219 Ga. 495, 133 S.E.2d 861 (1933); *Navarra v. State*, 51 Ga. App. 321, 180 S.E. 375 (1935); *Logue v. State*, 198 Ga. 672, 32 S.E.2d 397 (1944); *Kicklighter v. State*, 76 Ga. App. 246, 45 S.E.2d 719 (1947); *Figures v. State*, 80 Ga. App. 832, 57 S.E.2d 629 (1950); *Gilder v. State*, 219 Ga. 495, 133 S.E.2d 861 (1963); *Stephens v. State*, 127 Ga. App. 416, 193 S.E.2d 870 (1972); *Hilliard v. State*, 128 Ga. App. 157, 195 S.E.2d 772 (1973); *Griswold v. State*, 159 Ga. App. 22, 282 S.E.2d 679 (1981); *Sheppard v. State*, 165 Ga. App. 393, 301 S.E.2d 306 (1983); *Singleton v. State*, 195 Ga. App. 119, 393 S.E.2d 6 (1990).

Amount of evidence necessary to corroborate a confession is left entirely within the province of the jury and corroboration in any material particular satisfies the requirements of the law. *Reynolds v. State*, 168 Ga. App. 555, 309 S.E.2d 867 (1983).

Defendant's confession was significantly corroborated by the victim's testimony that the defendant was the person who robbed the victim. Although the defendant challenged the accuracy of the identification, this was a credibility issue for the jury to resolve. *Burns v. State*, 288 Ga. App. 507, 654 S.E.2d 405 (2007).

Proof of corpus delicti sufficient corroboration. — Conviction may be lawfully had upon a free and voluntary confession though the confession be not otherwise corroborated than by proof of the corpus delicti. *Johnson v. State*, 86 Ga. 90, 13 S.E. 282 (1890); *Westbrook v. State*, 91 Ga. 11, 16 S.E. 100 (1892); *Allen v. State*, 91 Ga. 189, 16 S.E. 980 (1893); *Schaefer v. State*, 93 Ga. 177, 18 S.E. 552 (1893); *Simmons v. State*, 18 Ga. App. 104, 88 S.E. 904 (1916); *Millen v. State*, 175 Ga. 283, 165 S.E. 226 (1932); *Mathis v. State*, 55 Ga. App. 727, 191 S.E. 272 (1937); *Wilson v. State*, 57 Ga. App. 839, 197 S.E. 48 (1938); *Burns v. State*, 188 Ga. 22, 2 S.E.2d 627 (1939); *Miller v. State*, 60 Ga. App. 682, 4 S.E.2d 729 (1939); *Newman v. State*, 63 Ga. App. 417, 11 S.E.2d 248 (1940); *Moore v. State*, 193 Ga. 877, 20 S.E.2d 403 (1942); *Byars v. State*, 73 Ga. App. 727, 38 S.E.2d 53 (1946); *Webb v. State*, 73 Ga. App. 748, 38

S.E.2d 54 (1946); *Reddick v. State*, 202 Ga. 209, 42 S.E.2d 742 (1947); *Jackson v. State*, 77 Ga. App. 635, 49 S.E.2d 198 (1948), cert. denied, 335 U.S. 905, 69 S. Ct. 403, 93 L. Ed. 439 (1949); *Grimes v. State*, 204 Ga. 854, 51 S.E.2d 797 (1949); *McVeigh v. State*, 205 Ga. 326, 53 S.E.2d 462 (1949); *Davenport v. State*, 81 Ga. App. 787, 60 S.E.2d 190 (1950); *Lastinger v. State*, 84 Ga. App. 760, 67 S.E.2d 411 (1951); *Moon v. State*, 85 Ga. App. 212, 68 S.E.2d 617 (1952); *Barksdale v. State*, 88 Ga. App. 861, 78 S.E.2d 82 (1953); *Davis v. State*, 211 Ga. 76, 84 S.E.2d 46 (1954); *Poythress v. State*, 95 Ga. App. 124, 97 S.E.2d 165 (1957); *Gray v. State*, 135 Ga. App. 253, 217 S.E.2d 482 (1975); *Soggins v. State*, 156 Ga. App. 652, 275 S.E.2d 676 (1980); *Rosser v. State*, 157 Ga. App. 161, 276 S.E.2d 672 (1981); *Christian v. State*, 190 Ga. App. 667, 379 S.E.2d 807 (1989); *Montijo v. State*, 238 Ga. App. 696, 520 S.E.2d 24 (1999).

Conviction may be lawfully had upon a free and voluntary confession although corroborated only by proof of the corpus delicti. *Brown v. State*, 167 Ga. App. 851, 307 S.E.2d 737 (1983); *Kirksey v. State*, 177 Ga. App. 428, 339 S.E.2d 401 (1986); *Ryan v. State*, 179 Ga. App. 210, 346 S.E.2d 3 (1986); *Nation v. State*, 180 Ga. App. 460, 349 S.E.2d 479 (1986).

When the testimony of the victims established the corpus delicti of each crime a defendant was charged with, the testimony provided the requisite corroboration of the defendant's confession to charges of rape, sodomy, assault, and burglary. *Smith v. State*, 195 Ga. App. 486, 393 S.E.2d 743 (1990).

Testimony by a victim who survived a robbery in which the victim's companion was killed was sufficient to corroborate defendant's confession that defendant was one of four men who committed the robbery and that defendant shot the victim who died when the victim grabbed the barrel of a gun the defendant was holding, and the state supreme court affirmed defendant's convictions for felony murder and armed robbery. *Chapman v. State*, 275 Ga. 314, 565 S.E.2d 442 (2002).

Confession is corroborated by the testimony of the victim who establishes the corpus delicti. *Patrick v. State*, 169 Ga. App. 302, 312 S.E.2d 385 (1983), aff'd, 252 Ga. 509, 314 S.E.2d 909 (1984); *McCloud v. State*, 210 Ga. App. 69, 435 S.E.2d 281 (1993).

Corroboration (Cont'd)

Corroborated by defendant's confession, the victim's testimony that defendant had sexual intercourse with the victim when the victim was 14 sufficed to sustain the conviction. *Bankston v. State*, 249 Ga. App. 118, 548 S.E.2d 25 (2001).

Corpus delicti may be proved either by direct or circumstantial evidence. *Davis v. State*, 105 Ga. 808, 32 S.E. 158 (1898); *Harvey v. State*, 8 Ga. App. 660, 70 S.E. 141 (1911); *Tolver v. State*, 10 Ga. App. 33, 72 S.E. 516 (1911); *Sutton v. State*, 17 Ga. App. 713, 88 S.E. 122 (1916); *Thomas v. State*, 18 Ga. App. 101, 88 S.E. 917 (1916); *Underwood v. State*, 51 Ga. App. 735, 181 S.E. 500 (1935); *Brown v. State*, 98 Ga. App. 350, 105 S.E.2d 785 (1958).

Corpus delicti must be proved independently of confession. — Corpus delicti cannot be proved by the extrajudicial confession of the accused, but must be shown by evidence aliunde the confession or incriminatory admissions. *West v. State*, 6 Ga. App. 105, 64 S.E. 130 (1909); *Moon v. State*, 12 Ga. App. 614, 77 S.E. 1088 (1913); *Sims v. State*, 12 Ga. App. 551, 77 S.E. 891, later appeal, 14 Ga. App. 28, 79 S.E. 1133 (1913); *Wilburn v. State*, 141 Ga. 510, 81 S.E. 444 (1914); *Pyant v. State*, 46 Ga. App. 490, 167 S.E. 922 (1933); *Navarra v. State*, 51 Ga. App. 321, 180 S.E. 375 (1935); *Underwood v. State*, 51 Ga. App. 735, 181 S.E. 500 (1935); *Grimes v. State*, 204 Ga. 854, 51 S.E.2d 797 (1949); *Williams v. State*, 96 Ga. App. 833, 101 S.E.2d 747 (1958).

Jury may consider the confession along with other facts and circumstances independent of and separate from the confession it in determining whether or not the corpus delicti has been established to the jury's satisfaction. *Stephens v. State*, 127 Ga. App. 416, 193 S.E.2d 870 (1972).

Jury may believe only portions of confessions. — Every confession necessarily contains incriminatory admissions, and though a statement as a whole may amount to a confession, still it is within the province of the jury to disbelieve that part which would constitute it a confession, and believe only the portion thereof which amounted to incriminatory admissions. *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, *Milton v. State*, 245 Ga.

18, 262 S.E.2d 789 (1980).

Two confessions. — Even two positive confessions of guilt, without independent proof of the corpus delicti, are not sufficient to authorize a conviction. *Bines v. State*, 118 Ga. 320, 45 S.E. 376 (1903).

To prove the corpus delicti in a charge of murder, in order to corroborate a confession, it is essential to establish that the person alleged to have been killed is actually dead, and that death was caused or accomplished by violence or other direct criminal agency of another human being; that is, it was not accidental, nor due to natural causes, nor to the act of the deceased, and that the accused caused the death in the manner charged. *Grimes v. State*, 204 Ga. 854, 51 S.E.2d 797 (1949).

Evidence sufficient to corroborate confession to burglary. — When defendant admitted both defendant's presence at the scene of the crime and that the defendant had cut defendant's hand on a broken windowpane there, and there was also testimony that broken bloodstained glass was found within the burglarized home, such evidence was sufficient to corroborate the defendant's confession. *Carter v. State*, 160 Ga. App. 299, 287 S.E.2d 313 (1981).

Evidence supported defendant's conviction for burglary and entering an automobile with the intent to commit a theft because there was evidence corroborating defendant's confession regarding how defendant gained entry into both a warehouse and a car. *Morris v. State*, 274 Ga. App. 41, 616 S.E.2d 829 (2005).

Because the defendant's statement was sufficiently corroborated by evidence that a bullet from the 9 mm handgun in the defendant's possession killed the victim, and by the defendant's admission to both being involved in the commission and planning of the robbery of the victim, sufficient evidence existed to find the defendant guilty as a party to the crime of burglary beyond a reasonable doubt. *Valentine v. State*, 289 Ga. App. 60, 656 S.E.2d 208 (2007).

Testimony of an accomplice was not required to be corroborated since the store clerk (victim) was able to testify positively that the defendant was one of the two men who entered the store and performed the robbery. *Welch v. State*, 179 Ga. App. 221, 346 S.E.2d 4 (1986).

Hearsay cannot corroborate confession.

— Since hearsay lacks any probative value, hearsay cannot provide the material evidence necessary to corroborate a defendant's confession, which, without such corroboration, is insufficient to support a conviction. The argument that hearsay is rendered trustworthy and admissible because corroborated by the defendant's confession, while the confession is simultaneously corroborated by the hearsay, is unpersuasive. This would sanction admission of otherwise unreliable evidence by mutual bootstrapping. *Shaver v. State*, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991).

Confession found to be sufficiently corroborated. *Steele v. State*, 166 Ga. App. 24, 303 S.E.2d 462 (1983); *Hunt v. State*, 166 Ga. App. 524, 304 S.E.2d 576 (1983); *Kilgore v. State*, 251 Ga. 291, 305 S.E.2d 82 (1983); *Barnes v. State*, 260 Ga. 398, 396 S.E.2d 207 (1990); *White v. State*, 266 Ga. 134, 465 S.E.2d 277 (1996); *McCant v. State*, 234 Ga. App. 433, 506 S.E.2d 917 (1998); *Kirkland v. State*, 271 Ga. 217, 518 S.E.2d 687 (1999).

When on a trial for leaving the scene of an accident, in addition to the defendant's "confession," evidence was adduced at trial showing the corpus delicti, one witness placed defendant near the scene of the accident in question on the night the accident occurred, and evidence was also produced showing that defendant's automobile was damaged at approximately the same time the accident took place, the trial court was authorized to find that the confession was corroborated as required by O.C.G.A. § 24-3-53. *Sheppard v. State*, 165 Ga. App. 393, 301 S.E.2d 306 (1983).

Following evidence of corroboration of the defendant's confession to murder satisfied the requirement of O.C.G.A. § 24-3-53: (1) a bloody claw hammer matching the description of the hammer the defendant confessed defendant used to kill the victim was found near the victim's body; and (2) the paint samples taken from the defendant's truck were similar to those taken from the crime scene. *Brown v. State*, 253 Ga. 363, 320 S.E.2d 539 (1984).

Defendant's conviction of financial transaction card fraud was affirmed since evidence that a VISA card was used without the owner's authorization to obtain goods and

money established the corpus delicti, and the owner's testimony that defendant had access to the owner's mail and that the signatures on the charge slips closely paralleled defendant's handwriting provided sufficient corroboration of defendant's confession. *Goswick v. State*, 201 Ga. App. 799, 412 S.E.2d 293 (1991).

State presented sufficient independent evidence to corroborate the defendant's confessions after it was shown that the victim died from gunshot wounds inflicted by another human being using a .38 caliber weapon or a .357 Magnum shortly after the defendant was seen in the victim's company. *Blackwell v. State*, 270 Ga. 509, 512 S.E.2d 233 (1999).

Evidence that defendant gave several false statements about the victim's whereabouts, contributing to the victim's body not being discovered, sufficiently corroborated defendant's confession to concealing a death in violation of O.C.G.A. § 16-10-31. *Howard v. State*, 262 Ga. App. 214, 585 S.E.2d 115 (2003).

Despite the fact that the defendant did not admit to every element of the charged offenses, the state presented sufficient evidence to corroborate the admissions made; specifically, that the victim died from manual strangulation inflicted by another human being shortly after the defendant was in the victim's company, and presented ample evidence of the defendant's intent to take the victim's life. *Sheffield v. State*, 281 Ga. 33, 635 S.E.2d 776 (2006).

Because the defendant's statement to a police investigator was corroborated by both the victim and an eyewitness as well as evidence of the defendant's fingerprint on the victim's stolen car, the defendant's claim that the evidence was not corroborated as required by O.C.G.A. § 24-3-53 was rejected. *Sheely v. State*, 287 Ga. App. 92, 650 S.E.2d 762 (2007).

Evidence that a vehicle was, in fact, stolen from a location reported by a juvenile involved in a high-speed chase with a state trooper, and abandoned after crashing into a pole in an apartment complex was sufficient to corroborate the juvenile's confession under O.C.G.A. § 24-3-53. In the Interest of L.A., 292 Ga. App. 101, 663 S.E.2d 420 (2008).

With regard to a defendant's malice mur-

Corroboration (Cont'd)

der conviction arising from the suffocation death of the defendant's newborn daughter, the defendant's confession was legally sufficient to support the convictions since the state produced independent evidence to corroborate the confession, namely, the recovered physical evidence and the witness testimony regarding the defendant's comments, appearance, and behavior before and after the victim's birth. *Wright v. State*, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, U.S. , 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

Instructions

Charge on the law of confessions, when unauthorized by the evidence, constitutes reversible error. *Denson v. State*, 150 Ga. 618, 104 S.E. 780 (1920); *Oliphant v. State*, 52 Ga. App. 105, 182 S.E. 523 (1935); *Meriwether v. State*, 63 Ga. App. 667, 11 S.E.2d 816 (1940); *Johnson v. State*, 204 Ga. 528, 50 S.E.2d 334 (1948); *Norrell v. State*, 116 Ga. App. 479, 157 S.E.2d 784 (1967).

Evidence was sufficient to warrant an instruction based on O.C.G.A. § 24-3-53. — See *Wallace v. Mize*, 153 Ga. 374, 112 S.E. 724 (1922); *Southern Ry. v. Bullock*, 42 Ga. App. 495, 156 S.E. 456 (1931); *Timbs v. State*, 71 Ga. App. 141, 30 S.E.2d 290 (1944); *McDowell v. State*, 78 Ga. App. 116, 50 S.E.2d 633 (1948).

Charge did not shift burden of proof. — Trial court did not err in charging the jury to consider with great care and caution the evidence of any statement the defendant made, and the jury charge did not improperly shift the burden away from the state, as the charge clearly referred to the jury's consideration of the defendant's custodial statement and not the defendant's testimony, and was given immediately after an explanation of how to determine the voluntariness of the defendant's custodial statement; moreover, the charge impressed upon the jury its duty to determine the credibility of the statement, instructing that a statement unsupported by any other evidence was not sufficient to justify a conviction. *Ford v. State*, 281 Ga. App. 114, 635 S.E.2d 391 (2006).

With regard to a defendant's conviction for robbery, the trial court did not err by

instructing the jury that the jury should consider with great care and caution the evidence of any statement made by the defendant as O.C.G.A. § 24-3-53 provided the authority for such an instruction. However, the appellate court suggested that to avoid any possibility of confusion, the suggested pattern instruction authorized by § 24-3-53 should be modified to refer to incriminatory statements only, for example, admissions and confessions. *McKenzie v. State*, 293 Ga. App. 350, 667 S.E.2d 142 (2008).

Failure to give instruction. — In the absence of any timely written request, the failure to charge the jury on the law of this statute is not reversible error, since there is evidence, independent of such confessions or admissions, to sustain the conviction. *Walker v. State*, 118 Ga. 34, 44 S.E. 850 (1903); *Cooner v. State*, 16 Ga. App. 539, 85 S.E. 688 (1915); *Denson v. State*, 150 Ga. 618, 104 S.E. 780 (1920), appeal dismissed, 258 U.S. 608, 42 S. Ct. 316, 66 L. Ed. 788 (1922); *Wallace v. Mize*, 153 Ga. 374, 112 S.E. 724 (1922); *Williamson v. State*, 29 Ga. App. 283, 114 S.E. 919 (1922); *Gore v. State*, 162 Ga. 267, 134 S.E. 36 (1926); *Whitfield v. State*, 51 Ga. App. 439, 180 S.E. 630 (1935); *Mims v. State*, 188 Ga. 702, 4 S.E.2d 831 (1939); *Anderson v. State*, 190 Ga. 455, 9 S.E.2d 642 (1940); *Davis v. State*, 66 Ga. App. 877, 19 S.E.2d 543 (1942); *Mika v. State*, 196 Ga. 473, 26 S.E.2d 616 (1943); *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945); *Brandt v. Eckman*, 79 Ga. App. 47, 52 S.E.2d 665 (1949); *Elvine v. State*, 205 Ga. 528, 54 S.E.2d 626 (1949); *Staggers v. State*, 101 Ga. App. 463, 114 S.E.2d 142 (1960); *Pryor v. State*, 113 Ga. App. 660, 149 S.E.2d 401 (1966); *Welch v. State*, 235 Ga. 243, 219 S.E.2d 151 (1975); *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979); *Jackson v. State*, 596 Ga. App. 596, 260 S.E.2d 565 (1979) (see O.C.G.A. § 24-3-53).

Absent a timely request, the trial court did not err in failing to charge on the evidentiary weight to be given admissions and confessions or in failing to charge that an uncorroborated confession is insufficient to support a conviction. *Hunt v. State*, 166 Ga. App. 524, 304 S.E.2d 576 (1983).

Trial court did not err by failing to charge the jury on the state's burden of proving the corpus delicti since defendant filed no written request to charge, and the subject of

defendant's oral request regarding the state's burden of proving the corpus delicti was fully satisfied by the trial court's charge regarding the presumption of defendant's innocence and the state's burden of proving all elements of the crime. *Barnes v. State*, 260 Ga. 398, 396 S.E.2d 207 (1990).

Trial court's decision not to give defendant's requested instruction on the jury considering defendant's admissions with caution, pursuant to O.C.G.A. § 24-3-53, was not reversible; defendant acquiesced in the counsel's request that a standard charge on credibility be given instead, and defendant was not entitled to acquiesce in that decision and later complain about the decision on appeal. *Lummus v. State*, 274 Ga. App. 636, 618 S.E.2d 692 (2005), overruled on other grounds, *McCart v. State*, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Court not required to give instruction absent specific request. — Because the defendant failed to request a charge on voluntariness of confessions and consideration of statements, admissions, and confessions, the defendant was precluded from asserting error on that basis; the trial court did not need to give an instruction on voluntariness of confessions absent a specific request therefor. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

Failure to charge the language of O.C.G.A. § 24-3-53 when there has been an admission, but not a "confession," was not error. *Richardson v. State*, 256 Ga. 746, 353 S.E.2d 342 (1987); *Gay v. State*, 199 Ga. App. 80, 403 S.E.2d 895 (1991).

Trial court did not err in failing to charge

the language of O.C.G.A. § 24-3-53 since the defendant's statement, while an admission, was not a confession to the crime of murder, inasmuch as the defendant contended that the killing was justified and the court's charge informed the jury that the statement should be examined closely for voluntariness. *Houston v. State*, 253 Ga. 696, 324 S.E.2d 183 (1985).

Omission in instructions. — Fact that charge omits an instruction as to the weight to be given to confessions is not cause for new trial, in the absence of a request therefor. *Williams v. State*, 196 Ga. 503, 26 S.E.2d 926 (1943).

Request to charge on principle of corroboration properly denied. — Trial court did not err in refusing to give a requested charge on the principle of corroboration since the charge was not adjusted to the evidence. *Flanders v. State*, 279 Ga. 35, 609 S.E.2d 346 (2005).

Language used in charging O.C.G.A. § 24-3-53 is discussed in the following cases. — See *Ford v. Kennedy*, 64 Ga. 537 (1880); *Ocean S.S. Co. v. McAlphin*, 69 Ga. 437 (1882); *Raleigh & G.R.R. v. Allen*, 106 Ga. 572, 32 S.E. 622 (1899); *Louisville & N.R.R. v. Bradford*, 135 Ga. 522, 69 S.E. 870 (1910); *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945); *Williams v. State*, 199 Ga. 504, 34 S.E.2d 854 (1945); *Elvine v. State*, 205 Ga. 528, 54 S.E.2d 626 (1949); *Figures v. State*, 80 Ga. App. 832, 57 S.E.2d 629 (1950); *Reece v. State*, 212 Ga. 609, 94 S.E.2d 723 (1956); *Beard v. State*, 151 Ga. App. 724, 261 S.E.2d 404 (1979); *Hill v. State*, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 765, 766, 1394.

C.J.S. — 31A C.J.S., Evidence, § 523, 524.

ALR. — Proof of entire conversation containing alleged confession, 2 ALR 1017; 26 ALR 541.

Confession by one who has been subjected to or threatened with physical suffering, 24 ALR 703.

Confession as circumstantial evidence, 40 ALR 571.

Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession, 102 ALR 605.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 102 ALR 641.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 ALR 974.

Detective or other person participating in crime to obtain evidence as accomplice within rule requiring corroboration of, or cautionary instruction as to, testimony of accomplice, 119 ALR 689.

Propriety of instruction, or requested instruction, in civil case, as to caution in considering testimony of oral admissions, or

as to weight of such admissions as evidence, 126 ALR 66.

Corroboration of confession, 127 ALR 1130; 45 ALR2d 1316.

Admissibility and weight of party's admissions as to tort occurring during his absence, 54 ALR2d 1069.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 ALR2d 463.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 ALR2d 772.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 ALR3d 990.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact, 33 ALR5th 571.

CHAPTER 4

PROOF GENERALLY

Article 1		Sec.	
General Provisions		24-4-42.	Judgment admissible; effect.
Sec.		24-4-43.	Calendars as proof of dates.
24-4-1.	On whom burden of proof lies.	24-4-44.	American Experience Mortality Tables.
24-4-2.	Change of burden in discretion of court.	24-4-45.	Other mortality tables.
24-4-3.	Amount of mental conviction required; preponderance of evidence in civil cases.	24-4-46.	United States Department of Agriculture inspection certificates prima-facie evidence.
24-4-4.	Determining where preponderance of evidence lies.	24-4-47.	Written finding or report by authorized federal officer that person is dead or missing as evidence; signature and certification deemed prima facie authorized.
24-4-5.	Reasonable doubt in criminal cases.	24-4-48.	Admissibility of photographs, motion pictures, videotapes, and audio recordings.
24-4-6.	When conviction may be had on circumstantial evidence.		
24-4-7.	Positive testimony preferred over negative; exception.		
24-4-8.	Number of witnesses required generally; exceptions; effect of corroboration.		
24-4-9.	Inferences from evidence or lack thereof.		
Article 2		Article 4	
Presumptions and Estoppel		DNA Analysis upon Conviction of Certain Sex Offenses	
24-4-20.	Presumptions of law and of fact distinguished.	24-4-60.	Requirement for DNA analysis of blood of persons convicted of certain sex offenses or convicted of a felony and incarcerated in a state correctional facility; storage of profile in data bank.
24-4-21.	Rebuttable presumptions of law.	24-4-61.	Time and procedure for withdrawal of blood samples.
24-4-22.	Presumption from failure to produce evidence.	24-4-62.	Procedure for analysis and storage of blood sample; use of remainder of sample not subjected to analysis; confidentiality of results.
24-4-23.	Presumption from failure to answer business letter.	24-4-63.	Dissemination of information in data bank to law enforcement officials; comparison of profile; request for search; separate statistical data base authorized; fee for search and comparative analysis.
24-4-23.1.	Presumption of payment of check.	24-4-64.	Unlawful dissemination or use of information; obtaining sample without authority.
24-4-23.2.	Occupancy of railroad right of way.	24-4-65.	Expungement of profile in data bank upon reversal and dismissal of conviction.
24-4-24.	Estoppels defined; enumeration generally.		
24-4-25.	Estoppel relating to real estate.		
24-4-26.	Trustees estopped to set up title adverse to trust.		
24-4-27.	Equitable estoppel.		
Article 3			
Particular Matters of Proof			
24-4-40.	Evidence of identity; burden in civil actions.		
24-4-41.	Proof of de facto officer.		

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998).

Note, "Evidence-Voiceprints-The Value of Spectrographic Analysis," see 9 Ga. St. B.J. 242 (1973).

JUDICIAL DECISIONS

Documents must be offered. — It is elementary that documents upon which a party rests the party's case must be offered into evidence. *Hadden v. Owens*, 154 Ga. App. 467, 268 S.E.2d 760 (1980).

Documents admissible. — Documentary evidence illustrative of oral testimony and authenticated by oral testimony is admissible. *King v. Browning*, 246 Ga. 46, 268 S.E.2d 653 (1980).

Tampering with evidence. — It is not necessary that the state negative all possibility of tampering with evidence but only that the state show that it is reasonably certain there was no alteration — when there is only a bare speculation of tampering, it is proper

to admit the evidence and let what doubt remains go to the weight of the evidence. *Marshall v. State*, 153 Ga. App. 198, 264 S.E.2d 718 (1980).

Lie detector test. — Upon an express stipulation of the parties that lie detector results shall be admissible, the results of the test shall be admissible as evidence for the jury to attach to the results whatever probative value the jury may find the results to have. *Jordan v. State*, 159 Ga. App. 716, 285 S.E.2d 71 (1981).

Proof of a fact by unobjected to evidence renders harmless subsequent incompetent or inadmissible evidence. *Lightsey v. State*, 160 Ga. App. 62, 286 S.E.2d 41 (1981).

RESEARCH REFERENCES

Am. Jur. Trials. — Excluding Illegally Obtained Evidence, 5 Am. Jur. Trials 331.

ALR. — Death certificate as evidence, 17 ALR 359; 42 ALR 1454; 96 ALR 324.

Admissibility of evidence obtained by illegal search and seizure, 32 ALR 408; 41 ALR 1145; 52 ALR 477; 88 ALR 348; 134 ALR 819; 150 ALR 566; 50 ALR2d 531.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 34 ALR 560; 55 ALR 460.

Admissibility in favor of accused in criminal case of extrajudicial confession by stranger, 48 ALR 348.

Admission of bankrupt or insolvent before or during bankruptcy or insolvency proceedings as evidence against trustee in bankruptcy or assignee in insolvency, 53 ALR 650.

Presumption or burden of proof as to whether or not instrument affecting title to property is recorded, 53 ALR 668.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 53 ALR 1485; 66 ALR 397; 134 ALR 614.

Demonstrative evidence on issue of negli-

gence or contributory negligence at railroad crossing, 55 ALR 1340.

Conduct and actions of animals or fowls as evidence, 61 ALR 888.

Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant, 63 ALR 602.

Admissibility of subsequent declarations of vendor on issue whether sale was in fraud of creditors, 64 ALR 797.

Admissibility of evidence as to character or conduct of plaintiff or reputation of his house in action for alienation of affections or criminal conversation, 68 ALR 560.

Admissibility of check stubs as evidence, 68 ALR 692.

Admissibility of report of operator filed pursuant to law, respecting automobile accident, 69 ALR 905.

Production of paper purporting to be indorsed in blank by payee or by a special indorsee as prima facie evidence of plaintiff's title, 85 ALR 304.

Experimental evidence as affected by similarity or dissimilarity of conditions, 85 ALR 479.

Admissibility in criminal prosecution of

adjudication or judgment in civil case or procedure, 87 ALR 1258.

Tax deeds and recitals therein as evidence of regularity of tax proceedings as to advertising and notice of sale, and as to time, manner, and place of sale, 88 ALR 264.

Admissibility and weight of evidence of resemblance on question of paternity or other relationship, 95 ALR 314.

Competency of testimony as to one's mental condition, based upon handwriting, 103 ALR 900.

Admissibility of telephone conversations in evidence, 105 ALR 326.

Questions of evidence involved in the inspection and examination of typewritten documents and typewriting machines, 106 ALR 721.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 ALR 1089.

Admissibility of testimony of person who spoke or wrote the words upon which an action for slander or libel is predicated as to his intention or the sense in which the words were spoken or written, 113 ALR 670.

Admissibility of declarations of testator on issue of undue influence, 148 ALR 1225.

Admissibility of report of public officer or employee on cause of or responsibility for injury to person or damage to property, 153 ALR 163; 69 ALR2d 1148.

Ancient instrument of executor, administrator, receiver, or other fiduciary or officer as affected by matters of judicial or other public record touching his authority, 159 ALR 436.

Admissibility in civil case of testimony by one charged with willful misconduct as to his intention or state of mind at time in question, 171 ALR 683.

Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899; 41 ALR4th 812; 41 ALR4th 877.

Proof of unadjudged incompetency which prevents running of statute of limitations, 9 ALR2d 964.

Propriety of permitting jury to take X-ray picture, introduced in evidence, with them into jury room, 10 ALR2d 918.

Admissibility of evidence of fact of making or receiving telephone calls, 13 ALR2d 1409.

Admissibility of posed photograph based

on recollection of position of persons or movable objects, 19 ALR2d 877.

Valuation for taxation purposes as admissible to show value for other purposes, 39 ALR2d 209.

Admissibility, in Federal Employers' Liability Act action, of rules, practices, precautions, safety devices, etc., used by other railroads, 43 ALR2d 618.

Admissibility of opinion or estimate by nonexpert witness in personal injury action of future hospital expenses, future hospitalization, or the like, 45 ALR2d 1148.

Right to have reporter's notes read to jury, 50 ALR2d 176.

Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 ALR2d 516.

Modern status of rule governing admissibility of evidence obtained by unlawful search and seizure, 50 ALR2d 531.

Admissibility of sound recordings, in evidence, 58 ALR2d 1024; 57 ALR3d 746; 58 ALR3d 598.

Admissibility of report of police or other public officer or employee, or portions of report, as to cause of or responsibility for accident, injury to person, or damage to property, 69 ALR2d 1148.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 ALR2d 769.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 73 ALR2d 1025.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 86 ALR2d 611.

Admissibility of evidence of accused's re-enactment of crime, 100 ALR2d 1257.

Official death certificate as evidence of cause of death in civil or criminal action, 21 ALR3d 418.

Admissibility, and prejudicial effect of admission, of "mug shot," "rogues' gallery" photograph, or photograph taken in prison, of defendant in criminal trial, 30 ALR3d 908.

Refusal of defendant in "public figure" libel case to identify claimed sources as raising presumption against existence of

source, 19 ALR4th 919.

Admissibility of evidence of fingernail comparisons in criminal case, 40 ALR4th 575.

Consumption or destruction of physical evidence due to testing or analysis by prosecution's expert as warranting suppression of evidence or dismissal of case against accused in state court, 40 ALR4th 594.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution, 41 ALR4th 877.

Proof of mailing by evidence of business or office custom, 45 ALR4th 476.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 ALR4th 1049.

Admissibility of traffic conviction in later state civil trial, 73 ALR4th 691.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 ALR5th 497.

Propriety of attorney's surreptitious sound recording of statements by others who are or may become involved in litigation. 32 ALR5th 715.

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene, 37 ALR5th 515.

Failure of police to preserve potentially exculpatory evidence as violating criminal defendant's rights under state constitution, 40 ALR5th 113.

ARTICLE 1

GENERAL PROVISIONS

244-1. On whom burden of proof lies.

The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation is essential to a party's case or defense, the proof of such negation or negative affirmation lies on the party so affirming it. (Orig. Code 1863, § 3681; Code 1868, § 3705; Code 1873, § 3758; Code 1882, § 3758; Civil Code 1895, § 5160; Penal Code 1895, § 994; Civil Code 1910, § 5746; Penal Code 1910, § 1020; Code 1933, § 38-103.)

Law reviews. — For article, the right to open and conclude the argument in tort cases, see 22 Ga. B.J. 297 (1960).

For comment on *Moore v. Allen*, 80 Ga. App. 784, 57 S.E.2d 511 (1950), see 12 Ga. B.J. 481 (1950). For comment on *Parham v.*

State, 120 Ga. App. 723, 171 S.E.2d 911 (1969) and the rejection of charge that defendant must prove alibi to the satisfaction of the jury, see 21 Mercer L. Rev. 511 (1970).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATIONS

SPECIFIC ACTIONS

JURY INSTRUCTIONS

General Considerations

In general. — Burden of proof as applied to the facts of a given case under its facts has a dual meaning; one of those meanings applies to the ultimate burden of proof which rests with the plaintiff from the beginning throughout the trial of the case, and the other meaning applies when the burden of procedure or burden of introducing evidence shifts from one party to the other. *Central of Ga. Ry. v. Hester*, 94 Ga. App. 226, 94 S.E.2d 124 (1956); *Evans v. DeKalb County Hosp. Auth.*, 154 Ga. App. 17, 267 S.E.2d 319 (1980).

Burden determined by pleadings. — Generally, the burden of proof rests where the pleadings originally placed the burden. *Lazenby v. Citizens Bank*, 20 Ga. App. 53, 92 S.E. 391 (1917); *Richter Bros. v. Atlantic Co.*, 59 Ga. App. 137, 200 S.E. 462 (1938), later appeal, 65 Ga. App. 605, 16 S.E.2d 259 (1941); *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951); *Whitley v. Wilson*, 90 Ga. App. 16, 81 S.E.2d 877 (1954); *Lovett v. American Family Life Ins. Co.*, 107 Ga. App. 603, 131 S.E.2d 70 (1963).

Effect of defendant's admission of prima facie case. — If the plaintiff alleges a right to recover, and the defendant denies the allegations without more, the plaintiff, upon the case as a whole carries the burden of proof; that is, the burden of showing, by a preponderance of the evidence, that the plaintiff is entitled to recover. If the defendant does not file a denial of the plaintiff's allegations, but admits in defendant's pleadings a prima facie case in favor of the plaintiff, and sets up an affirmative plea, the defendant then assumes the burden. *Williamson-Inman & Co. v. Thompson*, 53 Ga. App. 821, 187 S.E. 194 (1936); *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951).

Plaintiff carries burden of proving plaintiff's right to recover by a preponderance of the evidence. *Courson v. Pearson*, 132 Ga. 698, 64 S.E. 997 (1909); *Thigpen v. Aldred*, 175 Ga. 120, 165 S.E. 27 (1932); *Grimsley v. Morgan*, 178 Ga. 40, 172 S.E. 49 (1933); *Abernathy v. Putnam*, 85 Ga. App. 644, 69 S.E.2d 896 (1952); *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972); *Carr v. Jacuzzi Bros.*, 133 Ga. App. 70, 210 S.E.2d 16 (1974); *Anderson v. Poythress*, 246 Ga. 435, 271 S.E.2d 834 (1980).

When the plaintiff failed to present any evidence which raised a question of fact as to whether the defendant was negligent, plaintiff's contentions regarding what might have happened disappeared in light of the uncontradicted witness testimony as to what did happen, and the trial court correctly granted summary judgment to the defendant. *Etheredge v. Kersey*, 236 Ga. App. 243, 510 S.E.2d 544 (1998).

The burden of proof is determined by the pleadings, and a defendant's denial of the plaintiff's allegations is notice to the plaintiff that the plaintiff has the burden to prove the allegations. *Carver v. Jones*, 166 Ga. App. 197, 303 S.E.2d 529 (1983).

Standing. — Trial court did not err in dismissing state agency's petition for downward modification of father's child support obligation as the agency did not prove the agency's assertion that the agency had standing to bring such an action, since the agency did not show the legislature intended to give the state agency the power to seek modification of support to the same extent a parent could do so; accordingly, the state agency could only prove the agency had standing if the agency showed there was a prior court order which established or enforced a child support obligation and which the state agency participated in obtaining, and the agency was unable to make that showing. *Dep't of Human Res. v. Allison*, 276 Ga. 175, 575 S.E.2d 876 (2003).

Burden on state in criminal case. — In all criminal trials the burden is upon the state to prove every allegation which is material to an essential element of the offense. *Conyers v. State*, 50 Ga. 103, 15 Am. R. 686 (1873) (lack of parental consent); *Bell v. State*, 91 Ga. 15, 16 S.E. 207 (1892) (capacity of infant to commit crime); *Neil v. State*, 117 Ga. 14, 43 S.E. 435 (1903) (marital status of alleged fornicator); *Sikes v. State*, 120 Ga. 494, 48 S.E. 153 (1904); *Harris v. State*, 14 Ga. App. 574, 81 S.E. 815 (1914); *McLemore v. State*, 181 Ga. 462, 182 S.E. 618 (1935) (voluntariness of confession) *Butts v. State*, 153 Ga. App. 464, 265 S.E.2d 370 (1980).

Effect of denial by defendant of the plaintiff's allegations is to put the plaintiff on notice that the burden is on the plaintiff to prove those allegations. *Whitley v. Wilson*, 90 Ga. App. 16, 81 S.E.2d 877 (1954).

Defendant has burden of proof as to all matters purely of defense. *Life & Cas. Ins.*

General Considerations (Cont'd)

Co. v. Cartrell, 74 Ga. App. 204, 39 S.E.2d 437 (1946).

When a third-party defendant was unable to demonstrate any specific evidence that a claim was paid wrongfully by the third-party plaintiff, a surety, and that any consideration of the surety's late affidavit led to an unjust result, the trial court's grant of summary judgment was not error. *Horton v. U.S. Fid. & Guar. Co.*, 194 Ga. App. 881, 392 S.E.2d 25 (1990).

Affirmative defenses generally. — When the defendant admits the essential facts of the petition and sets up other facts in justification or avoidance, plaintiff has the burden of proving such affirmative defense. *Hunter v. Sanders, Swan & Co.*, 113 Ga. 140, 38 S.E. 406 (1901); *Brunswick & W.R.R. v. Wiggins*, 113 Ga. 842, 39 S.E. 551, 61 L.R.A. 513 (1901); *Milledgeville Cotton Co. v. Bacon*, 138 Ga. 470, 75 S.E. 604 (1912); *Larzenby v. Citizen's Bank*, 20 Ga. App. 53, 92 S.E. 391 (1917); *Branch v. American Agric. Chem. Co.*, 22 Ga. App. 52, 95 S.E. 476 (1918); *Alston v. Mobley*, 42 Ga. App. 98, 155 S.E. 81 (1930); *Hill v. City of Calhoun*, 47 Ga. App. 753, 171 S.E. 459 (1933); *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936); *Whitley v. Wilson*, 90 Ga. App. 16, 81 S.E.2d 877 (1954); *Purcell v. Hill*, 111 Ga. App. 256, 141 S.E.2d 153 (1965); *Willis v. Kemp*, 130 Ga. App. 758, 204 S.E.2d 486 (1974); *Metropolitan Publishers Representatives, Inc. v. Arnsdorff*, 153 Ga. App. 877, 267 S.E.2d 260 (1980).

When the defendant asserts affirmative defenses, it is not improper to argue that the burden of establishing those defenses lies on the one asserting the defenses. *Pembroke Mgt., Inc. v. Cossaboon*, 157 Ga. App. 675, 278 S.E.2d 100 (1981).

Justification and avoidance are affirmative defenses. — When a defendant admits the essential facts of a plaintiff's petition but sets up other facts in justification or avoidance, an affirmative defense is presented and the defendant ordinarily has the burden of proving the defense. *Carver v. Jones*, 166 Ga. App. 197, 303 S.E.2d 529 (1983).

Effect of entry of appearance. — When the defendant filed no written plea, but simply entered an appearance as required by the rules of the municipal court in cases of

the character of this case, this amounted to a plea of general denial; it was not a plea in the nature of one in confession and avoidance, and therefore, being one merely generally denying the allegations of the plaintiff, the burden which may have rested upon the plaintiff, if any, was the burden only of going on with the evidence, and this burden the plaintiff was not required to carry by a preponderance of the evidence. *Boss v. Ed. & Al. Matthews, Inc.*, 51 Ga. App. 889, 181 S.E. 688 (1935) (on motion for rehearing).

Effect of proving prima facie case. — Fact that the plaintiff introduces sufficient evidence to make out a prima facie case, and that in so doing plaintiff is relieved by statute of the burden of introducing evidence on an issue, the affirmative of which is essential to a recovery, in no way relieves the plaintiff of ultimately establishing the essential facts of plaintiff's case by a preponderance of the evidence. *Richter Bros. v. Atlantic Co.*, 59 Ga. App. 137, 200 S.E. 462 (1938), later appeal, 65 Ga. App. 605, 16 S.E.2d 259 (1941).

Effect of failure to prove prima facie case. — Rule that the burden is on the defendant to establish defendant's defense of contributory negligence on the part of the plaintiff, such as would bar a recovery, would not impose upon defendant such a duty in a case when the plaintiff personally had failed to make out a prima facie case, by failing to show negligence on the part of the defendant as alleged or by personally showing defendant's own contributory negligence. *McCrackin v. McKinney*, 52 Ga. App. 519, 183 S.E. 831 (1936).

Right to open and conclude argument. — Party having the burden of proof is entitled to open and conclude the argument before the jury. *Willet Seed Co. v. Kirkeby-Gundestrup Seed Co.*, 145 Ga. 559, 89 S.E. 486 (1916); *Simmons v. Brannen*, 155 Ga. 494, 117 S.E. 318 (1923); *Seagraves v. Couch & Jackson*, 168 Ga. 38, 147 S.E. 61 (1929); *Morgan-Hill Paving Co. v. Shanks*, 45 Ga. App. 274, 164 S.E. 221 (1932).

Defendant in defendant's plea may admit a prima facie case for the plaintiff, and if the defendant does so before the plaintiff introduces evidence, the burden of proving defendant's defense is on the defendant, and the defendant is entitled to open and conclude. *United States v. A Certain Tract or*

Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942).

Proving a negative. — When one party has the burden of proving a negative, but all the proof on the subject is within the control of the other party, the burden is shifted to the party having the power to produce the proof. *Mayo v. Owen*, 208 Ga. 483, 67 S.E.2d 709 (1951).

Propounder who offered a will for probate assumed the non-shifting burden of persuasion as to the validity of that document, including the requirement of showing by a preponderance of the evidence that the signature was that of decedent. *Heard v. Lovett*, 273 Ga. 111, 538 S.E.2d 434 (2000).

Prima facie case on life insurance contract. — Plaintiff's right to recover a life insurance contract is established prima facie, without proof of payment of the required premiums, on proof of possession of the policy by the plaintiff and its introduction in evidence, and proof of all other essentials to a recovery under the policy. *Masonic Relief Ass'n v. Hicks*, 47 Ga. App. 499, 171 S.E. 215 (1933).

Second marriages. — For a brief discussion of the presumption of validity or invalidity of second marriage, see *Scott v. Jefferson*, 174 Ga. App. 651, 331 S.E.2d 1 (1985).

Cited in *Kimsey v. Rogers*, 166 Ga. 176, 142 S.E. 667 (1928); *Sparkman v. Brown*, 42 Ga. App. 335, 156 S.E. 240 (1930); *Morgan-Hill Paving Co. v. Shanks*, 45 Ga. App. 274, 164 S.E. 221 (1932); *Wyatt v. Baker*, 45 Ga. App. 448, 165 S.E. 133 (1932); *Kennedy v. Brooke*, 176 Ga. 363, 168 S.E. 294 (1933); *Speed v. State*, 176 Ga. 751, 168 S.E. 891 (1933); *Hamby v. Crisp*, 48 Ga. App. 418, 172 S.E. 842 (1934); *Benton v. Roberts*, 49 Ga. App. 760, 176 S.E. 804 (1934); *Morgan v. Automobile Fin., Inc.*, 180 Ga. 394, 178 S.E. 721 (1935); *Trammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315 (1935); *Wilson v. Wester*, 181 Ga. 130, 181 S.E. 657 (1935); *Sovereign Camp, W.O.W. v. Lawson*, 52 Ga. App. 345, 183 S.E. 137 (1935); *Atlantic Coast Line R.R. v. Knight*, 54 Ga. App. 492, 188 S.E. 258 (1936); *Butler v. Ragsdale*, 54 Ga. App. 565, 188 S.E. 578 (1936); *Johnson v. Starr*, 55 Ga. App. 876, 191 S.E. 874 (1937); *Hanover Fire Ins. Co. v. Pruitt*, 59 Ga. App. 777, 2 S.E.2d 123 (1939); *Southern Ry. v. Maddox*, 63 Ga. App. 508, 11 S.E.2d 501 (1940);

Southern Ry. v. Jackson, 65 Ga. App. 316, 16 S.E.2d 147 (1941); *Harmon v. Gaddy*, 193 Ga. 574, 19 S.E.2d 302 (1942); *Joel v. Publix-Lucas Theater, Inc.*, 193 Ga. 531, 19 S.E.2d 730 (1942); *Jones v. Love*, 67 Ga. App. 594, 21 S.E.2d 254 (1942); *Eades v. Wheeler*, 74 Ga. App. 333, 39 S.E.2d 573 (1946); *Jones v. Cannady*, 78 Ga. App. 453, 51 S.E.2d 551 (1949); *Ludwig v. J.J. Newberry Co.*, 78 Ga. App. 871, 52 S.E.2d 485 (1949); *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Taylor*, 81 Ga. App. 277, 58 S.E.2d 542 (1950); *Solesbee v. Balkcom*, 207 Ga. 352, 61 S.E.2d 471 (1950); *Ellis v. Stokes*, 207 Ga. 423, 61 S.E.2d 806 (1950); *Jackson v. Faver*, 210 Ga. 58, 77 S.E.2d 728 (1953); *City of Sylvania v. Miller*, 210 Ga. 290, 79 S.E.2d 808 (1954); *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954); *Overstreet v. Rhodes*, 213 Ga. 181, 97 S.E.2d 561 (1957); *Noble v. Hunt*, 95 Ga. App. 804, 99 S.E.2d 345 (1957); *Aiken v. Glass*, 95 Ga. App. 849, 99 S.E.2d 426 (1957); *Employers Liab. Assurance Corp. v. Sheftall*, 97 Ga. App. 398, 103 S.E.2d 143 (1958); *Williamson v. Floyd County Wildlife Ass'n.*, 215 Ga. 789, 113 S.E.2d 626 (1960); *Lansdale Clothes, Inc. v. Wright*, 217 Ga. 817, 125 S.E.2d 502 (1962); *Porter v. Bland*, 105 Ga. App. 703, 125 S.E.2d 713 (1962); *B.C. Truck Lines v. Pilot Freight Carriers, Inc.*, 225 F. Supp. 1 (N.D. Ga. 1963); *Lewis v. State Hwy. Dep't*, 110 Ga. App. 845, 140 S.E.2d 109 (1964); *Elliott v. Leathers*, 116 Ga. App. 842, 159 S.E.2d 167 (1967); *Whitehead v. Seymour*, 120 Ga. App. 25, 169 S.E.2d 369 (1969); *Refrigerated Transp. Co. v. Heller Co.*, 129 Ga. App. 332, 199 S.E.2d 590 (1973); *Tolbert v. Tolbert*, 131 Ga. App. 388, 206 S.E.2d 63 (1974); *Parsons v. Harrison*, 133 Ga. App. 280, 211 S.E.2d 128 (1974); *Joiner v. State*, 236 Ga. 580, 224 S.E.2d 414 (1976); *Weeks v. Gwinnett County Bd. of Tax Equalization*, 139 Ga. App. 37, 227 S.E.2d 865 (1976); *Lancaster v. Eberhardt*, 141 Ga. App. 534, 233 S.E.2d 880 (1977); *Moon v. Moon*, 240 Ga. 208, 240 S.E.2d 17 (1977); *Jenkins v. Lampkin*, 145 Ga. App. 746, 244 S.E.2d 895 (1978); *Commercial & Exch. Bank v. McDaniel*, 147 Ga. App. 378, 249 S.E.2d 97 (1978); *Miller v. Spicer*, 147 Ga. App. 759, 250 S.E.2d 492 (1978); *Clark v. State*, 245 Ga. 629, 266 S.E.2d 466 (1980); *Bodrey v. Bodrey*, 246 Ga. 122, 269 S.E.2d 14 (1980); *Colley v. Dillon*, 158 Ga. App. 416, 280

General Considerations (Cont'd)

S.E.2d 425 (1981); *Hodsdon v. Whitworth*, 163 Ga. App. 793, 293 S.E.2d 70 (1982); *Parsells v. Orkin Exterminating Co.*, 178 Ga. App. 51, 342 S.E.2d 13 (1986); *Union Camp Corp. v. Guinn*, 180 Ga. App. 391, 349 S.E.2d 221 (1986); *Jiffy Store, Inc. v. Bishop*, 190 Ga. App. 716, 379 S.E.2d 602 (1989); *Congress Fin. Corp. v. Commercial Technology, Inc.*, 910 F. Supp. 637 (N.D. Ga. 1995); *Beasley v. Wachovia Bank*, 277 Ga. App. 698, 627 S.E.2d 417 (2006); *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007); *Eubanks v. Rabon*, 281 Ga. 708, 642 S.E.2d 652 (2007).

Specific Actions

Contributory negligence. — When the evidence is sufficient to raise an issue for the jury, and such issue is in fact submitted to the jury upon the question of the defendant's negligence, then, in order for the defendant to avail oneself of the affirmative defense of contributory negligence, it is incumbent upon defendant to prove the defense, and this is true even though defendant does not in defendant's own pleadings confess defendant's negligence as charged. *McCrackin v. McKinney*, 52 Ga. App. 519, 183 S.E. 831 (1936).

Comparative negligence. — While comparative negligence is available as an affirmative defense in Georgia, the burden of proving the defense remains with the party relying upon the defense and not upon the party making the original negligence claim to disprove the defense. *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

Defense of alternative proximate causation. — Trial court did not err when the court declined to give the customer and spouse's jury instruction directing that the pharmacy and pharmacist had the burden of proving their defense of alternative proximate causation in the customer and spouse's pharmaceutical malpractice action against them as the trial court's given instruction covered the same principle as that contained in the customer and spouse's requested charge and the charge given was a correct statement of the law. *Moresi v. Evans*, 257 Ga. App. 670, 572 S.E.2d 327 (2002).

Denial of contract not affirmative defense. — When a plaintiff is suing on an

alleged express contract by which plaintiff claims defendant agreed to pay a sum certain as rent, and defendant denies there is any such express contract, defendant's answer is not an affirmative defense as to which defendant is required to carry the burden of proof. *Willis v. Kemp*, 130 Ga. App. 758, 204 S.E.2d 486 (1974).

Legitimacy. — Existence of the presumption of legitimacy arising from the birth of a child requires the production of contrary evidence from the husband, but it does not relieve the wife of her burden of proof to establish legitimacy in the first place. *Miller v. Miller*, 258 Ga. 168, 366 S.E.2d 682 (1988).

Medical malpractice. — Defense counsel's claim that the conduct of the patient and the midwife was an intervening cause of the fetal death, and that the patient had the burden of proof under O.C.G.A. § 24-4-1 to show that there was no such intervening cause, was error which the trial court should have corrected. *Steele v. Atlanta Maternal-Fetal Med., P.C.*, 271 Ga. App. 622, 610 S.E.2d 546 (2005), overruled on other grounds, *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009).

Party asserting an accord and satisfaction bears the burden of proof on that issue. *Carpet Transp., Inc. v. TMS Ins. Agency, Inc.*, 165 Ga. App. 734, 302 S.E.2d 421 (1983).

Status as hospital charity patient. — When a nonpaying patient, who in the end was the recipient of a hospital's charity, claims the patient was able to pay and was not a charity patient so that the hospital would be subject to a negligence claim, the trial court abused the court's discretion in refusing to put the burden of proof on the patient or the patient's personal representative. *Fulton-DeKalb Hosp. Auth. v. Fanning*, 196 Ga. App. 556, 396 S.E.2d 534 (1990).

Specific issues. — For burden of proof on specific civil issues, see the following cases: *Lanier v. Hughley*, 91 Ga. 719, 18 S.E. 39 (1893) (payment); *Pyron & Son v. Ruohs*, 120 Ga. 1060, 48 S.E. 434 (1904) (jurisdiction); *Gaskins v. Touchton*, 151 Ga. 458, 107 S.E. 38 (1921) (payment); *Bankers Trust & Audit Co. v. Hanover Nat'l Bank*, 35 Ga. App. 619, 134 S.E. 195 (1926) (lack of consideration); *Paulk v. Roberts*, 42 Ga. App. 79, 155 S.E. 55 (1930) (legality of administrator's investments); *Branon v. Ellbee Pictures Corp.*, 42 Ga. App. 293, 155 S.E. 923 (1930) (mitigation of damages); *Supreme King-*

dom, Inc. v. Fourth Nat'l Bank, 174 Ga. 779, 164 S.E. 204 (1932) (forgery); State Hwy. Bd. v. Lewis, 46 Ga. App. 162, 167 S.E. 219 (1932) (invalidity of marriage); Masonic Relief Ass'n v. Hicks, 47 Ga. App. 499, 171 S.E. 215 (1933) (invalidity of insurance contract); Hill v. City of Calhoun, 47 Ga. App. 753, 171 S.E. 459 (1933) (affidavit of illegality); Bell v. City of Valdosta, 47 Ga. App. 808, 171 S.E. 572 (1933) (invalidity of municipal ordinance); Thomas v. Southern Ry., 92 F.2d 445 (5th Cir. 1937) (contributory negligence); Heaton v. Hayes, 188 Ga. 632, 4 S.E.2d 570 (1939) (payment in suit to foreclose security deed); Marion County v. First Nat'l Bank, 193 Ga. 263, 18 S.E.2d 475 (1942) (unconstitutional county debt); Hamilton v. North Ga. Elec. Membership Corp., 201 Ga. 689, 40 S.E.2d 750 (1946) (invalidity of municipal ordinance); Palatine Ins. Co. v. Gilleland, 79 Ga. App. 18, 52 S.E.2d 537 (1949) (lack of notice of application by insured for appointment of umpire); Estridge v. Janko, 96 Ga. App. 246, 99 S.E.2d 682 (1957) (set off and counterclaim); Polk v. Fulton County, 96 Ga. App. 733, 101 S.E.2d 736 (1957) (value of condemned property); Cobb v. Dutton, 222 Ga. 11, 148 S.E.2d 399 (1966) (lack of counsel); Smith v. Morgan, 113 Ga. App. 865, 150 S.E.2d 164 (1966) (title to land); First Pentecostal Church v. City of Atlanta, 144 Ga. App. 718, 242 S.E.2d 357 (1978) (unreasonableness of tax); Forehand v. Pace, 146 Ga. App. 682, 247 S.E.2d 192 (1978) (negligence); Brown v. Minter, 243 Ga. 397, 254 S.E.2d 326 (1979) (access to public records); A & N Inv., Inc. v. Cronin, 151 Ga. App. 738, 261 S.E.2d 469 (1979) (signing of note); Anderson v. Poythress, 246 Ga. 435, 271 S.E.2d 834 (1980) (action of public official); Carter v. Kim, 157 Ga. App. 418, 277 S.E.2d 776 (1981) (existence of contract and agency); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981) (hypersensitivity to x-rays).

Workers' compensation proceeding. — When claimant proved that claimant's injury arose out of and in the scope of claimant's employment, the burden shifted to the employer to prove that either claimant's injuries were intentionally self-inflicted or the injuries were caused by an attack for reasons personal to claimant. *Hulbert v. Domino's Pizza, Inc.*, 239 Ga. App. 370, 521 S.E.2d 43 (1999).

Burden of persuasion on propounders in "will contest". — Trial court did not err in finding that a codicil to a testator's will was invalid because it properly charged the jury that the caveators had no burden to prove the grounds of their caveats to the propounders' petition to probate codicils; because testamentary capacity and voluntary execution were necessary elements of the propounders' case, the burden of persuasion remained on the propounders to prove their assertions by a preponderance of the evidence, and in the absence of an asserted affirmative defense, the caveators had no duty to affirmatively prove anything but were required only to come forward with evidence to rebut the propounders' prima facie case as to essential elements. *Parker v. Melican*, 286 Ga. 185, 684 S.E.2d 654 (2009).

Jury Instructions

Instructions generally. — In the absence of a timely and appropriate request to charge, it is not reversible error for the judge to omit to instruct the jury upon the burden of proof. *Lazenby v. Citizens Bank*, 20 Ga. App. 53, 92 S.E. 391 (1917).

Instruction must be correct if the judge does charge the jury upon the burden of proof. *Lazenby v. Citizens Bank*, 20 Ga. App. 53, 92 S.E. 391 (1917).

Instruction on shifting burden. — When the judge correctly charges in regard to the general burden of proof, the judge is not required, as an essential part of the judge's charge (in the absence of a proper request), to discuss the shifting of the burden as to the particular points of contest made by the evidence. *Lazenby v. Citizens Bank*, 20 Ga. App. 53, 92 S.E. 391 (1917); *Haugabrooks v. Metropolitan Life Ins. Co.*, 63 Ga. App. 829, 12 S.E.2d 163 (1940).

In action by bank to collect on promissory note, when prima facie case had been admitted by defendant, it was misleading and confusing to jury to instruct the jury that burden still remained upon plaintiff to prove plaintiff's case to the jury's satisfaction by a preponderance of the evidence; the court should have instructed the jury that in view of defendant's admission as to prima facie right of plaintiff to recover, burden was upon defendant to meet this prima facie right by establishing defendant's affirmative defense of partial accord and satisfaction by

Jury Instructions (Cont'd)

a preponderance of the evidence. *Citizens Bank v. Ansley*, 164 Ga. App. 437, 296 S.E.2d 370 (1982).

Request for instructions. — If a party is not satisfied with the general charge on the subject of the burden of proof, it is incumbent upon the party to make timely written request to charge on the shifting of the burden if the party desires such charge. *Hyde v. Chappell*, 194 Ga. 536, 22 S.E.2d 313 (1942).

Instruction in murder case. — On trial of one charged with murder, it is not error to

charge the jury: "The law puts upon the defendant, where he admits the killing, the burden to satisfy the jury that he was justified under some rule of law, unless the admissions, together with the evidence in the case against him, or the statement of the defendant, shows justification or mitigation." *Gay v. State*, 173 Ga. 793, 161 S.E. 603 (1931).

Condemnation suit instruction in language of statute was a correct abstract principle of law and was not confusing or misleading to the jury. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956) (see O.C.G.A. § 24-4-1).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 1, 171.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 94.

C.J.S. — 31A C.J.S., Evidence, § 165 et seq.

ALR. — Burden of proof as regards discharge in bankruptcy, 2 ALR 1672.

Duty to charge as to reasonable doubt as between different degrees of crime or included offenses, 20 ALR 1258.

Presumption and burden of proof as to loss from failure of pledgee to sell or collect choses in action pledged, 53 ALR 1075.

Effect of fraud in the inception of a bill or note to throw upon the subsequent holder the burden of proving that he is a holder in due course, 57 ALR 1083.

Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 ALR 486; 92 ALR 653.

Burden of proof as to consideration for bill or note, when plaintiff not protected as a holder in due course, 65 ALR 904; 127 ALR 1003.

Burden and degree of proof as to alibi, 67 ALR 138; 124 ALR 471.

Prima facie case for proponent in will contest as shifting burden of proof, 76 ALR 373.

Governing law as regards presumption and burden of proof, 78 ALR 883; 168 ALR 191.

Pleading want of contributory negligence as waiver of right to presumption of freedom from negligence, 96 ALR 1116.

Presumption and burden of proof of settlement in action by one town or poor district against another for support of pauper, 99 ALR 457.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 ALR 389.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Necessity and sufficiency of proof, in prosecution for perjury during trial, that oath was administered, 132 ALR 1311.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Statute which places burden of proof as to contributory negligence on defendant or creates a presumption against contributory negligence as applicable to actions by one person for consequential damages resulting from injury to another, 147 ALR 726.

Distinction between burden of proof and burden of evidence as related to statutory provisions regarding presumption and burden of proof in respect of commercial paper, 152 ALR 1331.

Burden of proof as to doctrine of last clear chance, 159 ALR 724.

Burden of proof in partition suit as regards alleged prior voluntary partition of property, 1 ALR2d 473.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 ALR2d 1291.

Burden of proving value of relief from performing contract in suit based on defen-

dant's breach preventing or excusing full performance, 17 ALR2d 968.

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like, 21 ALR2d 1200.

Burden of proof in actions under general declaratory judgment acts, 23 ALR2d 1243.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 ALR2d 972.

Sufficiency of evidence, in absence of survivors or of eyewitnesses competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 ALR2d 580.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 ALR3d 642.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Zoning as a factor in determination of damages in eminent domain, 9 ALR3d 291.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 ALR3d 146.

Conflict of laws as to presumptions and burden of proof concerning facts of civil case, 35 ALR3d 289.

Burden of proof of defendant's age, in prosecution where attainment of particular age is statutory requisite of guilt, 49 ALR3d 526.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 ALR3d 1084.

Setting aside arbitration award on ground of interest or bias of arbitrators, 56 ALR3d 697.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 ALR3d 1054.

Answers to interrogatories as limiting answering party's proof at state trial, 86 ALR3d 1089.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 ALR4th 810.

Burden of proof as to entrapment defense — state cases, 52 ALR4th 775.

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 ALR5th 179.

24-4-2. Change of burden in discretion of court.

What amount of evidence will change the onus or burden of proof is a question to be decided in each case by the sound discretion of the court. (Orig. Code 1863, § 3682; Code 1868, § 3706; Code 1873, § 3759; Code 1882, § 3759; Civil Code 1895, § 5161; Penal Code 1895, § 995; Civil Code 1910, § 5747; Penal Code 1910, § 1021; Code 1933, § 38-104.)

Law reviews. — For note discussing shifting burden of persuasion in will contests

involving undue influence in Georgia, see 22 Ga. B.J. 555 (1960).

JUDICIAL DECISIONS

In general. — Term, "burden of proof," is used in two senses: one, the burden of proof thrust upon the party by the pleadings which remains upon the party throughout the trial and, two, the burden of the evidence which may and does shift during the progress of the trial as to facts or issues from one party to

the other. *Hawkins v. Davie*, 136 Ga. 550, 71 S.E. 873 (1911); *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951); *Deloach v. Automatic Transmission & Brake Shop, Inc.*, 106 Ga. App. 797, 128 S.E.2d 512 (1962).

Burden of proof. — Statute has no appli-

cation to the burden of proof placed by the pleadings; the statute applies only to the burden of evidence which may, as to any particular fact or issue, shift from one party to the other. *Department of Revenue v. Stewart*, 67 Ga. App. 281, 20 S.E.2d 40 (1942); *Davison Chem. Corp. v. Hart*, 68 Ga. App. 413, 23 S.E.2d 107 (1942); *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951); *Deloach v. Automatic Transmission & Brake Shop, Inc.*, 106 Ga. App. 797, 128 S.E.2d 512 (1962); *Richards v. Wilkinson Shaving Co.*, 198 Ga. App. 45, 400 S.E.2d 344 (1990) (see O.C.G.A. § 24-4-2).

Discretion of judge. — As to the burden of proof placed by the pleadings, the trial judge has no discretion — it is a matter of law; but as to the shifting of the burden of the evidence, the judge has discretion to determine whether the evidence produced, together with any applicable rules of presumption and procedure, in the particular case has shifted the burden. *Deloach v. Automatic Transmission & Brake Shop, Inc.*, 106 Ga. App. 797, 128 S.E.2d 512 (1962).

Application not always discretionary. — Statute did not intend to lay down the rule that whether under an affirmation and denial in pleadings upon the case one party or the other carried the burden of establishing that party's allegation was a matter of discretion in every case. *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951) (see O.C.G.A. § 24-4-2).

Exercise of discretion. — As to the discretion which the law invests in the trial judge, the judge may call to the judges's assistance in reaching a correct decision other well-recognized and fundamental principles of procedure and practice which are so well recognized that they take the form of substantive evidence. The judge may consider the question of peculiar knowledge. *Department of Revenue v. Stewart*, 67 Ga. App. 281, 20 S.E.2d 40 (1942).

Burden shifted to defendant. — When the plaintiff makes out a prima facie case, the burden is shifted to the defendant. *Equitable Life Assurance Soc'y v. Florence*, 47 Ga. App. 711, 171 S.E. 317 (1933).

Effect of failure to carry burden. — If the burden of proof has shifted and the party to whom the burden has shifted has not successfully carried this burden of evidence, the trial judge has authority to withdraw the case

from the jury by directing a verdict. *Deloach v. Automatic Transmission & Brake Shop, Inc.*, 106 Ga. App. 797, 128 S.E.2d 512 (1962).

Instructions. — Charge of the court should state what testimony would shift the onus, rather than when the onus would be changed, because the latter expression would intimate an opinion as to the sufficiency of the proof. *Clark v. Cassidy*, 64 Ga. 662 (1880); *Lazenby v. Citizens Bank*, 20 Ga. App. 53, 92 S.E. 391 (1917).

When state filed for condemnation of a DC-3 airplane, a truck, a trailer, and the contents of the vehicles which had been used previously to transport contraband drugs, the trial court did not err in charging the jury that the defendant had to prove that the defendant had no knowledge that the vehicles were used in violation of controlled substances laws after the state had made out a prima facie case that the vehicles had been used to transport drugs. *Morgan v. State*, 172 Ga. App. 375, 323 S.E.2d 620 (1984).

Proving a negative. — If a negation or negative affirmation is essential to prove a party's case, the burden of proof of such negative lies on the party so affirming it. *Supreme Kingdom, Inc. v. Fourth Nat'l Bank*, 174 Ga. 779, 164 S.E. 204 (1932).

Proving status as hospital charity patient. — When a nonpaying patient, who in the end was the recipient of a hospital's charity, claims the patient was able to pay and was not a charity patient so that the hospital would be subject to a negligence claim, the trial court abused the court's discretion in refusing to put the burden of proof on the patient or the patient's personal representative. *Fulton-DeKalb Hosp. Auth. v. Fanning*, 196 Ga. App. 556, 396 S.E.2d 534 (1990).

Mitigation. — When the lessor under an exclusive rights contract brought an action for damages against the lessee for a breach of the contract, and alleged that the lessor's damages were the total of the fixed amounts to be paid under the contract for the pictures and proved upon the trial the execution of the contract and a breach thereof by the lessee, a prima facie case in favor of the plaintiff for the full amount sued for was made out, and the burden was then upon the defendant to prove that the plaintiff could have lessened plaintiff's damages, and such proof should have included sufficient

data to allow the jury to reasonably estimate how much the damages could have been mitigated. *Branon v. Ellbee Pictures Corp.*, 42 Ga. App. 293, 155 S.E. 923 (1930).

Partnership accounting. — When the pleadings and the evidence in a partnership accounting showed that the defendant partner was in possession of the farm, that the defendant kept the books and records, and that the defendant admitted the receipt of the gross amount of money charged to the defendant by the plaintiff, from the sale of the farm and the equipment and cattle thereon, it was not error to charge that the burden was on the defendant of proving a proper disposition of the assets that came into the defendant's hands as a member of

the partnership in charge of the partnership's business and assets. *Brosnan v. Long*, 75 Ga. 837, 44 S.E.2d 809 (1947).

Cited in *Hamby v. Crisp*, 48 Ga. App. 418, 172 S.E. 842 (1934); *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Taylor*, 81 Ga. App. 277, 58 S.E.2d 542 (1950); *Mann v. Carter*, 213 Ga. 85, 97 S.E.2d 137 (1957); *Tolbert v. Tolbert*, 131 Ga. App. 388, 206 S.E.2d 63 (1974); *Holloway v. State*, 137 Ga. App. 124, 222 S.E.2d 898 (1975); *Jenkins v. Lampkin*, 145 Ga. App. 746, 244 S.E.2d 895 (1978); *Miller v. State*, 291 Ga. App. 478, 662 S.E.2d 261 (2008); *In re Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 172, 183.

ALR. — *Res ipsa loquitur* in its relation to burden of proof and burden of evidence, 59 ALR 486; 92 ALR 653.

Burden and degree of proof as to alibi, 67 ALR 138; 124 ALR 471.

Prima facie case for proponent in will contest as shifting burden of proof, 76 ALR 373.

Governing law as regards presumption and burden of proof, 78 ALR 883; 168 ALR 191.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Exception to principle of *pari delicto* where refusal of relief would involve harmful effect on persons for whose protection the law made the transaction illegal, 120 ALR 1461.

Use of the word "satisfaction" or a deriv-

ative in instructions in civil case relating to degree or amount or proof, 147 ALR 380.

Sufficiency of evidence, in absence of survivors or of eyewitness competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 ALR2d 580.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 ALR3d 1084.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 ALR3d 1054.

Answers to interrogatories as limiting answering party's proof at state trial, 86 ALR3d 1089.

24-4-3. Amount of mental conviction required; preponderance of evidence in civil cases.

Moral and reasonable certainty is all that can be expected in legal investigation. In all civil cases a preponderance of evidence is considered sufficient to produce mental conviction. In criminal cases a greater strength of mental conviction is held necessary to justify a verdict of guilty. (Orig. Code 1863, § 3672; Code 1868, § 3696; Code 1873, § 3749; Code 1882, § 3749; Civil Code 1895, § 5144; Penal Code 1895, § 986; Civil Code 1910, § 5730; Penal Code 1910, § 1012; Code 1933, § 38-105.)

History of Code section. — This Code section is derived from the decisions in *Jones*

v. State, 33 Ga. 257 (1862) and *Lucas v. State*, 48 Ga. App. 42, 171 S.E. 850 (1933).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CIVIL CASES

CRIMINAL CASES

General Consideration

Cited in *Jones v. McElroy*, 134 Ga. 857, 68 S.E. 729, 137 Am. St. R. 276 (1910); *Waller v. State*, 164 Ga. 128, 138 S.E. 67 (1927); *Chandler v. Bennefield*, 177 Ga. 45, 169 S.E. 309 (1933); *Wells v. State*, 53 Ga. App. 496, 186 S.E. 593 (1936); *Etheridge v. State*, 187 Ga. 30, 199 S.E. 185 (1938); *Richter Bros. v. Atlantic Co.*, 59 Ga. App. 137, 200 S.E. 462 (1938); *Martin v. State*, 193 Ga. 824, 20 S.E.2d 266 (1942); *Lewis v. State*, 196 Ga. 755, 27 S.E.2d 659 (1943); *Green v. State*, 74 Ga. App. 390, 39 S.E.2d 765 (1946); *Grant v. State*, 74 Ga. App. 493, 40 S.E.2d 406 (1946); *Borden Co. v. Dollar*, 96 Ga. App. 489, 100 S.E.2d 607 (1957); *Neal v. Dover*, 217 Ga. 545, 123 S.E.2d 760 (1962); *Fireman's Fund Am. Ins. Co. v. Hester*, 115 Ga. App. 39, 153 S.E.2d 622 (1967); *Holloway v. State*, 137 Ga. App. 124, 222 S.E.2d 898 (1975); *Green v. State*, 155 Ga. App. 795, 272 S.E.2d 761 (1980); *Garbaccio v. Oglesby*, 675 F. Supp. 1342 (M.D. Ga. 1987); *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 233 Ga. App. 706, 505 S.E.2d 232 (1998).

Civil Cases

Degree of proof. — Proof should be satisfactory, but the proof need not be perfectly clear or wholly unimpeached. *M.J. Atkins & Co. v. Cobb*, 56 Ga. 86 (1876); *City Bank v. Kent*, 57 Ga. 283 (1876); *Poullain v. Poullain*, 76 Ga. 420, 4 S.E. 92 (1886); *Patton v. State*, 117 Ga. 230, 43 S.E. 533 (1903).

Conviction as prima facie evidence of murder. — In a case in which a husband had been convicted of killing his wife, the estate executors were entitled to summary judgment for an order of distribution of life insurance proceeds under O.C.G.A. § 33-25-13. The husband's criminal conviction was prima facie evidence under O.C.G.A. § 24-4-3 that he was guilty of his wife's murder for the purpose of determin-

ing that he could not receive proceeds of an insurance policy on her life. *Cont'l Cas. Co. v. Adamo*, No. 08-10130, 2008 U.S. App. LEXIS 13979 (11th Cir. July 1, 2008) (Unpublished).

Preponderance of evidence. — It is improper to charge in a civil case that proof must establish the contention to a reasonable and moral certainty; a preponderance or superior weight of evidence is sufficient. *Supreme Conclave Knights of Damon v. Woods*, 120 Ga. 328, 47 S.E. 940 (1904); *Youmans v. Moore*, 11 Ga. App. 66, 74 S.E. 710 (1912); *Masonic Relief Ass'n v. Hicks*, 47 Ga. App. 499, 171 S.E. 215 (1933); *Life Ins. Co. v. Lawler*, 211 Ga. 246, 85 S.E.2d 1 (1954); *Hospital Auth. v. Eason*, 113 Ga. App. 401, 148 S.E.2d 499, rev'd on other grounds, 222 Ga. 536, 150 S.E.2d 812 (1966).

In a civil action under the Georgia RICO Act, given the similarities in the purpose and language of the federal and Georgia RICO statutes, together with the General Assembly's mandate to liberally construe the Act to effectuate the Act's remedial purposes, under O.C.G.A. § 16-14-2(b), the applicable standard of proof in state civil RICO actions was held to be a preponderance of the evidence; thus, the Supreme Court of Georgia overruled *Simpson Consulting, Inc. v. Barclays Bank PLC*, 227 Ga. App. 648 (1997), and those other cases holding to the contrary, specifically, *Blanton v. Bank of America*, 256 Ga. App. 103 (2002), *In re Copelan*, 250 Ga. App. 856 (2001) and *Tronitec, Inc. v. Shealy*, 249 Ga. App. 442 (2001). *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 614 S.E.2d 758 (2005).

Charging entire statute is not injuriously inapplicable to a civil case. *Central of Ga. Ry. v. McGuire*, 10 Ga. App. 483, 73 S.E. 702 (1912) (see O.C.G.A. § 24-4-3).

Charge ignoring statute in an action for debt is erroneous. *Central of Ga. Ry. v.*

Swann, 144 Ga. 11, 85 S.E. 1001 (1915) (see O.C.G.A. § 24-4-3).

Question for jury. — Preponderance is a question for the jury and should be decided not from mere number of witnesses, but from interest, opportunity, and general deportment and manner of testifying. *Clark v. Cassidy*, 62 Ga. 607 (1879).

Question of law. — When the evidence as a whole, with all reasonable inferences and deductions to be drawn therefrom, presents no conflict in any material particular, and points only to one result, and in that sense there is no question of fact to be determined, then it becomes a question of law, when the evidence is properly presented, to decide whether the verdict is supported by the evidence. *Dyal v. Sanders*, 194 Ga. 228, 21 S.E.2d 596 (1942).

In res ipsa loquitur case the plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. *Hospital Auth. v. Eason*, 113 Ga. App. 401, 148 S.E.2d 499, rev'd on other grounds, 222 Ga. 536, 150 S.E.2d 812 (1966).

Specific performance. — Notwithstanding this statute, to authorize specific performance of a parol contract for the sale of land or to authorize reformation of a written contract for such sale, the evidence must be so clear, strong, and satisfactory as to leave no reasonable doubt as to the agreement. *Redman Bros. v. Mays*, 129 Ga. 435, 59 S.E. 212 (1907); *Williams v. Segers*, 147 Ga. 219, 93 S.E. 215 (1918); *Gordon v. Spellman*, 148 Ga. 394, 96 S.E. 1006 (1918); *Lloyd v. Redford*, 148 Ga. 575, 97 S.E. 523 (1918); *Allen v. Allen*, 151 Ga. 278, 106 S.E. 81 (1921); *Ezell v. Mobley*, 160 Ga. 872, 129 S.E. 532 (1925) (see O.C.G.A. § 24-4-3).

Administrative hearings. — Preponderance of evidence standard was applicable in a disciplinary proceeding conducted by the Board of Dentistry. *Georgia Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 478 S.E.2d 437 (1996).

Instances when preponderance of evidence was sufficient. — In the following cases the preponderance was sufficient to satisfy the jury: *Berry v. Mathewes*, 7 Ga. 457 (1849) (whether a party has waived lien given by contract); *M.J. Atkins & Co. v. Cobb*, 56 Ga. 86 (1876) (proving that goods purchased were inferior); *Crockett v. Crockett*, 73 Ga. 647 (1884) (to correct a mistake in a voluntary deed); *Poullain v. Poullain*, 76 Ga. 420, 4 S.E. 92 (1886) (to overcome findings of fact by an auditor or master); *Atlanta Journal v. Mayson*, 92 Ga. 640, 18 S.E. 1010, 44 Am. St. R. 104 (1893) (in an action for libel although a plea of justification, imputes crime to the plaintiff); *Drakeford v. Adams*, 98 Ga. 722, 25 S.E. 833 (1896) (action by receiver to recover money to prove that the respondent had such money); *Brothers v. Horne*, 140 Ga. 617, 79 S.E. 468 (1913) (to authorize a recovery in trover); *Harp v. Adams*, 142 Ga. 5, 82 S.E. 246 (1914) (to prove the material allegations in a probate of a nuncupative will); *Cowart v. Strickland*, 149 Ga. 397, 100 S.E. 447, 7 A.L.R. 1110 (1919) (to prove forgery of a deed in an action of ejectment); *Carter v. Norton*, 25 Ga. App. 79, 102 S.E. 648 (1920) (in a plea of justification, in an action for slander); *Currie v. State*, 153 Ga. 178, 111 S.E. 727 (1922) (defense of insanity on a trial for murder must be proved by a preponderance); *Goosby v. State*, 153 Ga. 496, 112 S.E. 467 (1922) (insanity by preponderance of evidence in murder trial); *Mansor v. Opelinsky*, 30 Ga. App. 158, 117 S.E. 113 (1923) (purchase price of goods).

Criminal Cases

Proof required. — Burden of proof is on the state to show that defendant's guilt to a moral and reasonable certainty and beyond a moral and reasonable doubt. *Blakeley v. State*, 78 Ga. App. 516, 51 S.E.2d 598 (1949); *Life Ins. Co. v. Lawler*, 211 Ga. 246, 85 S.E.2d 1 (1954).

Degree of certainty required. — Mathematical certainty is not required and cannot be attained in a legal investigation; moral and reasonable certainty is all the law requires. *McNaughton v. State*, 136 Ga. 600, 71 S.E. 1038 (1911), appeal dismissed, 223 U.S. 744, 32 S. Ct. 532, 56 L. Ed. 639 (1912).

"Moral and reasonable certainty." — Better practice in charging the jury on reason-

Criminal Cases (Cont'd)

able doubt is to omit the phrase "moral and reasonable certainty", since "what is perceived as 'moral' may differ from group to group, from class to class, and from individual to individual," and the equivocal nature of the term "reasonable" might conceivably lead a juror to apply to the evidence a lesser standard of proof than beyond a reasonable doubt. *Gearin v. State*, 208 Ga. App. 878, 432 S.E.2d 818 (1993).

Court's instruction that "No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt and to a moral and reasonable certainty..." was not reasonably likely to be interpreted by the jury to allow conviction on proof not meeting the standard of beyond a reasonable doubt or on factors other than the government's proof when, in defining reasonable doubt, the court did not equate it with anything else and repeated the "beyond a reasonable doubt" standard many times. Nevertheless, the "moral certainty" terminology should not be used in jury instructions. *Lloyd v. State*, 214 Ga. App. 564, 448 S.E.2d 729 (1994).

Charging entire statute not prejudicial. — While it is the better practice in criminal cases to omit from the charge the portion of

the statute relating to preponderance of the evidence, no prejudicial error is shown when the entire statute is charged. *Howell v. State*, 124 Ga. 698, 52 S.E. 649 (1906); *Williams v. State*, 125 Ga. 302, 54 S.E. 108 (1906); *Holmes v. State*, 131 Ga. 806, 63 S.E. 347 (1909); *Brundage v. State*, 7 Ga. App. 726, 67 S.E. 1051 (1910); *Fowler v. State*, 187 Ga. 472, 1 S.E.2d 18 (1939) (see O.C.G.A. § 24-4-3).

Failure to charge statute not prejudicial. — When the court properly instructs the jury as to the law of reasonable doubt, the failure to charge the provisions of this statute affords no cause for a new trial. *Skinner v. State*, 98 Ga. 126, 26 S.E. 475 (1896); *Middleton v. State*, 7 Ga. App. 1, 66 S.E. 22 (1909); *Fort v. State*, 31 Ga. App. 525, 121 S.E. 128 (1924); *Albritton v. State*, 175 Ga. 891, 166 S.E. 643 (1932) (see O.C.G.A. § 24-4-3).

Province of jury. — When evidence is adduced to authorize a conviction in a criminal case, it is the province of the jury to decide the weight and credit to be given the evidence and whether the state's proof when considered together with that submitted on behalf of the defendant meets the standard of removing every reasonable doubt as to the guilt of the accused. *Whitus v. State*, 222 Ga. 103, 149 S.E.2d 130 (1966), rev'd on other grounds, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 173, 185.

C.J.S. — 32A C.J.S., Evidence, §§ 1272, 1274, 1277.

ALR. — Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 7 ALR 568; 68 ALR 1309.

Quantum of proof in civil case on issue involving fraudulent, dishonest, or criminal misappropriation of property, 62 ALR 1449.

Rule of reasonable doubt as applicable to proof of previous conviction for purpose of enhancing punishment, 79 ALR 1337.

Degree or quantum of evidence required

to establish oral rescission or modification of written contract, 94 ALR 1278.

Reasonable doubt rule as applicable to evidence in civil case of facts amounting to felony or misdemeanor, 124 ALR 1378.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 ALR2d 852.

Admissibility of expert medical testimony as to future consequences of injury as affected by expression in terms of probability a possibility, 75 ALR3d 9.

24-4-4. Determining where preponderance of evidence lies.

In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses’ manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number. (Civil Code 1895, § 5146; Civil Code 1910, § 5732; Code 1933, § 38-107.)

History of Code section. — This Code section is derived from the decisions in *Clark v. Cassidy*, 62 Ga. 407 (1879); *Head v. Bridges*, 67 Ga. 227 (1881); *Cleghorn v. Jones*, 68 Ga. 87 (1881); and *Kinnebrew v. State*, 80 Ga. 232, 5 S.E. 26 (1887).

Law reviews. — For survey article on evidence law, see 60 *Mercer L. Rev.* 135 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INSTRUCTIONS

- 1. CIVIL CASES
- 2. CRIMINAL CASES

EXAMPLES

- 1. CIVIL CASES
- 2. CRIMINAL CASES

General Consideration

Statute not mandatory as to jury. — Directions in this statute are for the jury only and not mandatory as to the jury but merely addressed to the jury’s discretion. *Alexander v. State*, 1 Ga. App. 289, 57 S.E. 996 (1907) (see O.C.G.A. § 24-4-4).

Jury “may” consider rules. — It was not error to charge that jury “may” consider the rules of this statute. *Louisville & N.R.R. v. Rodgers*, 21 Ga. App. 324, 94 S.E. 321 (1917); *Hatcher v. Bray*, 88 Ga. App. 344, 77 S.E.2d 64 (1953) (see O.C.G.A. § 24-4-4).

Jury “will” consider rules. — There was no error in using the word “will” instead of the word “may” in connection with this statute. *Robinson v. State*, 158 Ga. 47, 122 S.E. 886 (1924) (see O.C.G.A. § 24-4-4).

Province of jury. — It is the province of the jury to determine the credibility of witnesses. *Caldwell v. Caldwell*, 59 Ga. App. 637,

1 S.E.2d 764 (1939) (interest of witness); *Couch v. State*, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (bias of witness); *Pantone v. Pantone*, 206 Ga. 305, 57 S.E.2d 77 (1950) (weight and credit of testimony); *Harrison v. Regents of Univ. Sys.*, 99 Ga. App. 762, 109 S.E.2d 854 (1959) (interest of witness); *Freedman v. Housing Auth.*, 108 Ga. App. 418, 136 S.E.2d 544 (1963) (bias of witness); *Brown v. Nutter*, 125 Ga. App. 449, 188 S.E.2d 133 (1972) (credibility of party); *Brown Transp. Co. v. Parker*, 129 Ga. App. 737, 201 S.E.2d 17 (1973) (party at interest).

Within the closing argument presented by the state, the probability or improbability of a police officer’s testimony, as well as an interest or want of interest and personal credibility, could properly be considered by the jury. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

Equal credibility of witnesses. — Personal credibility of the witnesses in conflict must

General Consideration (Cont'd)

first be equal before the other contingencies named in this statute will apply equally. *Nashville, C. & S.L. Ry. v. Hubble*, 139 Ga. 300, 76 S.E. 1009 (1913); *Georgia Power Co. v. Burger*, 63 Ga. App. 784, 11 S.E.2d 834 (1940) (see O.C.G.A. § 24-4-4).

Unimpeached witnesses. — Rule that the uncontradicted testimony of unimpeached witnesses cannot be arbitrarily disregarded does not mean that the jury are obliged to believe testimony which the jury in fact discredits, but means that the jury are to consider the testimony of every witness who is sworn, and not arbitrarily disregard the testimony of any witness. *Caldwell v. Caldwell*, 59 Ga. App. 637, 1 S.E.2d 764 (1939); *American Cas. Co. v. Windham*, 26 F. Supp. 261 (M.D. Ga.), *aff'd*, 107 F.2d 88 (5th Cir. 1939), *cert. denied*, 309 U.S. 674, 60 S. Ct. 714, 84 L. Ed. 1019 (1940); *Pantone v. Pantone*, 206 Ga. 305, 57 S.E.2d 77 (1950); *Brown v. Nutter*, 125 Ga. App. 449, 188 S.E.2d 133 (1972); *Brown Transp. Co. v. Parker*, 129 Ga. App. 737, 201 S.E.2d 17 (1973).

Testimony of party who offers oneself as a witness in one's own behalf is to be construed most strongly against that party. *Western & Atl. R.R. v. Michael*, 42 Ga. App. 603, 157 S.E. 226 (1931).

Equivocal testimony of party. — Testimony of a party who offers oneself as a witness in one's own behalf is to be construed most strongly against that party when it is self-contradictory, vague, or equivocal. *Brooks v. Douglas*, 154 Ga. App. 54, 267 S.E.2d 495 (1980).

Court's charge to jury that equivocal testimony of a party is to be construed most strongly against that party and that there should not be a finding in that party's favor if that version would support a verdict against that party is reversible error when other competent evidence supports the equivocal testimony of that witness, because such a charge unjustly prejudices the jury. *Weathers v. Cowan*, 176 Ga. App. 19, 335 S.E.2d 392 (1985).

Testimony of principal witness. — Instruction that "when the testimony of a party or a principal witness is vague, equivocal or self-contradictory, it should be construed most strongly against the cause for which he

is testifying" violates this statute unless the party is the sole witness testifying in that party's behalf. *Slaton Mach. Sales, Inc. v. Owens-Illinois, Inc.*, 138 Ga. App. 80, 225 S.E.2d 473 (1976) (see O.C.G.A. § 24-4-4).

Unwillingness of witness to commit oneself. — Testimony of a witness is not to be excluded merely because the witness prefaces the witness's statement by an expression of unwillingness to commit oneself absolutely and positively to the accuracy of what one says. *Holcombe v. State*, 5 Ga. App. 47, 62 S.E. 647 (1908).

Number of witnesses. — While a plaintiff may sustain plaintiff's case by the greater number of witnesses, this does not necessarily mean that the preponderance of the testimony is in the plaintiff's favor. Sometimes, in the minds of jurors, the testimony of one witness is of more weight and credit than that of a host of witnesses. *McGriff v. McGriff*, 154 Ga. 560, 115 S.E. 21 (1922).

When number of witnesses equal. — Ruling that it might amount to reversible error, in charging the provisions of this statute, to fail to include in the charge the provision that "the jury may also consider the number of witnesses, though the preponderance is not necessary with the greater number," does not apply to a case if the number of witnesses on both sides are the same. *Atlanta Gas-Light Co. v. Cook*, 35 Ga. App. 622, 134 S.E. 198 (1926) (see O.C.G.A. § 24-4-4).

Argument to jury concerning credibility. — While it is the right of counsel for the defendant in counsel's argument to the jury to comment on the credibility of a witness for the state, and to accuse the witness of having committed perjury, counsel has no absolute right while doing so to point the witness out to the jury as the witness sits in the courtroom. *Corley v. State*, 64 Ga. App. 841, 14 S.E.2d 121 (1941).

Argument to jury concerning deposition testimony. — Counsel may by argument call attention to the fact that the opponent relied on written depositions, and that this manner of the witnesses in testifying cannot in this way be observed, although the witnesses themselves were in court. *Georgia, Fla. & Ala. Ry. v. Sasser*, 4 Ga. App. 276, 61 S.E. 505 (1908).

Personal knowledge of juror. — Juror must not consider any personal knowledge that the juror might have in reference to the

plaintiff's character. *Georgia Ry. & Elec. Co. v. Dougherty*, 4 Ga. App. 614, 62 S.E. 158 (1908).

Appellate court considers only the sufficiency of the evidence; the weight of the evidence is within the sole province of the jury. *Sherman v. Stephens*, 30 Ga. App. 509, 118 S.E. 567 (1923); *Reaves v. Columbus Elec. & Power Co.*, 32 Ga. App. 140, 122 S.E. 824, cert. denied, 32 Ga. App. 807 (1924); *Crawley v. Marta*, 147 Ga. App. 293, 248 S.E.2d 555 (1978); *Coleman v. State*, 150 Ga. App. 380, 258 S.E.2d 12 (1979).

Cited in *Jones v. Harris*, 169 Ga. 665, 151 S.E. 343 (1930); *Caison v. State*, 171 Ga. 1, 154 S.E. 337 (1930); *Clinton v. State*, 41 Ga. App. 661, 154 S.E. 377 (1930); *George v. McCurdy*, 42 Ga. App. 614, 157 S.E. 219 (1931); *Byrd v. Grace*, 43 Ga. App. 255, 158 S.E. 467 (1931); *Boyd v. Boyd*, 173 Ga. 139, 159 S.E. 674 (1931); *Schumpert v. Carter*, 175 Ga. 860, 166 S.E. 436 (1932); *Emory Univ. v. Shadburn*, 47 Ga. App. 643, 171 S.E. 192 (1933); *Payton v. Turner*, 50 Ga. App. 519, 179 S.E. 162 (1935); *Walker v. Perry*, 54 Ga. App. 537, 188 S.E. 546 (1936); *Southern Ry. v. Lunsford*, 57 Ga. App. 53, 194 S.E. 602 (1937); *Harrell v. Blackshear Mfg. Co.*, 187 Ga. 531, 1 S.E.2d 440 (1939); *Wallis v. Bellah*, 59 Ga. App. 633, 1 S.E.2d 773 (1939); *Southern Ry. v. Wilcox*, 59 Ga. App. 785, 2 S.E.2d 225 (1939); *Scott v. Wimberly*, 188 Ga. 148, 3 S.E.2d 71 (1939); *State Hwy. Bd. v. Bridges*, 60 Ga. App. 240, 3 S.E.2d 907 (1939); *Kemp v. State*, 61 Ga. App. 337, 6 S.E.2d 196 (1939); *Winn v. Hinson*, 64 Ga. App. 48, 12 S.E.2d 172 (1940); *Renfroe v. Hamilton*, 193 Ga. 194, 17 S.E.2d 709 (1941); *Davison Chem. Corp. v. Hart*, 68 Ga. App. 413, 23 S.E.2d 107 (1942); *McCann Lumber Co. v. Hall*, 77 Ga. App. 455, 49 S.E.2d 150 (1948); *Milwaukee Mechanics Ins. Co. v. Davis*, 79 Ga. App. 70, 52 S.E.2d 643 (1949); *Atlas Auto Fin. Co. v. Atkins*, 79 Ga. App. 91, 53 S.E.2d 171 (1949); *Stone v. State*, 80 Ga. App. 557, 56 S.E.2d 835 (1949); *Martin v. Waltman*, 82 Ga. App. 375, 61 S.E.2d 214 (1950); *Toles v. Hair*, 83 Ga. App. 144, 63 S.E.2d 3 (1951); *Smith v. State*, 85 Ga. App. 459, 69 S.E.2d 281 (1952); *Atlantic Coast Line R.R. v. Sellars*, 89 Ga. App. 293, 79 S.E.2d 35 (1953); *Williams v. U.S. Fid. & Guar. Co.*, 90 Ga. App. 409, 83 S.E.2d 225 (1954); *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954); *Smith v. Harrison*,

92 Ga. App. 576, 89 S.E.2d 273 (1955); *Bell v. Proctor*, 92 Ga. App. 759, 90 S.E.2d 84 (1955); *Griffin v. Kelley*, 227 F.2d 258 (5th Cir. 1955); *Georgia R.R. & Banking Co. v. Cook*, 94 Ga. App. 650, 95 S.E.2d 703 (1956); *Cotton States Mut. Ins. Co. v. Rentz*, 95 Ga. App. 887, 99 S.E.2d 438 (1957); *Betsill v. State*, 98 Ga. App. 695, 106 S.E.2d 323 (1958); *Yellow Cab Co. v. McCullers*, 98 Ga. App. 601, 106 S.E.2d 535 (1958); *Brock v. Avery Co.*, 99 Ga. App. 881, 110 S.E.2d 122 (1959); *Wilson v. State*, 215 Ga. 672, 113 S.E.2d 95 (1960); *Clark v. State*, 216 Ga. 459, 117 S.E.2d 160 (1960); *Price v. State*, 108 Ga. App. 581, 133 S.E.2d 916 (1963); *Fuller v. Fuller*, 109 Ga. App. 386, 136 S.E.2d 461 (1964); *Williams v. Colonial Pipeline Co.*, 220 Ga. 381, 139 S.E.2d 308 (1964); *Sears v. Smith*, 221 Ga. 47, 142 S.E.2d 792 (1965); *Southern Ry. v. Smalley*, 112 Ga. App. 471, 145 S.E.2d 708 (1965); *Daniel v. Dixie Plumbing Supply Co.*, 112 Ga. App. 427, 145 S.E.2d 796 (1965); *Roper v. GMC*, 121 Ga. App. 163, 173 S.E.2d 240 (1970); *Brown v. Wingard*, 122 Ga. App. 544, 177 S.E.2d 797 (1970); *Wells v. State*, 126 Ga. App. 130, 190 S.E.2d 106 (1972); *Stinson v. Gray*, 232 Ga. 542, 207 S.E.2d 506 (1974); *Rini v. State*, 235 Ga. 60, 218 S.E.2d 811 (1975); *Hayes v. State*, 136 Ga. App. 746, 222 S.E.2d 193 (1975); *Holloway v. State*, 137 Ga. App. 124, 222 S.E.2d 898 (1975); *Hogan v. City-County Hosp.*, 138 Ga. App. 906, 227 S.E.2d 796 (1976); *Ross v. Yancey Bros. Co.*, 141 Ga. App. 452, 233 S.E.2d 847 (1977); *Gilbert v. Powell*, 165 Ga. App. 504, 301 S.E.2d 683 (1983); *Clements v. Long*, 167 Ga. App. 11, 305 S.E.2d 830 (1983); *Maurer v. Chyatte*, 173 Ga. App. 343, 326 S.E.2d 543 (1985); *Weathers v. Cowan*, 175 Ga. App. 19, 333 S.E.2d 921 (1985); *Abernathy v. State*, 192 Ga. App. 355, 385 S.E.2d 25 (1989); *Crews v. State*, 226 Ga. App. 232, 486 S.E.2d 61 (1997); *Golf Mktg., Inc. v. Atlanta Classic Cars, Inc.*, 245 Ga. App. 720, 538 S.E.2d 809 (2000); *Chambers v. Gwinnett Community Hosp., Inc.*, 253 Ga. App. 25, 557 S.E.2d 412 (2001).

Instructions

1. Civil Cases

Failure to charge on preponderance of the evidence is not error in the absence of a special request. — See *Freeman v. Coleman*

Instructions (Cont'd)
1. Civil Cases (Cont'd)

Ray & Co., 88 Ga. 421, 14 S.E. 551 (1892); Rome Ry. & Light Co. v. King, 33 Ga. App. 383, 126 S.E. 294 (1925); Loftin v. Carroll County Bd. of Educ., 70 Ga. App. 315, 28 S.E.2d 372 (1943); Flatauer v. Goodman, 84 Ga. App. 881, 67 S.E.2d 794 (1951).

Instruction must be full and complete. —

If the court undertakes to charge the jury on the preponderance of the evidence as laid down in this statute, it is the court's duty to instruct the jury fully and completely with respect thereto and not merely to charge certain portions of that statute. *A.F. Gossett & Sons v. Wilder*, 46 Ga. App. 651, 168 S.E. 903 (1933); *Travelers Indem. Co. v. Paramount Publix Corp.*, 52 Ga. App. 239, 182 S.E. 923 (1935); *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942); *Fountain v. McCallum*, 194 Ga. 269, 21 S.E.2d 610 (1942); *Smaha v. George*, 195 Ga. 412, 24 S.E.2d 385 (1943); *Turner v. Joiner*, 77 Ga. App. 603, 48 S.E.2d 907 (1948); *Southern Ry. v. Florence*, 81 Ga. App. 1, 57 S.E.2d 856 (1950); *Georgia Power Co. v. Pittman*, 92 Ga. App. 673, 89 S.E.2d 577 (1955); *Bell v. Proctor*, 212 Ga. 325, 92 S.E.2d 514 (1956); *Williams v. Southern Ry.*, 99 Ga. App. 503, 109 S.E.2d 343 (1959) (see O.C.G.A. § 24-4-4).

Incomplete charge not necessarily reversible. — If the language in *A.F. Gossett & Sons v. Wilder*, 46 Ga. App. 651, 168 S.E. 903 (1933), is so construed that it is always reversible error for a trial judge, in charging the provisions of this statute, to omit any of the provisions therein, such language is expressly disapproved. *Georgia Power Co. v. Burger*, 63 Ga. App. 784, 11 S.E.2d 834 (1940) (see O.C.G.A. § 24-4-4).

Existence of reversible error depends on particular facts. — In charging to the jury the provisions of this statute, the better practice is to charge the statute in its entirety, but the omission of some of the provisions, may or may not be error, depending on the facts of the case. *Georgia Power Co. v. Burger*, 63 Ga. App. 784, 11 S.E.2d 834 (1940); *Callaway v. Fischer*, 69 Ga. App. 251, 25 S.E.2d 131 (1943); *Cedrone v. Beck*, 74 Ga. App. 488, 40 S.E.2d 388 (1946); *City of Louisville v. Clark*, 108 Ga. App. 389, 133 S.E.2d 45 (1963); *Carter v. Wyatt*, 113 Ga.

App. 235, 148 S.E.2d 74 (1966) (see O.C.G.A. § 24-4-4).

Statute as means for determining credibility. — It is not error to charge that the language of this statute is also a means for determining the credibility of witnesses. *Andrews Taxi & U-Drive It Co. v. McEver*, 101 Ga. App. 383, 114 S.E.2d 145 (1960); *Collins v. Porterfield*, 102 Ga. App. 294, 116 S.E.2d 105 (1960); *Chandler v. Alabama Power Co.*, 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962) (see O.C.G.A. § 24-4-4).

Detailed charge unauthorized. — Trial court is not authorized to charge a jury in specific detail as to certain testimony neutralizing other testimony because what has been proven is solely and exclusively to be determined by the jury. *Fules, Inc. v. Rutland*, 123 Ga. App. 23, 179 S.E.2d 290 (1970).

Error must be shown. — Even if the court has not instructed in the terms of this statute, error must be shown for a reversal. *Southern Ry. v. Wessinger*, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924) (see O.C.G.A. § 24-4-4).

Specific exceptions. — In order to take advantage of an omission to charge a specific part of this statute, it is necessary to make specific exception. *Harris v. Central of Ga. Ry.*, 30 Ga. App. 720, 119 S.E. 349 (1923) (see O.C.G.A. § 24-4-4).

2. Criminal Cases

Applicability to credibility. — Insofar as this statute relates to matters pertinent to the consideration of the credibility of witnesses, the statute may be given in a charge to the jury in a criminal case. *Bell v. State*, 47 Ga. App. 216, 169 S.E. 732 (1933); *Campbell v. State*, 53 Ga. App. 380, 186 S.E. 137 (1935); *Moore v. State*, 57 Ga. App. 287, 195 S.E. 320 (1938); *Couch v. State*, 73 Ga. App. 153, 35 S.E.2d 708 (1945); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955); *McDonald v. State*, 104 Ga. App. 578, 122 S.E.2d 145 (1961) (see O.C.G.A. § 24-4-4).

Inapplicability to quantum of proof. — This statute, insofar as it relates to the determination of where the preponderance of the evidence lies has no application to a criminal

case and should not be charged. *Baker v. State*, 47 Ga. App. 205, 170 S.E. 209 (1933); *Eller v. State*, 48 Ga. App. 163, 172 S.E. 592 (1934); *Sconyers v. State*, 67 Ga. App. 902, 21 S.E.2d 504 (1942); *Couch v. State*, 73 Ga. App. 153, 35 S.E.2d 708 (1945); *McDonald v. State*, 104 Ga. App. 578, 122 S.E.2d 145 (1961) (see O.C.G.A. § 24-4-4).

Harmless error. — While it is ordinarily inapt to charge this statute in a criminal case, doing so is not reversible error if the instruction appears to be harmless. *Eller v. State*, 48 Ga. App. 163, 172 S.E. 592 (1934); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955); *Harper v. State*, 201 Ga. 10, 39 S.E.2d 45 (1946); *Fountain v. State*, 207 Ga. 144, 60 S.E.2d 433 (1950), overruled on other grounds, *Lavender v. State*, 234 Ga. 608, 216 S.E.2d 855 (1975) (see O.C.G.A. § 24-4-4).

Examples

1. Civil Cases

Failure to charge certain portions of statute harmful error in the following cases: *Hinson v. Hooks*, 27 Ga. App. 430, 108 S.E. 822 (1921) (number of witnesses); *Farmers State Bank v. Kelley*, 166 Ga. 683, 144 S.E. 258 (1928) (number of witnesses); *Shankle v. Crowder*, 174 Ga. 399, 163 S.E. 180 (1932) (credibility); *Tucker v. Talmadge*, 186 Ga. 798, 198 S.E. 726 (1938) (number of witnesses); *Garner v. Wood*, 188 Ga. 463, 4 S.E.2d 137 (1939) (number of witnesses); *Fountain v. McCallum*, 194 Ga. 269, 21 S.E.2d 610 (1942) (intelligence of witnesses and nature of facts to which the witnesses testified); *Edge v. Dorsey*, 78 Ga. App. 70, 50 S.E.2d 227 (1948) (number of witnesses); *Bank of Loganville v. Briscoe*, 93 Ga. App. 558, 92 S.E.2d 326 (1956) (probability of testimony); *Bell v. Proctor*, 93 Ga. App. 816, 92 S.E.2d 807 (1956) (interest of witnesses); *Sheridan v. Haggard*, 95 Ga. App. 792, 99 S.E.2d 163 (1957) (witnesses' means of knowing facts); *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958) (credibility); *Willard v. Willard*, 221 Ga. 2, 142 S.E.2d 849 (1965) (number of witnesses) (see O.C.G.A. § 24-4-4).

Failure to charge entire statute harmless error in the following cases. — See

Palmer-Murphey Co. v. Barnett, 32 Ga. App. 635, 124 S.E. 538, cert. denied, 32 Ga. App. 807 (1924); *Travelers Ins. Co. v. Anderson*, 53 Ga. App. 1, 184 S.E. 813 (1936); *Georgia Power Co. v. Burger*, 63 Ga. App. 784, 11 S.E.2d 834 (1940); *Rushing v. Akins*, 210 Ga. 450, 80 S.E.2d 813 (1954); *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955); *Bank of Loganville v. Briscoe*, 93 Ga. App. 558, 92 S.E.2d 326 (1956) (intelligence of witnesses and probability of the witnesses' testimony); *Bell v. Proctor*, 212 Ga. 325, 92 S.E.2d 514 (1956); *Williams v. Southern Ry.*, 99 Ga. App. 503, 109 S.E.2d 343 (1959) (nature of facts to which witnesses testified); *Southern Ry. Sys. v. Yancey*, 102 Ga. App. 159, 115 S.E.2d 693 (1960); *Chandler v. Alabama Power Co.*, 140 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962); *City of Louisville v. Clark*, 108 Ga. App. 389, 133 S.E.2d 45 (1963) (nature of facts to which witnesses testified, incidental issues) (see O.C.G.A. § 24-4-4).

Instructions proper in the following cases.

— See *Western & Atlantic R.R. v. Henderson*, 6 Ga. App. 385, 65 S.E. 48 (1909) (credibility); *Rome Ry. & Light Co. v. King*, 33 Ga. App. 383, 126 S.E. 294 (1925) (credibility); *Daughtry v. Georgia Power Co.*, 61 Ga. App. 505, 6 S.E.2d 454 (1939) (action for damages); *Jackson v. Moultrie Prod. Credit Ass'n.*, 76 Ga. App. 768, 47 S.E.2d 127 (1948) (credibility); *Georgia Automatic Gas Co. v. Fowler*, 77 Ga. App. 675, 49 S.E.2d 550 (1948) (nature of witnesses' testimony); *Ludwig v. J.J. Newberry Co.*, 78 Ga. App. 871, 52 S.E.2d 485 (1949) (action for damages); *Hughes v. Al Grider, Inc.*, 97 Ga. App. 599, 103 S.E.2d 627 (1958) (number of witnesses); *Andrews Taxi & U-Drive It Co. v. McEver*, 101 Ga. App. 383, 114 S.E.2d 145 (1960) (credibility of witnesses); *King v. Faries*, 120 Ga. App. 393, 170 S.E.2d 747 (1969) (number of witnesses).

2. Criminal Cases

Instructions harmless error in the following cases. — See *Howard v. State*, 60 Ga. App. 229, 4 S.E.2d 418 (1939) (manner of testifying); *Couch v. State*, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (number of witnesses, inapplicability of preponderance standard in criminal case); *Smith v. State*, 85 Ga. App. 129, 68 S.E.2d 393 (1951) (error which party

Examples (Cont'd)**2. Criminal Cases (Cont'd)**

invited); *Morris v. State*, 97 Ga. App. 762, 104 S.E.2d 483 (1958) (credibility of witnesses).

Instructions proper in the following cases.

— See *Andrews v. State*, 196 Ga. 84, 26

S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955) (credibility); *Carter v. State*, 69 Ga. App. 570, 26 S.E.2d 374 (1943) (reasonable doubt); *Couch v. State*, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (credibility).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1275.

ALR. — Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility, 6 ALR 1608; 25 ALR 339; 103 ALR 350; 161 ALR 233.

Instructions on sudden emergency in motor vehicle cases, 80 ALR2d 5.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238.

24-4-5. Reasonable doubt in criminal cases.

Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt. (Penal Code 1895, § 987; Penal Code 1910, § 1013; Code 1933, § 38-110.)

History of Code section. — This Code section is derived from the decision in *John v. State*, 33 Ga. 257 (1862).

JUDICIAL DECISIONS

Statute applies to recorder's courts. *Scott v. Mayor of Athens*, 111 Ga. App. 173, 140 S.E.2d 922 (1965) (see O.C.G.A. § 24-4-5).

Preponderance of evidence standard inapplicable. — Law of the preponderance of evidence is not applicable in criminal cases. *McDonald v. State*, 104 Ga. App. 578, 122 S.E.2d 145 (1961).

Reasonable and moral certainty. — Reasonable doubt is such as leaves the mind in an uncertain and wavering condition where it is impossible to say with reasonable and moral certainty that the accused is guilty. *Dumas v. State*, 63 Ga. 600 (1879); *Davis v. State*, 114 Ga. 104, 39 S.E. 906 (1901).

Mathematical certainty not required and cannot be attained in a legal investigation; moral and reasonable certainty is all that the law requires. *McNaughton v. State*, 136 Ga. 600, 71 S.E. 1038 (1911), appeal dismissed, 223 U.S. 744, 32 S. Ct. 532, 56 L. Ed. 639 (1912).

Mere doubt insufficient. — Reasonable doubt is not a vague or conjectural doubt on a mere guess. *Giles v. State*, 6 Ga. 276 (1849); *Bone v. State*, 102 Ga. 387, 390 S.E. 845 (1897); *Brantley v. State*, 133 Ga. 264, 65 S.E. 426 (1909).

Bare suspicion not sufficient. — Bare suspicion of guilt is not sufficient to authorize a conviction. *Oneil v. State*, 48 Ga. 66 (1873); *Hammond v. State*, 2 Ga. App. 384, 58 S.E. 509 (1907); *Diggs v. State*, 90 Ga. App. 853, 84 S.E.2d 611 (1954); *Scott v. Mayor of Athens*, 111 Ga. App. 173, 140 S.E.2d 922 (1965); *Muckle v. State*, 165 Ga. App. 873, 303 S.E.2d 54 (1983).

Reason for doubt. — In the charge of the court on the subject of reasonable doubt, it was not error to include the phrase, "a doubt for which you can give a reason." *Vann v. State*, 83 Ga. 44, 9 S.E. 945 (1889); *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259

(1944); *Carter v. State*, 71 Ga. App. 626, 31 S.E.2d 666 (1944).

Moral certainty equated with reasonable doubt. — Phrases, “to a moral and reasonable certainty” and “beyond a reasonable doubt,” and applied to the quality of proof in a case, are identical in meaning. *Austin v. State*, 6 Ga. App. 211, 64 S.E. 670 (1909); *Dicks v. State*, 155 Ga. App. 591, 271 S.E.2d 727 (1980).

Moral certainty equated with absolute certainty. — Statute requires proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for a crime, the two phrases are synonymous and equivalent; each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. *Bone v. State*, 102 Ga. 387, 30 S.E. 845 (1897).

Reversible error despite defendant's failure to object to the charge. — After trial court gave the jury the suggested pattern charge on reasonable doubt the court summarized the charge by saying “In other words, if you honestly believe he's guilty, convict him. If you honestly believe he is not guilty, find him not guilty.” *Jones v. State*, 252 Ga. App. 332, 556 S.E.2d 238 (2001).

Trial court's instruction that “neither does [reasonable doubt] mean a possibility that the defendant may be innocent” violates defendant's state and federal due process rights. *Mangum v. State*, 274 Ga. 573, 555 S.E.2d 451 (2001).

Conflicts in testimony do not preclude finding of guilt. — While there may be conflicts in the testimony of witnesses at trial, a rational trier of fact, in certain cases, may still reasonably find from the evidence adduced at trial proof of defendant's guilt beyond a reasonable doubt. *Hammonds v. State*, 157 Ga. App. 393, 277 S.E.2d 762 (1981).

Quantum of proof. — Burden of proof is on the state in all criminal cases to show the defendant's guilt to a moral and reasonable certainty and beyond a moral and reasonable doubt. *Walker v. State*, 137 Ga. 398, 73 S.E. 368 (1912); *Montgomery v. State*, 202 Ga. 678, 44 S.E.2d 242 (1947); *Blakeley v.*

State, 78 Ga. App. 516, 51 S.E.2d 598 (1949); *Life Ins. Co. v. Lawler*, 211 Ga. 246, 85 S.E.2d 1 (1954).

Proof beyond reasonable doubt required in criminal contempt prosecution. — It is a denial of a defendant's right of due process of law under the federal and state constitutions and O.C.G.A. § 24-4-5 to fail to require proof beyond a reasonable doubt in a criminal contempt prosecution because the result of such a conviction is to deny the defendant's liberty and the levy of a penal fine. *In re Crane*, 253 Ga. 667, 324 S.E.2d 443 (1985).

It is not necessary for state to prove that it was impossible for offenses charged to have been committed by anybody else. *Perry v. State*, 158 Ga. App. 349, 280 S.E.2d 390 (1981).

Every element of crime must be proved beyond a reasonable doubt. *Gosha v. State*, 56 Ga. 36 (1876) (venue); *Bell v. State*, 91 Ga. 15, 16 S.E. 207 (1892) (capacity to commit crime); *Barnes v. State*, 113 Ga. 716, 39 S.E. 488 (1901) (grade of offense); *Glover v. State*, 114 Ga. 828, 40 S.E. 998 (1902) (identity of defendant); *Green v. State*, 4 Ga. App. 260, 61 S.E. 234 (1908) (venue); *Simpson v. State*, 12 Ga. App. 292, 77 S.E. 105 (1913) (grade of offense); *Davis v. State*, 46 Ga. App. 174, 167 S.E. 205 (1932) (possession of stolen article).

Circumstantial evidence sufficient to convict if the evidence is consistent with the hypothesis of the guilt of the defendant and excludes every other reasonable hypothesis. *Graham v. State*, 183 Ga. 881, 189 S.E. 910 (1937); *Carter v. State*, 57 Ga. App. 180, 194 S.E. 842 (1938); *Dominick v. State*, 66 Ga. App. 531, 18 S.E.2d 502 (1942); *Diggs v. State*, 90 Ga. App. 853, 84 S.E.2d 611 (1954); *Crane v. State*, 123 Ga. App. 226, 180 S.E.2d 289 (1971); *Lewis v. State*, 149 Ga. App. 181, 254 S.E.2d 142 (1979); *Barfield v. State*, 160 Ga. App. 228, 286 S.E.2d 516 (1981).

To sustain a conviction on circumstantial evidence only, the state must prove facts that are not only consistent with the hypothesis of the guilt of the accused, but the facts proved must exclude every other reasonable hypothesis. *Johnson v. State*, 159 Ga. App. 497, 283 S.E.2d 711 (1981).

Circumstantial evidence may outweigh positive evidence in probative value. *Stephens v. State*, 127 Ga. App. 416, 193 S.E.2d 870 (1972).

Two theories presented. — When the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence. *Davis v. State*, 13 Ga. App. 142, 78 S.E. 866 (1913); *Rutland v. State*, 46 Ga. App. 417, 167 S.E. 705 (1933); *Barnett v. State*, 153 Ga. App. 430, 265 S.E.2d 348 (1980); *Johnson v. State*, 159 Ga. App. 497, 283 S.E.2d 711 (1981).

An instruction that the existence of two equal theories, guilt or innocence, requires acquittal is not error unless the evidence relied on by the state is wholly circumstantial, in which case the word "equal" should not appear in the instruction. *Carpenter v. State*, 167 Ga. App. 634, 307 S.E.2d 19 (1983), *aff'd*, 252 Ga. 79, 310 S.E.2d 912 (1984).

Presumption of innocence. — Every accused person has a presumption of innocence in the accused's favor, and the accused cannot be convicted until this evidence is overcome and the accused's guilt established beyond all reasonable doubt. *Smith v. State*, 63 Ga. 168 (1879); *Campbell v. State*, 100 Ga. 267, 28 S.E. 71 (1897); *Wimberly v. State*, 12 Ga. App. 540, 77 S.E. 879 (1913).

Reasonable doubt must be charged. — In every criminal case the court should charge the jury that to authorize conviction, guilt must be proved "beyond a reasonable doubt"; and, unless the evidence demands the verdict rendered, the failure to do so will be reversible error. *Norman v. State*, 10 Ga. App. 802, 74 S.E. 428 (1912).

Not error to charge this statute. — It is never error for the trial court to charge the jury on the subject of reasonable doubt in the language of this statute. *Thomas v. State*, 33 Ga. App. 680, 127 S.E. 891 (1925); *McDowell v. State*, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (see O.C.G.A. § 24-4-5).

Charging entire statute unnecessary. — When the charge given was not the entire charge on reasonable doubt as found in this statute, if the charge was fair and did not shift any burden to the defendant the charge is approved. *Jones v. State*, 139 Ga. App. 366, 228 S.E.2d 387 (1976) (see O.C.G.A. § 24-4-5).

Definition of reasonable doubt unnecessary. — Court need not attempt to define

reasonable doubt. *Jordan v. State*, 16 Ga. App. 393, 85 S.E. 455 (1915); *Bell v. State*, 148 Ga. 352, 96 S.E. 861 (1918); *Floyd v. State*, 58 Ga. App. 867, 200 S.E. 207 (1938); *Fountain v. State*, 71 Ga. App. 191, 30 S.E.2d 359 (1944); *Brock v. State*, 91 Ga. App. 141, 85 S.E.2d 177 (1954); *Lingo v. State*, 96 Ga. App. 379, 100 S.E.2d 116 (1957).

Province of jury. — It is the province of the jury to decide the weight and credit to be given the evidence. *Fortson v. State*, 69 Ga. App. 378, 25 S.E.2d 820 (1943); *Whitus v. State*, 222 Ga. 103, 149 S.E.2d 130 (1966); *Armour v. State*, 154 Ga. App. 740, 270 S.E.2d 22 (1980); *Mosley v. State*, 157 Ga. App. 578, 278 S.E.2d 154 (1981); *Davis v. State*, 159 Ga. App. 197, 283 S.E.2d 17 (1981); *Painter v. State*, 159 Ga. App. 479, 283 S.E.2d 695 (1981).

Whether every reasonable hypothesis except that of guilt of the defendant has been excluded is question for jury, when the jury is properly instructed. *Barfield v. State*, 160 Ga. App. 228, 286 S.E.2d 516 (1981).

Instructions not error in the following cases. — See *Smith v. State*, 34 Ga. App. 779, 131 S.E. 923 (1926); *Lucas v. State*, 48 Ga. App. 42, 171 S.E. 850 (1933); *Pound v. State*, 180 Ga. 83, 178 S.E. 291 (1935); *Stowe v. State*, 51 Ga. App. 726, 181 S.E. 419 (1935); *Pulliam v. State*, 196 Ga. 782, 28 S.E.2d 139 (1943); *Rogers v. State*, 72 Ga. App. 791, 35 S.E.2d 473 (1945); *Johnson v. State*, 209 Ga. 333, 72 S.E.2d 291 (1952); *Dicks v. State*, 155 Ga. App. 591, 271 S.E.2d 727 (1980); *Jackson v. State*, 157 Ga. App. 581, 278 S.E.2d 156 (1981).

Erroneous charge. — Following charge was held inaccurate: "Whether dependent upon positive or circumstantial evidence, the true question in all criminal cases is not that the conclusion to which the evidence points may be false, but whether or not the state has satisfied the minds and consciences of the jury beyond a reasonable doubt of the guilt of the accused." *King v. State*, 163 Ga. 313, 136 S.E. 154 (1926).

Evidence found sufficient to support conviction in the following cases. — See *Johnson v. State*, 79 Ga. App. 210, 53 S.E.2d 498 (1949) (illegal possession of whiskey); *Gray v. State*, 151 Ga. App. 684, 261 S.E.2d 402 (1979) (rape); *Cosby v. State*, 151 Ga. App. 676, 261 S.E.2d 424 (1979) (burglary).

Cited in *Thompson v. State*, 166 Ga. 758, 144 S.E. 301 (1928); *Robinson v. State*, 43

Ga. App. 129, 157 S.E. 884 (1931); Taylor v. State, 44 Ga. App. 821, 163 S.E. 271 (1932); Hatcher v. State, 176 Ga. 454, 168 S.E. 278 (1933); Jones v. State, 52 Ga. App. 83, 182 S.E. 527 (1935); Wells v. State, 53 Ga. App. 496, 186 S.E. 593 (1936); Kryder v. State, 57 Ga. App. 200, 194 S.E. 890 (1938); Moyers v. State, 58 Ga. App. 237, 198 S.E. 283 (1938); Etheridge v. State, 187 Ga. 30, 199 S.E. 185 (1938); Sheffield v. State, 188 Ga. 1, 2 S.E.2d 657 (1939); Allen v. State, 194 Ga. 430, 22 S.E.2d 65 (1942); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263 (1943); Lewis v. State, 196 Ga. 755, 27 S.E.2d 659 (1943); Grant v. State, 74 Ga. App. 493, 40 S.E.2d 406 (1946); Marcus v. State, 76 Ga. App. 581, 46 S.E.2d 770 (1948); Burke v. State, 76 Ga. App. 612, 47 S.E.2d 116 (1948); Thompson v. State, 204 Ga. 407, 50 S.E.2d 74 (1948); Davis v. State, 84 Ga. App. 83, 65 S.E.2d 644 (1951); Howard v. State, 86 Ga. App. 85, 70 S.E.2d 870 (1952); Hobbs v. State, 98 Ga. App. 816, 107 S.E.2d 253 (1959); Townsend v. State, 115 Ga. App. 529, 154 S.E.2d 788 (1967); Wright v. State, 121 Ga. App. 21, 172 S.E.2d 457 (1970); Griffith v. State, 124 Ga. App.

505, 184 S.E.2d 477 (1971); Wheeler v. State, 228 Ga. 402, 185 S.E.2d 900 (1971); Williams v. State, 126 Ga. App. 350, 190 S.E.2d 785 (1972); King v. State, 230 Ga. 581, 198 S.E.2d 305 (1973); Powell v. State, 235 Ga. 208, 219 S.E.2d 109 (1975); Wadley v. State, 139 Ga. App. 744, 229 S.E.2d 545 (1976); Phillips v. State, 144 Ga. App. 690, 242 S.E.2d 343 (1978); Ross v. State, 245 Ga. 173, 263 S.E.2d 913 (1980); Holmes v. State, 155 Ga. App. 115, 270 S.E.2d 327 (1980); Roman v. State, 155 Ga. App. 355, 271 S.E.2d 21 (1980); Godbee v. State, 155 Ga. App. 671, 272 S.E.2d 537 (1980); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685 (1980); D.O.D. v. State, 156 Ga. App. 301, 274 S.E.2d 696 (1980); Sell v. State, 156 Ga. App. 333, 274 S.E.2d 723 (1980); Meeks v. State, 160 Ga. App. 233, 286 S.E.2d 520 (1981); Cornish v. State, 187 Ga. App. 140, 369 S.E.2d 515 (1988); Hicks v. State, 195 Ga. App. 887, 395 S.E.2d 341 (1990); Dumas v. State, 199 Ga. App. 582, 405 S.E.2d 571 (1991); Evans v. State, 233 Ga. App. 879, 506 S.E.2d 169 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Statute inapplicable to contempt case. — Criminal contempt is not strictly speaking a “criminal case” and as such does not require

proof beyond a reasonable doubt as required for other criminal cases. 1979 Op. Att’y Gen. No. 79-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 185. 29A Am. Jur. 2d, Evidence, § 1414.

ALR. — Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 7 ALR 568; 68 ALR 1309.

Propriety of instructions as to the significance of evidence concerning the defendant’s good character as an element bearing upon the question of reasonable doubt, 10 ALR 8; 68 ALR 1068.

Duty to charge as to reasonable doubt as between different degrees of crime of included offenses, 20 ALR 1258.

Instruction on circumstantial evidence in criminal case, 89 ALR 1379.

Admissibility and weight on question of materiality of misrepresentation, of testimony of officers or employees of insurer to

effect that application would not have been accepted but for the misrepresentation, or that there was a rule or policy to reject risks of the kind that would have been shown but for the misrepresentation, 115 ALR 100.

Instruction applying rule of reasonable doubt specifically to particular matter or defense as curing instruction placing burden of proof upon defendant in that regard, 120 ALR 591.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 ALR 119; 91 ALR2d 1046.

Reasonable doubt rule as applicable to evidence in civil case of facts amounting to felony or misdemeanor, 124 ALR 1378.

Rule of reasonable doubt as applicable to reasonable doubt on part of individual juror, 137 ALR 394.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 ALR 1199.

Use of term "actual doubt" in instruction on reasonable doubt, 147 ALR 1046.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle, 35 ALR3d 1418.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 ALR3d 988.

Instructions to jury: sympathy to accused as appropriate factor in jury consideration, 72 ALR3d 842.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 ALR3d 717.

Admissibility of DNA identification evidence, 84 ALR4th 313.

24-4-6. When conviction may be had on circumstantial evidence.

To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. (Penal Code 1895, § 984; Penal Code 1910, § 1010; Code 1933, § 38-109.)

History of Code section. — This Code section is derived from the decisions in *Martin v. State*, 38 Ga. 293 (1868); *Carter v. State*, 46 Ga. 637 (1872); and *Simmons v. State*, 85 Ga. 224, 11 S.E. 555 (1890).

Law reviews. — For survey of cases dealing

with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 *Mercer L. Rev.* 27 (1978). For annual survey of criminal law, see 38 *Mercer L. Rev.* 129 (1986). For article, "Criminal Law," see 53 *Mercer L. Rev.* 209 (2001).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EXCLUSION OF REASONABLE HYPOTHESIS

INSTRUCTIONS

SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE

APPEAL

General Consideration

Meaning of this statute is so clear and manifest as not to require explanation. *Morris v. State*, 176 Ga. 243, 167 S.E. 509 (1933) (see O.C.G.A. § 24-4-6).

Statute constitutes standard of proof. — Although O.C.G.A. § 24-4-6 is designated as a rule of evidence, in substance the statute is actually a standard of proof required for a conviction based upon circumstantial evidence. *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987).

Standard in federal court. — In setting out the federal constitutional standard in *Jackson v. Virginia* 443 U.S. 307 (1979), the

United States Supreme Court expressly rejected the standard of proof now embodied in O.C.G.A. § 24-4-6, and that state standard has no place in a federal appellate court's sufficiency of the evidence analysis in a habeas corpus case. *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987); *Bishop v. Kelso*, 914 F.2d 1468 (11th Cir. 1990).

Question of admissibility of circumstantial evidence is largely in the discretion of the trial court, and when facts are such that the jury may or may not make an inference pertinent to the issue, it is not error to permit the jury to hear the circumstantial evidence. *Bond v. State*, 104 Ga. App. 627,

122 S.E.2d 310 (1961).

Statute applicable to municipal court sitting as a jury. *Hanjaras v. City of Atlanta*, 6 Ga. App. 575, 65 S.E. 356 (1909); *Porter v. Mayor of Athens*, 18 Ga. App. 232, 89 S.E. 173 (1916) (see O.C.G.A. § 24-4-6).

Statute applies to circumstantial evidence, not direct evidence. — Defendant's reliance on the circumstantial evidence rule of O.C.G.A. § 24-4-6 to assert defendant's innocence for the crimes of armed robbery and hijacking a motor vehicle was misplaced as use of that rule presumed that only circumstantial evidence was offered, but, in fact, direct evidence was offered in the form of the victim's positive identification of defendant at the scene of the arrest. *Lane v. State*, 255 Ga. App. 274, 564 S.E.2d 857 (2002).

Trial court did not err in denying defendant's motion for directed verdict of acquittal as direct evidence that defendant fired at the victim and defendant's own admission that defendant fired at the victim was sufficient to submit the question of whether defendant was guilty of aggravated assault to the jury; no error occurred pursuant to O.C.G.A. § 24-4-6, involving a conviction based solely on circumstantial evidence, as the state offered more than circumstantial evidence to support the state's case against defendant. *Cobb v. State*, 268 Ga. App. 66, 601 S.E.2d 443 (2004).

Defendant's claim that the evidence was insufficient to disprove alternative hypotheses of innocence necessarily presumed that the evidence was entirely circumstantial, failed in light of the direct evidence of the victim's in-court identification of defendant. *Banks v. State*, 269 Ga. App. 653, 605 S.E.2d 47 (2004).

In attacking defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony arising from a shooting death, defendant's reliance on O.C.G.A. § 24-4-6 was misplaced because there was direct evidence of defendant's guilt in the form of defendant's own statement and eyewitness testimony that defendant approached the victim's car armed with a pistol and that multiple shots were fired. *Wallace v. State*, 279 Ga. 26, 608 S.E.2d 634 (2005).

When defendant sat in a stolen would-be getaway car while the accomplice murdered

a victim, and then defendant and the accomplice abandoned that car and fled the scene, defendant's conviction for the accomplice's crime was not based solely on circumstantial evidence, as a neighbor saw a person leaning into the stolen car who fit defendant's physical appearance, and defendant admitted to being that person. *Jackson v. State*, 274 Ga. App. 279, 617 S.E.2d 249 (2005).

Evidence supported a defendant's conviction for possession of a firearm by a convicted felon as defendant's possession of the victim's handgun and shotgun on the night of the crimes was shown by the victim's direct testimony since: (1) the victim testified that two men forced their way into the victim's house, hit the victim in the head with a blunt object, recovered a .380 caliber handgun and a 20-gauge single-barrel shotgun, forced the victim to give them thousands of dollars the victim had hidden in the attic; (2) during a consensual search, the police found a .380 caliber handgun hidden in the defendant's bedroom that was identified as the victim's by the victim and that bore the same serial number as the victim's gun; and (3) the victim identified defendant in a photo array and at trial; the evidence authorized the jury to find that the defendant was in actual possession of the handgun on February 21 and that the defendant continued to be in at least constructive possession of the gun when the gun was found in the defendant's bedroom. *Tanksley v. State*, 281 Ga. App. 61, 635 S.E.2d 353 (2006).

Defendant's argument that the evidence presented by the state failed to exclude every alternative, reasonable hypothesis failed; the reasonable hypothesis rule, under O.C.G.A. § 24-4-6, had no application to the case as there was direct evidence of the defendant's guilt in the form of the victim's prior inconsistent statements about being beaten by the defendant. *Meeks v. State*, 281 Ga. App. 334, 636 S.E.2d 77 (2006).

In a drug possession case, the defendant was not convicted based on circumstantial evidence that, in violation of O.C.G.A. § 24-4-6, failed to exclude every other hypothesis save that of the defendant's guilt; the passenger's testimony that the defendant handed the passenger drugs and told the passenger to discard the drugs provided direct evidence that the defendant possessed

General Consideration (Cont'd)

more than an ounce of marijuana in violation of O.C.G.A. § 16-13-30. *Curtis v. State*, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, 2007 Ga. LEXIS 203 (Ga. 2007).

Because the victim's testimony provided direct evidence of defendant's guilt, the rule that the facts had to exclude every other reasonable hypothesis save that of the guilt of the accused was not at issue. *Mack v. State*, 294 Ga. App. 518, 669 S.E.2d 487 (2008).

Because a codefendant's prior inconsistent statements were based on the codefendant's eyewitness account of what occurred, the statements were direct evidence of the defendant's guilt, rendering the reasonable hypothesis rule inapplicable. *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

There was no merit to the defendant's argument that the state's evidence failed to exclude every reasonable hypothesis save that of the defendant's guilt because the prior statement of the defendant's father to an investigator provided direct evidence that the defendant had moved and supported the charge that the defendant had changed residences without notifying the local authorities as required by O.C.G.A. § 42-1-12. *State v. Canup*, 300 Ga. App. 678, 686 S.E.2d 275 (2009).

Venue may be shown by circumstantial evidence. *Graham v. State*, 16 Ga. App. 221, 84 S.E. 981 (1915); *Dickerson v. State*, 186 Ga. 557, 199 S.E. 142 (1938).

Case involving life or imprisonment. — Statute should never be relaxed in a case involving life or imprisonment. *Cook v. State*, 114 Ga. 523, 40 S.E. 703 (1902); *Creech v. State*, 30 Ga. App. 631, 118 S.E. 501 (1923) (see O.C.G.A. § 24-4-6).

Incriminary statements. — When the defendant makes incriminatory statements after the victim's death, the case is not one depending entirely upon circumstantial evidence. *Phipps v. State*, 203 Ga. App. 128, 416 S.E.2d 319, cert. denied, 203 Ga. App. 907, 416 S.E.2d 319 (1992).

Defendant was not convicted of possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b) merely based on circumstantial evidence that failed, in violation of O.C.G.A. § 24-4-6, to exclude every other reasonable hypothesis except that of

the defendant's guilt; the defendant made several admissions to officers that constituted direct evidence, including that the defendant had a gun in the defendant's bedroom and that the defendant used the gun to hunt. *Parramore v. State*, 277 Ga. App. 372, 626 S.E.2d 567 (2006).

Confession is not circumstantial evidence; thus, defendant was not entitled to directed verdict under O.C.G.A. § 24-4-6 since the defendant failed to prove that defendant's confession was unlawfully obtained. *Bigham v. State*, 222 Ga. App. 353, 474 S.E.2d 254 (1996).

Defendant's admission that the defendant shot the victim but did so in self-defense removed the case from the rule that a conviction based entirely on circumstantial evidence can be affirmed only if every reasonable hypothesis other than guilt is excluded. *Wright v. State*, 294 Ga. App. 20, 668 S.E.2d 505 (2008).

Proven facts must be inconsistent with innocence to warrant a conviction on circumstantial evidence. *Riley v. State*, 1 Ga. App. 651, 57 S.E. 1031 (1907); *Middleton v. State*, 7 Ga. App. 1, 66 S.E. 22 (1909).

When the circumstances authorize a mere conjecture of guilt. *Fowler v. State*, 32 Ga. App. 361, 123 S.E. 43 (1924); *Vinson v. State*, 120 Ga. App. 425, 170 S.E.2d 749 (1969); *Jackson v. State*, 152 Ga. App. 441, 263 S.E.2d 181 (1979); *Hall v. State*, 155 Ga. App. 211, 270 S.E.2d 377 (1980).

Cited in *Burgess v. State*, 164 Ga. 92, 137 S.E. 768 (1927); *Hall v. State*, 36 Ga. App. 670, 137 S.E. 915 (1927); *Heath v. State*, 38 Ga. App. 269, 143 S.E. 605 (1928); *North v. State*, 39 Ga. App. 119, 146 S.E. 347 (1929); *Cain v. State*, 41 Ga. App. 333, 153 S.E. 79 (1930); *Durden v. State*, 42 Ga. App. 345, 156 S.E. 294 (1930); *Coker v. State*, 42 Ga. App. 385, 156 S.E. 299 (1930); *Robinson v. State*, 43 Ga. App. 129, 157 S.E. 884 (1931); *Adrian v. State*, 43 Ga. App. 424, 159 S.E. 142 (1931); *Faulkner v. State*, 43 Ga. App. 763, 160 S.E. 117 (1931); *Serritt v. State*, 44 Ga. App. 269, 161 S.E. 279 (1931); *Crowe v. State*, 44 Ga. App. 719, 162 S.E. 849 (1932); *Yopp v. State*, 175 Ga. 314, 165 S.E. 29 (1932); *Long v. State*, 175 Ga. 274, 165 S.E. 75 (1932); *Cole v. State*, 178 Ga. 674, 173 S.E. 655 (1934); *Morris v. State*, 51 Ga. App. 145, 179 S.E. 822 (1935); *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1937); *Roberson v.*

State, 190 Ga. 664, 10 S.E.2d 403 (1940); Griffin v. State, 195 Ga. 368, 24 S.E.2d 399 (1943); Lewis v. State, 196 Ga. 755, 27 S.E.2d 659 (1943); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943); Smith v. State, 200 Ga. 188, 36 S.E.2d 350 (1945); Oakes v. State, 201 Ga. 365, 39 S.E.2d 866 (1946); White v. State, 203 Ga. 340, 46 S.E.2d 500 (1948); Palmer v. State, 76 Ga. App. 881, 47 S.E.2d 604 (1948); Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948); Buchanan v. State, 77 Ga. App. 435, 49 S.E.2d 157 (1948); Redwine v. State, 207 Ga. 318, 61 S.E.2d 481 (1950); Goss v. State, 82 Ga. App. 533, 61 S.E.2d 570 (1950); Heughan v. State, 82 Ga. App. 640, 61 S.E.2d 685 (1950); Williams v. State, 83 Ga. App. 252, 63 S.E.2d 442 (1951); Walker v. State, 208 Ga. 99, 65 S.E.2d 403 (1951); Gentry v. State, 208 Ga. 370, 66 S.E.2d 913 (1951); Peterson v. State, 85 Ga. App. 598, 69 S.E.2d 831 (1952); Jackson v. State, 210 Ga. 303, 79 S.E.2d 812 (1954); Henderson v. State, 210 Ga. 680, 82 S.E.2d 638 (1954); Bowen v. State, 90 Ga. App. 407, 83 S.E.2d 255 (1954); Peters v. State, 211 Ga. 370, 86 S.E.2d 106 (1955); Stinnett v. State, 91 Ga. App. 875, 87 S.E.2d 354 (1955); Parise v. State, 92 Ga. App. 598, 89 S.E.2d 673 (1955); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d 330 (1956); McCluskey v. State, 212 Ga. 396, 93 S.E.2d 341 (1956); Brown v. State, 94 Ga. App. 542, 95 S.E.2d 302 (1956); Collis v. Ashe, 212 Ga. 746, 95 S.E.2d 634 (1956); Jackson v. State, 213 Ga. 275, 98 S.E.2d 571 (1957); Farris v. State, 96 Ga. App. 320, 99 S.E.2d 911 (1957); Bobo v. State, 101 Ga. App. 48, 112 S.E.2d 679 (1960); McGill v. State, 106 Ga. App. 482, 127 S.E.2d 332 (1962); Williams v. State, 106 Ga. App. 544, 127 S.E.2d 492 (1962); Stewart v. State, 112 Ga. App. 193, 144 S.E.2d 561 (1965); Kennemore v. State, 223 Ga. 41, 153 S.E.2d 307 (1967); Arthur v. State, 118 Ga. App. 350, 163 S.E.2d 752 (1968); DePalma v. State, 225 Ga. 465, 169 S.E.2d 801 (1969); Wright v. State, 121 Ga. App. 21, 172 S.E.2d 457 (1970); Gee v. State, 121 Ga. App. 41, 172 S.E.2d 480 (1970); Thomas v. State, 121 Ga. App. 91, 172 S.E.2d 860 (1970); Walden v. State, 121 Ga. App. 142, 173 S.E.2d 110 (1970); Neal v. State, 121 Ga. App. 817, 175 S.E.2d 920 (1970); Miller v. State, 122 Ga. App. 553, 177 S.E.2d 838 (1970); McGill v. State, 123 Ga. App. 20, 179 S.E.2d 297 (1970); Craft v. State, 124 Ga. App. 57, 183

S.E.2d 37 (1971); Griffith v. State, 124 Ga. App. 505, 184 S.E.2d 477 (1971); Varnum v. State, 125 Ga. App. 57, 186 S.E.2d 485 (1971); T.K. v. State, 126 Ga. App. 269, 190 S.E.2d 588 (1972); Simmons v. State, 129 Ga. App. 107, 198 S.E.2d 718 (1973); Bell v. State, 129 Ga. App. 783, 201 S.E.2d 340 (1973); Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973); Kendricks v. State, 231 Ga. 670, 203 S.E.2d 859 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); B.N.M. v. State, 131 Ga. App. 353, 206 S.E.2d 112 (1974); Banks v. State, 132 Ga. App. 809, 209 S.E.2d 252 (1974); Griffin v. State, 133 Ga. App. 126, 210 S.E.2d 174 (1974); Ward v. State, 233 Ga. 251, 210 S.E.2d 772 (1974); Johnson v. State, 133 Ga. App. 394, 211 S.E.2d 20 (1974); Phillips v. State, 133 Ga. App. 461, 211 S.E.2d 411 (1974); Moreland v. State, 133 Ga. App. 723, 212 S.E.2d 866 (1975); Woodruff v. State, 233 Ga. 840, 213 S.E.2d 689 (1975); Huff v. State, 135 Ga. App. 134, 217 S.E.2d 187 (1975); McKenty v. State, 135 Ga. App. 271, 217 S.E.2d 388 (1975); Cunningham v. State, 235 Ga. 126, 218 S.E.2d 854 (1975); Pinson v. State, 235 Ga. 188, 219 S.E.2d 125 (1975); Welch v. State, 235 Ga. 243, 219 S.E.2d 151 (1975); Woodall v. State, 235 Ga. 525, 221 S.E.2d 794 (1975); Huncke v. State, 137 Ga. App. 299, 223 S.E.2d 492 (1976); Brown v. State, 137 Ga. App. 331, 223 S.E.2d 753 (1976); Dill v. State, 236 Ga. 803, 225 S.E.2d 300 (1976); Hudson v. State, 237 Ga. 241, 227 S.E.2d 257 (1976); Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976); Pace v. State, 138 Ga. App. 839, 227 S.E.2d 436 (1976); Duhart v. State, 237 Ga. 426, 228 S.E.2d 822 (1976); Tucker v. State, 237 Ga. 740, 229 S.E.2d 749 (1976); Bass v. State, 140 Ga. App. 788, 232 S.E.2d 98 (1976); Ward v. State, 238 Ga. 367, 233 S.E.2d 175 (1977); Reed v. State, 238 Ga. 457, 233 S.E.2d 369 (1977); Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977); Carter v. State, 239 Ga. 509, 238 S.E.2d 57 (1977); State v. Chambers, 240 Ga. 76, 239 S.E.2d 324 (1977); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977); Campbell v. State, 240 Ga. 352, 240 S.E.2d 828 (1977); Denham v. State, 144 Ga. App. 373, 241 S.E.2d 295 (1977); Thomas v. State, 240 Ga. 454, 241 S.E.2d 204 (1978); Simmons v. State, 144 Ga. App. 618, 241 S.E.2d 490 (1978); Bain v. State, 144 Ga. App. 470, 241 S.E.2d 586 (1978); Phillips v. State, 144 Ga. App. 690,

General Consideration (Cont'd)

242 S.E.2d 343 (1978); Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978); Copeland v. State, 241 Ga. 370, 245 S.E.2d 642 (1978); Gee v. State, 146 Ga. App. 528, 246 S.E.2d 720 (1978); Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978); Bremer v. State, 148 Ga. App. 461, 251 S.E.2d 355 (1978); Smith v. State, 149 Ga. App. 378, 254 S.E.2d 498 (1979); Dukes v. State, 150 Ga. App. 787, 258 S.E.2d 906 (1979); Boyd v. State, 244 Ga. 130, 259 S.E.2d 71 (1979); Jarrard v. State, 152 Ga. App. 553, 263 S.E.2d 444 (1979); Howard v. State, 153 Ga. App. 171, 264 S.E.2d 704 (1980); Paul v. State, 245 Ga. 505, 265 S.E.2d 806 (1980); Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980); Banks v. State, 246 Ga. 1, 268 S.E.2d 630 (1980); Adams v. State, 246 Ga. 119, 269 S.E.2d 11 (1980); Morrison v. State, 155 Ga. App. 234, 270 S.E.2d 397 (1980); Morrow v. State, 155 Ga. App. 571, 271 S.E.2d 707 (1980); Thompson v. State, 156 Ga. App. 1, 273 S.E.2d 894 (1980); Smith v. State, 156 Ga. App. 102, 273 S.E.2d 918 (1980); Nelson v. State, 247 Ga. 172, 274 S.E.2d 317 (1981); Jones v. State, 247 Ga. 268, 275 S.E.2d 67 (1981); Brooks v. State, 157 Ga. App. 220, 276 S.E.2d 890 (1981); Holt v. State, 247 Ga. 648, 278 S.E.2d 390 (1981); Meeks v. State, 160 Ga. App. 233, 286 S.E.2d 520 (1981); Thomas v. State, 161 Ga. App. 159, 288 S.E.2d 112 (1982); Matthews v. State, 161 Ga. App. 1, 289 S.E.2d 278 (1982); Howard v. State, 161 Ga. App. 743, 289 S.E.2d 815 (1982); Tucker v. State, 249 Ga. 323, 290 S.E.2d 97 (1982); Thompson v. State, 163 Ga. App. 35, 292 S.E.2d 470 (1982); Nicholson v. State, 249 Ga. 775, 294 S.E.2d 485 (1982); Highfield v. State, 163 Ga. App. 599, 295 S.E.2d 350 (1982); Zant v. Nelson, 250 Ga. 152, 296 S.E.2d 590 (1982); Murdix v. State, 250 Ga. 272, 297 S.E.2d 265 (1982); Williams v. State, 164 Ga. App. 621, 298 S.E.2d 306 (1982); Smith v. State, 164 Ga. App. 624, 298 S.E.2d 587 (1982); Jones v. State, 165 Ga. App. 498, 299 S.E.2d 576 (1983); Pattillo v. State, 250 Ga. 510, 299 S.E.2d 710 (1983); Pugh v. State, 250 Ga. 668, 300 S.E.2d 504 (1983); Brown v. State, 250 Ga. 862, 302 S.E.2d 347 (1983); Conner v. State, 251 Ga. 113, 303 S.E.2d 266 (1983); Black v. State, 167 Ga. App. 204, 305 S.E.2d 837 (1983); Hallmark v. State, 169 Ga. App. 8, 311 S.E.2d 219 (1983); Campbell v. State, 169 Ga. App. 112, 312 S.E.2d 136 (1983); Droke v. State, 252 Ga. 472, 314 S.E.2d 230 (1984); Mercer v. State, 169 Ga. App. 723, 314 S.E.2d 729 (1984); Byse v. State, 169 Ga. App. 856, 315 S.E.2d 58 (1984); White v. State, 253 Ga. 106, 317 S.E.2d 196 (1984); Brown v. State, 170 Ga. App. 398, 317 S.E.2d 207 (1984); Parker v. State, 170 Ga. App. 333, 317 S.E.2d 209 (1984); Saine v. State, 170 Ga. App. 610, 317 S.E.2d 650 (1984); Christmas v. State, 171 Ga. App. 4, 318 S.E.2d 682 (1984); Worrell v. State, 173 Ga. App. 820, 328 S.E.2d 232 (1985); Hatcher v. State, 175 Ga. App. 768, 334 S.E.2d 709 (1985); Precision Printers, Inc. v. Central Mut. Ins. Co., 175 Ga. App. 890, 334 S.E.2d 914 (1985); Akins v. State, 176 Ga. App. 254, 335 S.E.2d 486 (1985); Lee v. State, 177 Ga. App. 8, 338 S.E.2d 445 (1985); Richardson v. State, 177 Ga. App. 48, 338 S.E.2d 506 (1985); Stoker v. State, 177 Ga. App. 94, 338 S.E.2d 525 (1985); Wilcox v. Ford, 626 F. Supp. 760 (M.D. Ga. 1985); Moore v. State, 255 Ga. 519, 340 S.E.2d 888 (1986); Black v. State, 255 Ga. 668, 341 S.E.2d 436 (1986); Johnson v. State, 178 Ga. App. 219, 342 S.E.2d 706 (1986); Bing v. State, 178 Ga. App. 288, 342 S.E.2d 762 (1986); Youngblood v. State, 179 Ga. App. 163, 345 S.E.2d 634 (1986); Cooper v. State, 256 Ga. 234, 347 S.E.2d 553 (1986); Shaw v. State, 179 Ga. App. 807, 348 S.E.2d 132 (1986); Lewis v. State, 180 Ga. App. 369, 349 S.E.2d 257 (1986); Atchison v. State, 181 Ga. App. 351, 352 S.E.2d 201 (1986); Crenshaw v. State, 183 Ga. App. 527, 359 S.E.2d 419 (1987); Goins v. State, 184 Ga. App. 452, 361 S.E.2d 853 (1987); Fatora v. State, 185 Ga. App. 15, 363 S.E.2d 566 (1987); Farmer v. State, 185 Ga. App. 512, 364 S.E.2d 639 (1988); Cook v. State, 185 Ga. App. 585, 364 S.E.2d 912 (1988); Huff v. State, 258 Ga. 108, 365 S.E.2d 430 (1988); Palmer v. State, 186 Ga. App. 892, 369 S.E.2d 38 (1988); Nebbitt v. State, 187 Ga. App. 265, 370 S.E.2d 1 (1988); Walker v. State, 187 Ga. App. 631, 371 S.E.2d 199 (1988); In re C.A.A., 187 Ga. App. 691, 371 S.E.2d 247 (1988); In re J.G., 188 Ga. App. 856, 374 S.E.2d 797 (1988); Gilbert v. State, 259 Ga. 211, 378 S.E.2d 683 (1989); Schley v. State, 191 Ga. App. 412, 382 S.E.2d 120 (1989); Shortt v. State, 191 Ga. App. 511, 382 S.E.2d 209 (1989); Champion v. State, 192 Ga. App. 43, 383 S.E.2d 565 (1989); Jackson v. State, 193 Ga. App. 636,

388 S.E.2d 881 (1989); *Jones v. State*, 193 Ga. App. 837, 389 S.E.2d 402 (1989); *Solomon v. State*, 195 Ga. App. 684, 394 S.E.2d 570 (1990); *Norton v. State*, 195 Ga. App. 737, 395 S.E.2d 34 (1990); *Hicks v. State*, 195 Ga. App. 887, 395 S.E.2d 341 (1990); *Wofford v. State*, 196 Ga. App. 284, 395 S.E.2d 630 (1990); *Allen v. State*, 199 Ga. App. 365, 405 S.E.2d 94 (1991); *Robinson v. State*, 199 Ga. App. 368, 405 S.E.2d 101 (1991); *Henderson v. State*, 200 Ga. App. 200, 407 S.E.2d 448 (1991); *In re J.T.M.*, 200 Ga. App. 636, 409 S.E.2d 256 (1991); *Fitz v. State*, 201 Ga. App. 83, 410 S.E.2d 186 (1991); *Farrie v. State*, 201 Ga. App. 549, 411 S.E.2d 561 (1991); *Carswell v. State*, 201 Ga. App. 746, 412 S.E.2d 572 (1991); *Williams v. State*, 204 Ga. App. 43, 418 S.E.2d 387 (1992); *Bean v. State*, 204 Ga. App. 242, 418 S.E.2d 798 (1992); *Hill v. State*, 207 Ga. App. 65, 426 S.E.2d 915 (1993); *Thomas v. State*, 207 Ga. App. 140, 426 S.E.2d 923 (1993); *Griffin v. State*, 212 Ga. App. 411, 441 S.E.2d 897 (1994); *Gardiner v. State*, 264 Ga. 329, 444 S.E.2d 300 (1994); *Anderson v. State*, 215 Ga. App. 426, 451 S.E.2d 103 (1994); *Shutt v. State*, 215 Ga. App. 617, 451 S.E.2d 530 (1994); *Alford v. State*, 224 Ga. App. 451, 480 S.E.2d 893 (1997); *Parris v. State*, 226 Ga. App. 854, 487 S.E.2d 690 (1997); *Ely v. State*, 241 Ga. App. 896, 528 S.E.2d 532 (2000); *Brannon v. State*, 243 Ga. App. 28, 530 S.E.2d 761 (2000); *Brinson v. State*, 272 Ga. 345, 529 S.E.2d 129 (2000); *Stewart v. State*, 243 Ga. App. 860, 534 S.E.2d 544 (2000); *Dodson v. State*, 244 Ga. App. 94, 534 S.E.2d 815 (2000); *In re E.G.W.*, 244 Ga. App. 119, 534 S.E.2d 869 (2000); *Perkins v. State*, 244 Ga. App. 412, 535 S.E.2d 802 (2000); *Fowler v. State*, 245 Ga. App. 795, 538 S.E.2d 869 (2000); *Carter v. State*, 246 Ga. App. 891, 543 S.E.2d 42 (2000); *Eckman v. State*, 274 Ga. 63, 548 S.E.2d 310 (2001); *Hayes v. State*, 249 Ga. App. 857, 549 S.E.2d 813 (2001); *In re G.J.*, 251 Ga. App. 299, 554 S.E.2d 269 (2001); *Kennedy v. State*, 274 Ga. 396, 554 S.E.2d 178 (2001); *McClam v. State*, 257 Ga. App. 70, 570 S.E.2d 380 (2002); *Lester v. State*, 267 Ga. App. 795, 600 S.E.2d 787 (2004); *Pitmon v. State*, 265 Ga. App. 655, 595 S.E.2d 360 (2004); *Stack-Thorp v. State*, 270 Ga. App. 796, 608 S.E.2d 289 (2004); *Buruca v. State*, 278 Ga. App. 650, 629 S.E.2d 438 (2006); *Perez v. State*, 284 Ga. App. 212, 643 S.E.2d 792 (2007); *Chandler v. State*, 281

Ga. 712, 642 S.E.2d 646 (2007); *Banks v. State*, 281 Ga. 678, 642 S.E.2d 679 (2007); *Drammeh v. State*, 285 Ga. App. 545, 646 S.E.2d 742 (2007); *In the Interest of Q.P.*, 286 Ga. App. 225, 648 S.E.2d 731 (2007); *Bell v. State*, 291 Ga. App. 169, 661 S.E.2d 207 (2008); *Howard v. State*, 291 Ga. App. 386, 662 S.E.2d 203 (2008); *McKinney v. State*, 293 Ga. App. 419, 667 S.E.2d 210 (2008); *Crutchfield v. State*, 295 Ga. App. 490, 672 S.E.2d 467 (2009); *Durham v. State*, 295 Ga. App. 734, 673 S.E.2d 80 (2009); *Connelly v. State*, 295 Ga. App. 765, 673 S.E.2d 274 (2009); *Hinds v. State*, 296 Ga. App. 80, 673 S.E.2d 598 (2009); *Marshall v. State*, 285 Ga. 351, 676 S.E.2d 201 (2009); *Wells v. State*, 297 Ga. App. 153, 676 S.E.2d 821 (2009).

Exclusion of Reasonable Hypothesis

In general. — When the state relies for a conviction on circumstantial evidence alone, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis except that of the guilt of the accused. *Amorous v. State*, 1 Ga. App. 313, 57 S.E. 999 (1907); *Toomer v. State*, 130 Ga. 63, 60 S.E. 198 (1908); *Carter v. State*, 57 Ga. App. 180, 194 S.E. 842 (1938); *Blakeley v. State*, 78 Ga. App. 516, 51 S.E.2d 598 (1949); *McQuire v. State*, 82 Ga. App. 132, 60 S.E.2d 526 (1950); *Diggs v. State*, 90 Ga. App. 853, 84 S.E.2d 611 (1954); *Crane v. State*, 123 Ga. App. 226, 180 S.E.2d 289 (1971); *Ridley v. State*, 232 Ga. 646, 208 S.E.2d 466 (1974); *Wright v. State*, 147 Ga. App. 111, 248 S.E.2d 183 (1978); *Barnett v. State*, 153 Ga. App. 430, 265 S.E.2d 348 (1980); *Perry v. State*, 158 Ga. App. 349, 280 S.E.2d 390 (1981); *Johnson v. State*, 159 Ga. App. 497, 283 S.E.2d 711 (1981).

If the state relies upon circumstantial evidence, that evidence must be so strong as to exclude every other reasonable hypothesis save that of the guilt of the accused. It must be inconsistent with the accused's innocence. This court has ruled on several occasions that, in cases involving life or liberty, this rule must not be relaxed. *Parks v. State*, 202 Ga. 84, 42 S.E.2d 103 (1947).

In a trial for aggravated assault, although there were certain discrepancies in the evidence, and a portion of the evidence was circumstantial rather than direct, the quantum of evidence in the defendant's favor fell

Exclusion of Reasonable Hypothesis (Cont'd)

far short of that necessary to “demand” a verdict of acquittal; since there was direct evidence pointing to the same conclusion as the circumstantial evidence, the verdict was not disturbed on appeal. *Cobb v. State*, 195 Ga. App. 429, 393 S.E.2d 723 (1990).

In a prosecution of the offense of terroristic threats, the state’s failure to present evidence excluding a reasonable hypothesis of innocence resulted in a failure of proof in regard to several elements of the crime charged and should have precluded the jury’s return of a verdict of guilty. *Cooley v. State*, 219 Ga. App. 176, 464 S.E.2d 619 (1995).

Circumstantial evidence is worth nothing if circumstances are reasonably consistent with the hypothesis of innocence as well as the hypothesis of guilt. *Johnson v. State*, 159 Ga. App. 497, 283 S.E.2d 711 (1981).

“Exclusion of reasonable hypothesis” only applied in cases when evidence was purely circumstantial; hence, the defendant could not benefit from the that legal principle when all the state’s evidence, including the identification evidence, was direct evidence. *Morales v. State*, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

Term “hypothesis” refers to such reasonable inferences as are ordinarily drawn by men in the light of their experience in everyday life. *White v. State*, 18 Ga. App. 214, 89 S.E. 175 (1916); *Wrisper v. State*, 193 Ga. 157, 17 S.E.2d 714 (1941); *Kalb v. State*, 195 Ga. 544, 25 S.E.2d 24 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976); *Hunter v. State*, 91 Ga. App. 136, 85 S.E.2d 90 (1954); *Townsend v. State*, 115 Ga. App. 529, 154 S.E.2d 788 (1967); *Johnson v. State*, 126 Ga. App. 93, 189 S.E.2d 900 (1972); *D.O.D. v. State*, 156 Ga. App. 301, 274 S.E.2d 696 (1980); *McGee v. State*, 159 Ga. App. 763, 285 S.E.2d 224 (1981); *Barnes v. State*, 175 Ga. App. 621, 334 S.E.2d 205 (1985), aff’d in part, rev’d in part, 255 Ga. 396, 339 S.E.2d 229 (1986); *Holland v. State*, 176 Ga. App. 343, 335 S.E.2d 739 (1985); *Lewis v. State*, 186 Ga. App. 349, 367 S.E.2d 123 (1988); *Redwine v. State*, 188 Ga. App. 638, 373 S.E.2d 804, cert. denied, 188 Ga. App. 912, 373 S.E.2d 804, 489 U.S. 1069, 109 S. Ct. 1347, 103 L. Ed. 2d 816 (1989);

Sanford v. State, 193 Ga. App. 18, 386 S.E.2d 899 (1989).

Reasonableness question for jury. — Whether or not in a given case circumstances are sufficient to exclude every reasonable hypothesis save the guilt of the accused is primarily a question for determination by the jury. *Fortson v. State*, 69 Ga. App. 378, 25 S.E.2d 820 (1943); *Townsend v. State*, 115 Ga. App. 529, 154 S.E.2d 788 (1967); *Brown v. State*, 125 Ga. App. 300, 187 S.E.2d 301 (1972); *Jackson v. State*, 129 Ga. App. 901, 201 S.E.2d 816 (1973); *Neal v. State*, 130 Ga. App. 708, 204 S.E.2d 451 (1974); *Murray v. State*, 135 Ga. App. 264, 217 S.E.2d 293 (1975); *Harris v. State*, 236 Ga. 242, 223 S.E.2d 643 (1976); *Parker v. State*, 140 Ga. App. 92, 230 S.E.2d 99 (1976); *Collins v. State*, 146 Ga. App. 857, 247 S.E.2d 602 (1978); *Dowdy v. State*, 150 Ga. App. 137, 257 S.E.2d 41 (1979); *Anglin v. State*, 244 Ga. 1, 257 S.E.2d 513 (1979); *Butler v. State*, 150 Ga. App. 751, 258 S.E.2d 691 (1979); *Baldwin v. State*, 153 Ga. App. 35, 264 S.E.2d 528 (1980); *Hendrix v. State*, 153 Ga. App. 791, 266 S.E.2d 568 (1980); *Estep v. State*, 154 Ga. App. 1, 267 S.E.2d 314 (1980); *Smith v. State*, 154 Ga. App. 497, 268 S.E.2d 714 (1980); *Humphries v. State*, 154 Ga. App. 596, 269 S.E.2d 90 (1980); *Brewer v. State*, 156 Ga. App. 468, 274 S.E.2d 817 (1980); *Wood v. State*, 156 Ga. App. 810, 275 S.E.2d 694 (1980); *Walker v. State*, 157 Ga. App. 728, 278 S.E.2d 487 (1981); *Barfield v. State*, 160 Ga. App. 228, 286 S.E.2d 516 (1981); *In re J.P.*, 160 Ga. App. 896, 288 S.E.2d 607 (1982).

Question of whether every other reasonable hypothesis has been excluded is generally a question for the jury. *Muckle v. State*, 165 Ga. App. 873, 303 S.E.2d 54 (1983); *Bird v. State*, 178 Ga. App. 687, 344 S.E.2d 468 (1986).

What is a reasonable hypothesis is generally a question for the jury, and there is no yardstick to determine what is a “reasonable” hypothesis save the opinion of the jurors. *Jenkins v. State*, 201 Ga. App. 395, 411 S.E.2d 122 (1991).

Only reasonable hypotheses need be excluded. — To sustain a conviction, it is not required that the evidence exclude every possibility or every inference that may be drawn from proven facts; it is only necessary to exclude reasonable inferences and rea-

sonable hypotheses which may be drawn from the evidence under all the facts and circumstances surrounding the particular case. *Reese v. State*, 94 Ga. App. 387, 94 S.E.2d 741 (1956); *Bobo v. State*, 100 Ga. App. 643, 112 S.E.2d 205 (1959); *Samsell v. State*, 222 Ga. 235, 149 S.E.2d 367 (1966); *Alexander v. State*, 223 Ga. 34, 153 S.E.2d 431 (1967); *Townsend v. State*, 115 Ga. App. 529, 154 S.E.2d 788 (1967); *Vinson v. State*, 120 Ga. App. 425, 170 S.E.2d 749 (1969); *Wheeler v. State*, 228 Ga. 402, 185 S.E.2d 900 (1971); *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972); *Murray v. State*, 135 Ga. App. 264, 217 S.E.2d 293 (1975); *McConnell v. State*, 235 Ga. 366, 220 S.E.2d 5 (1975); *Rogers v. State*, 139 Ga. App. 656, 229 S.E.2d 132 (1976); *Weatherington v. State*, 139 Ga. App. 795, 229 S.E.2d 676 (1976); *Parker v. State*, 142 Ga. App. 396, 236 S.E.2d 141 (1977); *Runnels v. State*, 146 Ga. App. 75, 245 S.E.2d 475 (1978); *Lewis v. State*, 149 Ga. App. 181, 254 S.E.2d 142 (1979); *Dowdy v. State*, 150 Ga. App. 137, 257 S.E.2d 41 (1979); *Creamer v. State*, 150 Ga. App. 428, 258 S.E.2d 212 (1979); *Baldwin v. State*, 153 Ga. App. 35, 264 S.E.2d 528 (1980); *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980); *Brewer v. State*, 156 Ga. App. 468, 274 S.E.2d 817 (1980); *Strickland v. State*, 156 Ga. App. 475, 274 S.E.2d 823 (1980); *Perry v. State*, 158 Ga. App. 349, 280 S.E.2d 390 (1981); *Slack v. State*, 159 Ga. App. 185, 283 S.E.2d 64 (1981); *In re J.P.*, 160 Ga. App. 896, 288 S.E.2d 607 (1982).

Rule as to the sufficiency of circumstantial evidence to support a conviction is that the evidence exclude every reasonable hypothesis except that of guilt, not that it remove every possibility of the innocence of the defendant. *Barfield v. State*, 160 Ga. App. 228, 286 S.E.2d 516 (1981).

To sustain the judgment of conviction, the evidence need not exclude every inference or hypothesis except guilt of the accused, but only reasonable inferences and hypotheses so as to justify the inference, beyond reasonable doubt, of guilt. *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983); *Hulsey v. State*, 210 Ga. App. 251, 435 S.E.2d 713 (1993).

Conviction based solely upon circumstantial evidence must be supported by facts which not only are consistent with guilt of

the accused, but should exclude every reasonable hypothesis save that of the guilt of the accused. This does not mean that the state must exclude every possible hypothesis showing innocence, but any reasonable hypothesis showing innocence. *Robinson v. State*, 168 Ga. App. 569, 309 S.E.2d 845 (1983).

Circumstantial evidence must include only reasonable hypothesis; it need not exclude every inference or hypothesis except that of the defendant's guilt. *Smith v. State*, 257 Ga. 381, 359 S.E.2d 662 (1987).

When a conviction is based on circumstantial evidence, although the circumstantial evidence must exclude every other reasonable hypothesis save the defendant's guilt, it need not exclude every inference or hypothesis. *Mason v. State*, 199 Ga. App. 691, 405 S.E.2d 747 (1991).

When the evidence connecting a defendant to the charged crime is circumstantial, to warrant a conviction the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. *Dean v. State*, 203 Ga. App. 836, 418 S.E.2d 117 (1992).

Beyond the witnesses' identification of a juvenile's hairstyle and clothing as those worn by one of the burglars, and beyond the burglars' going to the juvenile's home to escape, the juvenile's possession of the stolen items soon after the burglary was sufficient to uphold the court's adjudication of delinquency on that charge; furthermore, any reasonable hypothesis of innocence was undermined by the identification of the juvenile's hairstyle and clothes and by the identification of the juvenile's residence as the place to which the burglars escaped. *In the Interest of A.D.*, 282 Ga. App. 586, 639 S.E.2d 556 (2006).

Evidence supporting two theories. — When the circumstantial evidence supports more than one theory, one consistent with guilt and another with innocence, it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant's guilt beyond a reasonable doubt. *Carr v. State*, 119 Ga. App. 540, 167 S.E.2d 707 (1969); *Roberson v. State*, 145 Ga. App. 687, 244 S.E.2d 629 (1978); *Kreager v. State*, 148 Ga. App. 548, 252 S.E.2d 1 (1978); *Johnson v. State*, 159 Ga. App. 497, 283 S.E.2d 711 (1981).

Exclusion of Reasonable Hypothesis (Cont'd)

When evidence failed to establish whether the defendant first took property and then killed the victim and ransacked the house, or first killed the victim and then took the property and ransacked the house, the evidence was insufficient to meet the standard of O.C.G.A. § 24-4-6 and, moreover, was insufficient for a rational trier of fact to have found the defendant guilty of armed robbery beyond a reasonable doubt. *Miles v. State*, 261 Ga. 232, 403 S.E.2d 794 (1991).

Consideration of defendant's explanation. — In making a determination of whether any other reasonable hypothesis exists, the defendant's explanation must be taken into consideration insofar as it is consistent with the circumstantial evidence properly admitted. *Elam v. State*, 125 Ga. App. 427, 187 S.E.2d 920 (1972); *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972); *Wright v. State*, 147 Ga. App. 111, 248 S.E.2d 183 (1978); *Jackson v. State*, 152 Ga. App. 441, 263 S.E.2d 181 (1979); *Barnett v. State*, 153 Ga. App. 430, 265 S.E.2d 348 (1980); *Bogan v. State*, 158 Ga. App. 1, 279 S.E.2d 229 (1981); *Ragan v. State*, 250 Ga. App. 89, 550 S.E.2d 476 (2001).

Evidence was sufficient to support defendant's convictions on four counts of aggravated battery and one count of cruelty to children in the first degree after the 17-month-old daughter of a girlfriend was found with hot-water immersion burns incurred while defendant was watching the daughter for the girlfriend; the jury was free to reject the explanation that defendant had no criminal intent at the time the burns were incurred and that defendant maliciously and intentionally immersed the baby in hot water after the baby soiled a diaper, especially since defendant's explanations were not consistent with the evidence. *Lee v. State*, 275 Ga. App. 93, 619 S.E.2d 767 (2005).

Because sufficient evidence was presented to support a finding that the defendant was intoxicated to the level that the intoxication caused both the defendant's loss of consciousness and an accident resulting in the defendant's truck straddling a ditch with the truck's nose down at close to a 90-degree angle, and the responding deputies testified

that the defendant appeared to be under the influence of alcohol to the extent that it was less safe to drive, the defendant's conviction for violating O.C.G.A. § 40-6-391(a)(1) was supported by sufficient direct evidence of guilt; moreover, based on the evidence, the trial court could reasonably reject as unreasonable the hypothesis that the defendant became intoxicated after the accident occurred. *Stewart v. State*, 288 Ga. App. 735, 655 S.E.2d 328 (2007).

Sufficient evidence supported defendant's convictions on one count of simple assault and two counts of battery, which arose from a fight with a romantic friend, as it was within the jury's province to consider defendant's self-defense theory and reject the defense; jury heard witnesses and observed testimony and was more capable of determining reasonableness of the hypothesis produced by evidence or lack of evidence than appellate court. *Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

Evidence raising an inference of a defendant's innocence improperly excluded. — During a trial for felony murder while in the commission of cruelty to a child arising from the death of a defendant's child from brain trauma sustained while the child was in the defendant's care, the defendant was improperly prevented from cross-examining a person who was in the apartment at the time about the person's history of inappropriate behavior toward the person's own child, including allegations of child abuse, because it was a crucial element of the defense that the person was a likely suspect, and, under O.C.G.A. § 24-4-6, the circumstantial evidence did not exclude the reasonable hypothesis that the person was the likely culprit; the defendant's conviction required reversal because it was not highly probable that the jury's verdict would have been different if the evidence had been admitted, and the error therefore could not be considered harmless. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

Error to charge guilt in less reasonable explanation. — Charge given by trial court in theft case that the jury could have inferred guilt unless there was from the evidence a reasonable explanation of possession consistent with a plea of innocence was not a sufficient restatement of O.C.G.A. § 24-4-6. The jury was not adequately in-

structed that the state's circumstantial evidence of guilt should "exclude every other reasonable hypothesis save that of the guilt of the accused." *McChargue v. State*, 209 Ga. App. 612, 434 S.E.2d 153 (1993).

Proof to moral certainty. — It is not necessary to show that it was impossible for the offense to have been committed by anybody else or that it might not, by bare possibility, have been done by another; it is sufficient to show to a moral certainty that it was the defendant. *Johnson v. State*, 126 Ga. App. 93, 189 S.E.2d 900 (1972); *Neal v. State*, 130 Ga. App. 708, 204 S.E.2d 451 (1974); *Harris v. State*, 236 Ga. 766, 225 S.E.2d 263 (1976); *Van Voltenburg v. State*, 138 Ga. App. 628, 227 S.E.2d 451 (1976); *Castleberry v. State*, 152 Ga. App. 769, 264 S.E.2d 239 (1979); *Strickland v. State*, 156 Ga. App. 475, 274 S.E.2d 823 (1980).

O.C.G.A. § 24-4-6 does not mean that the act might by bare possibility have been done by somebody else, but that the state should show to a moral certainty that it was the defendant's act. *McGee v. State*, 159 Ga. App. 763, 285 S.E.2d 224 (1981).

Burden on state. — Defendant does not have the obligation to offer a theory consistent with innocence. Rather, the state has the burden of proving guilt. *Howard v. State*, 148 Ga. App. 598, 251 S.E.2d 829 (1979).

Burden under O.C.G.A. § 24-4-6 to present evidence excluding every other reasonable hypothesis save that of guilt, is upon the state. *Cornish v. State*, 187 Ga. App. 140, 369 S.E.2d 515 (1988).

Hypothesis considered by jury. — Questions as to the reasonableness of hypothesis are generally to be decided by the jury and when the jury finds that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, that finding will not be disturbed unless the verdict of guilty is insupportable as a matter of law. *Robbins v. State*, 269 Ga. 500, 499 S.E.2d 323 (1998); *Callahan v. State*, 249 Ga. App. 108, 547 S.E.2d 741 (2001).

Evidence did not exclude very reasonable hypothesis. — Circumstantial evidence was insufficient for adjudication as a delinquent for acts that would have constituted cocaine possession if committed by an adult because the circumstantial evidence of defendant's spatial proximity to cocaine found in a car's

console and the fact that the defendant did not live near the parking lot where the car was parked did not exclude every reasonable hypothesis other than constructive possession. *In re J.S.*, No. A10A0654, 2010 Ga. App. LEXIS 399 (Apr. 16, 2010).

Instructions

Abstract principles for jury. — In trying a case depending upon circumstantial evidence, very few abstract principles should be given to the jury. *Dacus v. State*, 56 Ga. App. 439, 193 S.E. 93 (1937).

Request to charge not waived when request not in writing. — As the defendant's request to charge the jury on circumstantial evidence as set forth in O.C.G.A. § 24-4-6 directed the trial court to the language in the pattern jury instructions that defendant wished to have the trial court use, and the trial court recognized what was requested, the defendant's request to charge the principle stated in § 24-4-6 was not waived by the failure to properly submit the request in writing under Ga. Unif. Super. Ct. R. 10.3. *Davis v. State*, 285 Ga. 176, 674 S.E.2d 879 (2009).

When charge required. — When the conviction depends entirely upon circumstantial evidence, the court's failure to charge the law pertaining to circumstantial evidence is reversible error, even in the absence of a timely written request. *Harris v. State*, 18 Ga. App. 710, 90 S.E. 370 (1916); *Coggin v. State*, 41 Ga. App. 659, 154 S.E. 376 (1930); *Towler v. State*, 44 Ga. App. 262, 161 S.E. 164 (1931); *Cofer v. State*, 178 Ga. 742, 174 S.E. 331 (1934); *Grooms v. State*, 53 Ga. App. 348, 185 S.E. 596 (1936); *De Loach v. State*, 57 Ga. App. 799, 196 S.E. 924 (1938); *Kinsey v. State*, 57 Ga. App. 813, 197 S.E. 61 (1938); *Williams v. State*, 196 Ga. 503, 26 S.E.2d 926 (1943); *Dyer v. State*, 71 Ga. App. 41, 29 S.E.2d 922 (1944); *Steed v. State*, 80 Ga. App. 360, 56 S.E.2d 171 (1949); *Culver v. State*, 80 Ga. App. 438, 56 S.E.2d 197 (1949); *Jones v. State*, 91 Ga. App. 662, 86 S.E.2d 724 (1955); *McGruder v. State*, 213 Ga. 259, 98 S.E.2d 564 (1957); *Ledford v. State*, 215 Ga. 799, 113 S.E.2d 628 (1960); *Harvey v. State*, 111 Ga. App. 279, 141 S.E.2d 604 (1965); *Campbell v. State*, 129 Ga. App. 836, 201 S.E.2d 666 (1973); *Hethcox v. State*, 138 Ga. App. 207, 225 S.E. 764 (1976); *Williams v. State*, 239 Ga. 12, 235 S.E.2d 504 (1977);

Instructions (Cont'd)

Jones v. State, 243 Ga. 584, 255 S.E.2d 702 (1979); Nelms v. State, 150 Ga. App. 720, 258 S.E.2d 531 (1979); Russell v. State, 152 Ga. App. 693, 263 S.E.2d 689 (1979); Arnett v. State, 245 Ga. 470, 265 S.E.2d 771 (1980); Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980); Caylor v. State, 155 Ga. App. 489, 270 S.E.2d 924 (1980); Stephens v. State, 208 Ga. App. 291, 430 S.E.2d 29 (1993); Dunaway v. State, 214 Ga. App. 128, 447 S.E.2d 153 (1994); Stubbs v. State, 265 Ga. 883, 463 S.E.2d 686 (1995).

Charge on circumstantial evidence must be given when the defendant has made a timely written request therefor. Hancock v. State, 158 Ga. App. 829, 282 S.E.2d 401 (1981); Dunaway v. State, 214 Ga. App. 128, 447 S.E.2d 153 (1994).

If the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request whether or not the jury is authorized to find that the direct evidence presented by witness testimony has been impeached. Gidden v. State, 205 Ga. App. 245, 422 S.E.2d 30, cert. denied, 205 Ga. App. 900, 422 S.E.2d 30 (1992).

When the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request. Postell v. State, 261 Ga. 842, 412 S.E.2d 831 (1992).

When the case against the defendant is close or doubtful and is composed solely of circumstantial evidence, it is reversible error for a trial court to fail to charge O.C.G.A. § 24-4-6 even absent a request. Jenkins v. State, 209 Ga. App. 19, 432 S.E.2d 270 (1993).

Since no drugs were found in the defendant's actual possession, the case was dependent on circumstantial evidence and it was error to refuse to so charge upon written request. Lowe v. State, 208 Ga. App. 49, 430 S.E.2d 169 (1993), overruled on other grounds, Kelly v. State, 212 Ga. App. 278, 442 S.E.2d 462 (1994).

Instruction required in DUI conviction. — In a prosecution for driving under the influence of alcohol, defendant was entitled to defendant's requested instruction on circumstantial evidence based on a reasonable hypothesis from defendant's use of Benadryl

that the defendant was not guilty of the crime charged. Cato v. State, 212 Ga. App. 417, 441 S.E.2d 900 (1994).

It is error to fail to charge the substance of O.C.G.A. § 24-4-6 when the circumstances from which a guilty intent can be inferred are consistent with an innocent intention or an intention different from that charged against the accused. Hathcock v. State, 214 Ga. App. 188, 447 S.E.2d 104 (1994).

In a prosecution for driving under the influence of alcohol, evidence upon which an officer based the officer's opinion that defendant was impaired and a less safe driver was circumstantial, and the failure to give a requested charge on O.C.G.A. § 24-4-6 was reversible error. Tomko v. State, 233 Ga. App. 20, 503 S.E.2d 300 (1998).

Instruction required in child molestation conviction. — In a prosecution for child molestation, it was reversible error to refuse to give defendant's requested charge on circumstantial evidence, when defendant offered evidence of an intention other than to arouse defendant's or the child's sexual desires and the trial court gave the jury no instructions under which the jury could consider this evidence. Hathcock v. State, 214 Ga. App. 188, 447 S.E.2d 104 (1994).

Two different rules governing when the trial court must instruct the jury on O.C.G.A. § 24-4-6 are: (1) the charge must be given absent a request if the case against the defendant is wholly circumstantial; and (2) the charge must be given upon request if the case relies to any degree upon circumstantial evidence. Yarn v. State, 215 Ga. App. 883, 452 S.E.2d 537 (1994), aff'd, 265 Ga. 787, 462 S.E.2d 359 (1995).

Whenever the state introduces circumstantial evidence of the defendant's guilt, it is error not to charge under O.C.G.A. § 24-4-6 if such has been timely requested; however, it is not error to fail to give such a charge in the absence of a timely request when the state's case depends both upon direct and circumstantial evidence. Stubbs v. State, 215 Ga. App. 873, 452 S.E.2d 571 (1994), rev'd in part on other grounds, 265 Ga. 883, 463 S.E.2d 686 (1995), vacated on other grounds, 219 Ga. App. 871, 467 S.E.2d 612 (1996); Davis v. State, 266 Ga. 801, 471 S.E.2d 191 (1996).

Instruction required in DUI conviction and operating unsafe motor vehicle. — In a

prosecution for driving under the influence and driving an unsafe motor vehicle with defective equipment, the state was required to prove defendant was driving the car, proof of which was dependent in part on circumstantial evidence requiring the giving of a charge under O.C.G.A. § 24-4-6. *Coates v. State*, 216 Ga. App. 93, 453 S.E.2d 35 (1994).

When the state's case is composed solely of circumstantial evidence, a defendant is relieved from the necessity of requesting a charge on O.C.G.A. § 24-4-6; even in the absence of such a request, it may be reversible error to fail to give the instruction. *Yarn v. State*, 265 Ga. 787, 462 S.E.2d 359 (1995).

Trial court must charge on the law of circumstantial evidence, even absent a request, if the case against the defendant is wholly circumstantial, and if the case relies to any degree upon circumstantial evidence, a charge on circumstantial evidence is required upon written request. *Massey v. State*, 270 Ga. 76, 508 S.E.2d 149 (1998).

Instruction in kidnapping case not required when direct evidence exists. — Trial court's failure to give a charge under O.C.G.A. § 24-4-6 was not harmful as a matter of law because the state presented direct evidence that the defendant committed the crime of kidnapping. *Holden v. State*, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, 2008 Ga. LEXIS 153 (Ga. 2008).

Charge on circumstantial evidence is required, upon request in appropriate cases, pursuant to O.C.G.A. § 24-4-6. *Kelly v. State*, 212 Ga. App. 278, 442 S.E.2d 462 (1994).

Only when evidence is wholly circumstantial is substance of O.C.G.A. § 24-4-6 required to be given in charge, and when there was direct evidence, as well as circumstantial, and when there was no such equality of theories of guilt or innocence as to require such charge it was not error to refuse charge as requested by defendant. *Bearden v. State*, 163 Ga. App. 434, 294 S.E.2d 667 (1982).

Only when the case is wholly dependent on circumstantial evidence is a charge on circumstantial evidence required. *Galloway v. State*, 165 Ga. App. 536, 301 S.E.2d 894 (1983).

Jury charge under O.C.G.A. § 24-4-6, though requested by a defendant, is required only when the evidence relied on for conviction is entirely circumstantial. *Griffith v. State*, 172 Ga. App. 255, 322 S.E.2d 921

(1984); *Todd v. State*, 184 Ga. App. 750, 362 S.E.2d 400 (1987).

Instruction not required in DUI trial. — When the defendant was charged with driving under the influence with a blood alcohol percentage of .10, the evidence introduced by the state in support of this charge, the results from the breath test, was characterized as direct evidence, not circumstantial evidence, and the trial court did not err in refusing to give a circumstantial evidence instruction. *Cawthon v. State*, 235 Ga. App. 791, 510 S.E.2d 586 (1998).

Charge required if possession of stolen goods is only evidence of burglary. — In a burglary prosecution, if the only evidence tending to connect the accused with the alleged offense is the accused's unsatisfactorily explained possession of recently stolen goods, it is error for the trial court to fail to give, with or without request, a charge on the principle contained in O.C.G.A. § 24-4-6. *Price v. State*, 180 Ga. App. 215, 348 S.E.2d 740 (1986).

When charge not required. — Unless the evidence relied upon for conviction is entirely circumstantial, it is not error to fail to charge the law of circumstantial evidence in the absence of a request to do so. *Wilson v. State*, 152 Ga. 337, 110 S.E. 8 (1921); *Chamblee v. State*, 50 Ga. App. 251, 177 S.E. 824 (1934); *Roberts v. State*, 50 Ga. App. 307, 177 S.E. 825 (1934); *Wyatt v. State*, 50 Ga. App. 266, 177 S.E. 840 (1934); *Summers v. State*, 63 Ga. App. 445, 11 S.E.2d 409 (1940); *Hall v. State*, 66 Ga. App. 655, 19 S.E.2d 40 (1942); *Allen v. State*, 194 Ga. 430, 22 S.E.2d 65 (1942); *Miller v. State*, 69 Ga. App. 847, 26 S.E.2d 851 (1943); *Newsome v. State*, 69 Ga. App. 445, 26 S.E.2d 113 (1943); *Daniels v. State*, 199 Ga. 818, 35 S.E.2d 362 (1945); *Johnson v. State*, 84 Ga. App. 745, 67 S.E.2d 246 (1951); *Young v. State*, 85 Ga. App. 122, 68 S.E.2d 219 (1951); *Hicks v. State*, 86 Ga. App. 365, 71 S.E.2d 695 (1952); *Weaver v. State*, 86 Ga. App. 699, 71 S.E.2d 901 (1952); *Johnson v. State*, 209 Ga. 333, 72 S.E.2d 291 (1952); *King v. State*, 86 Ga. App. 786, 72 S.E.2d 502 (1952); *Marshman v. State*, 88 Ga. App. 250, 76 S.E.2d 443 (1953); *Jones v. State*, 88 Ga. App. 330, 76 S.E.2d 810 (1953); *Wiggins v. State*, 92 Ga. App. 65, 87 S.E.2d 652 (1955); *Nelson v. State*, 92 Ga. App. 746, 90 S.E.2d 91 (1955); *Weatherby v. State*, 213 Ga. 188, 97 S.E.2d 698 (1957); *Whiting v.*

Instructions (Cont'd)

State, 108 Ga. App. 374, 133 S.E.2d 50 (1963); *Ryder v. State*, 121 Ga. App. 796, 175 S.E.2d 882 (1970); *Bryant v. State*, 229 Ga. 60, 189 S.E.2d 435 (1972); *Johnson v. State*, 235 Ga. 486, 220 S.E.2d 448 (1975); *Jones v. State*, 243 Ga. 584, 255 S.E.2d 702 (1979); *Fuller v. State*, 166 Ga. App. 734, 305 S.E.2d 463 (1983); *Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73 (1984); *McGarity v. State*, 212 Ga. App. 17, 440 S.E.2d 695 (1994); *Sharpe v. State*, 272 Ga. 684, 531 S.E.2d 84, cert. denied, 531 U.S. 948, 121 S. Ct. 350, 148 L. Ed. 2d 282 (2000).

Refusal to give a requested instruction on O.C.G.A. § 24-4-6 is not error except when the case is totally dependent upon circumstantial evidence. *Heath v. State*, 186 Ga. App. 655, 368 S.E.2d 346 (1988); *Lewis v. State*, 198 Ga. App. 808, 403 S.E.2d 233, cert. denied, 198 Ga. App. 898, 403 S.E.2d 233 (1991).

When there is some direct evidence against the defendant, it is not error to fail to charge on circumstantial evidence. *Terrell v. State*, 258 Ga. 722, 373 S.E.2d 751 (1988).

Trial court did not err in refusing to give defendant's requested instruction on circumstantial evidence since the evidence in the case was not entirely circumstantial. *Ebenezer v. State*, 191 Ga. App. 901, 383 S.E.2d 373 (1989); *Rainey v. State*, 216 Ga. App. 557, 455 S.E.2d 73 (1995), *aff'd*, 266 Ga. 163, 465 S.E.2d 447 (1996); *Carter v. State*, 240 Ga. App. 203, 523 S.E.2d 47 (1999).

Trial court did not err by failing to instruct the jury on circumstantial evidence since direct evidence of guilt obviated the requirement of such a charge. *Baines v. State*, 201 Ga. App. 354, 411 S.E.2d 95 (1991).

In a case involving both direct and circumstantial evidence, it was not reversible error for the trial court to fail to give a charge on circumstantial evidence as contained in O.C.G.A. § 24-4-6, nor to fail to instruct the jury that a conviction based on circumstantial evidence is permissible only if the offense charged was proved beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. This type of instruction is required only when the case is totally dependent upon circumstantial evi-

dence. *Williams v. State*, 199 Ga. App. 566, 405 S.E.2d 716 (1991).

Trial court did not err in failing to give a charge on circumstantial evidence, since the requested charge was not adjusted to the principles involved in the case since a charge on how the jury should treat a defendant's testimony in the context of a circumstantial evidence case was included but defendant did not testify. *Minor v. State*, 264 Ga. 195, 442 S.E.2d 754 (1994).

Failure to charge on O.C.G.A. § 24-4-6 is not reversible error when the case is not close or doubtful, the charge on reasonable doubt is full and fair, and no other reasonable hypothesis save that of guilt was offered. *Cato v. State*, 212 Ga. App. 417, 441 S.E.2d 900 (1994).

Even if the victims were impeached, a charge on circumstantial evidence was not warranted because there was no other evidence authorizing a verdict of guilty. *Miller v. State*, 212 Ga. App. 193, 441 S.E.2d 443 (1994).

In a prosecution for trafficking in cocaine involving direct and circumstantial evidence, in the absence of any evidence evincing a plausible explanation or reasonable hypothesis of innocence and, particularly in the context of the entire charge in the case, the omission of a charge reciting the principle in O.C.G.A. § 24-4-6 was not reversible error. *Roura v. State*, 214 Ga. App. 43, 447 S.E.2d 52 (1994).

Because there was some direct evidence of defendant's guilt and no request was made for a charge on circumstantial evidence, the trial court's failure to give an instruction in the language of O.C.G.A. § 24-4-6 was not error. *Brooks v. State*, 265 Ga. 548, 458 S.E.2d 349 (1995).

When the state's case includes both direct and circumstantial evidence, a defendant is not relieved from the necessity of requesting the charge and, in the absence of such a request, it is not error to fail to give the charge. *Yarn v. State*, 265 Ga. 787, 462 S.E.2d 359 (1995).

Failure to give a requested circumstantial evidence charge was not error because the evidence was consistent only with defendant's guilt as to the acts alleged in the indictment and was completely inconsistent with a reasonable hypothesis of innocence. *Carroll v. State*, 224 Ga. App. 543, 481 S.E.2d 562 (1997).

Defendant must request a circumstantial evidence charge within a similar transaction charge since the case against the defendant is not wholly circumstantial. *Johnson v. State*, 236 Ga. App. 252, 511 S.E.2d 603 (1999), *aff'd*, 272 Ga. 254, 526 S.E.2d 549 (2000).

In a prosecution for child molestation, a charge under O.C.G.A. § 24-4-6 was not appropriate since the evidence directly contradicted defendant's contention that inadvertent contact was made with the victim's leg or thigh as a result of a trip and fall. *Turner v. State*, 245 Ga. App. 294, 536 S.E.2d 814 (2000), overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Since there was no request to charge on the circumstantial evidence rule, the charge was needed only if the state's case was based wholly on circumstantial evidence, and no such charge was needed when defendant's cousin testified that the cousin saw defendant rob a store; that was direct evidence, not circumstantial. *Moore v. State*, 268 Ga. App. 398, 601 S.E.2d 854 (2004).

Defense counsel was not ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, for failing to request a charge on circumstantial evidence based on O.C.G.A. § 24-4-6, which imposed certain requirements for convictions based on circumstantial evidence; the trial court adequately charged the jury on reasonable doubt, and direct evidence for both offenses was presented. *Guillen v. State*, 275 Ga. App. 316, 620 S.E.2d 518 (2005).

Because the defendant did not request a charge under O.C.G.A. § 24-4-6, the trial court did not commit reversible error in failing to give the charge. *Barrino v. State*, 282 Ga. App. 496, 639 S.E.2d 489 (2006).

Prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, and convictions on those charges were not subject to being reversed merely because the trial court failed to charge O.C.G.A. § 24-4-6 as the defendant failed to request that charge. *Rodriguez v. State*, 283 Ga. App. 752, 642 S.E.2d 705 (2007).

Because the defendant made an oral request that the jury be charged on the law under O.C.G.A. § 24-4-6, but did not make a written request for that charge, the trial

court did not err in failing to charge the jury as the defendant requested. *Attaway v. State*, 284 Ga. App. 855, 644 S.E.2d 919 (2007).

When the evidence at trial consisted of both direct and circumstantial evidence, the defendant did not request in writing a charge regarding O.C.G.A. § 24-4-6, and defense counsel stated that the trial court's proposed charges were sufficient, it was not error not to give a charge based on § 24-4-6. *Moore v. State*, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

Because the evidence rested largely on the direct evidence provided by the eyewitnesses to the event, and there was no reasonable likelihood that had the circumstantial evidence charge been given to the jury the outcome of the trial would have differed, the defendant's trial counsel could not be found ineffective in failing to request the instruction. *Holden v. State*, 287 Ga. App. 472, 651 S.E.2d 552 (2007), *cert. denied*, 2008 Ga. LEXIS 153 (Ga. 2008).

Because the testimony from the medical examiner amounted to direct, and not circumstantial, evidence that: (1) the accident the defendant was charged with causing caused the decedent's death; (2) either the defendant's or the other impact caused the blunt force trauma to the decedent's head; and (3) any of the impacts, alone, could have caused the trauma, the defendant's requested circumstantial evidence charge was properly denied by the trial court. *Kirk v. State*, 289 Ga. App. 125, 656 S.E.2d 251 (2008).

In a defendant's prosecution for, *inter alia*, felony murder, the trial court did not err by failing to instruct the jury on the law of circumstantial evidence as set forth in O.C.G.A. § 24-4-6 because both direct and circumstantial evidence were presented by the state and the defendant failed to request a circumstantial evidence instruction. *Sumlin v. State*, 283 Ga. 264, 658 S.E.2d 596 (2008).

In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, a trial court did not err in failing to sua sponte instruct the jury about circumstantial evidence because the victims provided direct evidence of defendant's guilt. *Fortune v. State*, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

Trial court did not err in failing to charge

Instructions (Cont'd)

the jury on circumstantial evidence because nothing of record showed that the defendant requested such a charge; nevertheless, the record showed that the trial court properly charged the jury *sua sponte* on circumstantial evidence, and when trial counsel was asked if counsel objected to the jury charge as given counsel indicated that counsel did not, which resulted in waiver on appeal. *Jackson v. State*, No. A10A0501, 2010 Ga. App. LEXIS 325 (Mar. 25, 2010).

Charge not required when guilt is the only reasonable hypothesis. — Even in a case which is wholly dependent on circumstantial evidence, if from the proved facts only one reasonable hypothesis presents itself, i.e., that the defendant is guilty of the offense charged, then a failure to charge O.C.G.A. § 24-4-6 does not furnish cause for a new trial. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). But see *Stewart v. State*, 232 Ga. App. 565, 502 S.E.2d 502 (1998).

Better practice to charge statute on circumstantial evidence when the evidence upon which the state depends for conviction is both direct and circumstantial. *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Jackson v. State*, 92 Ga. App. 774, 90 S.E.2d 29 (1955); *Ramsey v. State*, 212 Ga. 381, 92 S.E.2d 866 (1956); *Holton v. State*, 192 Ga. App. 745, 386 S.E.2d 404 (1989) (see O.C.G.A. § 24-4-6).

Circumstantial evidence charge should have been given. — When state introduced circumstantial as well as direct evidence in the state's case against defendant, defendant was entitled to have defendant's requested charge on circumstantial evidence given to the jury. *Mims v. State*, 264 Ga. 271, 443 S.E.2d 845 (1994).

A trial court's failure to give the circumstantial evidence charge under O.C.G.A. § 24-4-6 constituted reversible error, even though the defendant failed to request such a charge, because the evidence against the defendant in a cocaine trafficking case under O.C.G.A. § 16-13-31(a)(1) was entirely circumstantial based on the defendant's participation in the crime with the defendant's sibling and a third party. *Martinez v. State*, No. A09A1955, 2010 Ga. App. LEXIS 278 (Mar. 24, 2010).

Charging precise language of statute unnecessary. — Failure of the court to charge

the law of circumstantial evidence in the exact language of the statute is not error. *Sellers v. State*, 36 Ga. App. 653, 137 S.E. 912 (1927); *Thompson v. State*, 166 Ga. 512, 143 S.E. 896 (1928); *Brent v. State*, 44 Ga. App. 777, 163 S.E. 319 (1932); *Pound v. State*, 180 Ga. 83, 178 S.E. 291 (1935); *Rowland v. State*, 51 Ga. App. 54, 179 S.E. 585 (1935); *Sanders v. State*, 71 Ga. App. 334, 30 S.E.2d 810 (1944); *Townsend v. State*, 86 Ga. App. 459, 71 S.E.2d 738 (1952); *Roman v. State*, 155 Ga. App. 355, 271 S.E.2d 21 (1980) (see O.C.G.A. § 24-4-6).

Trial court need not track the exact language of O.C.G.A. § 24-4-6 in order to satisfy the requirement that the jury be instructed on the principle of the sufficiency of circumstantial evidence to warrant a conviction. *Price v. State*, 180 Ga. App. 215, 348 S.E.2d 740 (1986).

Trial court was not required to give the exact language of O.C.G.A. § 24-4-6 in the court's charge to the jury. *Richards v. State*, 189 Ga. App. 146, 375 S.E.2d 278 (1988).

Charge on circumstantial evidence which added the word "alone" to the statutory phrase "to warrant a conviction on circumstantial evidence," was the functional equivalent of the statutory language because the trial court did not have to track the exact language in order to properly instruct the jury on the principle contained therein. *Lowe v. State*, 267 Ga. 180, 476 S.E.2d 583 (1996); *Wynn v. State*, 236 Ga. App. 98, 511 S.E.2d 201 (1999); *Morris v. State*, 239 Ga. App. 100, 520 S.E.2d 485 (1999).

When a circumstantial evidence charge given to the jury added the word "alone" to the phrase "to warrant a conviction on circumstantial evidence," it was the functional equivalent of the rule contained in O.C.G.A. § 24-4-6 and was not error. *Martin v. State*, 235 Ga. App. 844, 510 S.E.2d 602 (1998).

Trial court did not err in giving a circumstantial evidence charge that was the functional equivalent of O.C.G.A. § 24-4-6 since the trial court added the word "alone" twice, substituted the word "theory" for "hypothesis," and amplified upon the statutory language. *Johnson v. State*, 251 Ga. App. 455, 554 S.E.2d 587 (2001).

Failure to track statute's language held to be error. — Even though the trial court instructed the jury on the definitions of direct and circumstantial evidence and the

difference between them, its refusal to give defendant's requested charge tracking the language of O.C.G.A. § 24-4-6 was reversible error. *Waits v. State*, 232 Ga. App. 357, 501 S.E.2d 870 (1998).

Charge using the statutory language satisfied the requirement that, where the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request. *Wiley v. State*, 238 Ga. App. 334, 519 S.E.2d 10 (1999).

When the defendant makes incriminatory statements after the victim's death, the case is not one depending entirely upon circumstantial evidence. *Stewart v. State*, 163 Ga. App. 735, 295 S.E.2d 112 (1982); *Yarborough v. State*, 183 Ga. App. 198, 358 S.E.2d 484 (1987).

Instruction defining circumstantial evidence and its weight approved. — Following instruction is entirely consistent with O.C.G.A. § 24-4-6: "Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience. Circumstantial evidence alone will not justify a finding of guilt unless the circumstances are entirely consistent with the defendant's guilt, wholly inconsistent with any reasonable theory of the defendant's innocence, and are so convincing as to exclude a reasonable doubt of the defendant's guilt." *Carpenter v. State*, 167 Ga. App. 634, 307 S.E.2d 19 (1983), *aff'd*, 252 Ga. 79, 310 S.E.2d 912 (1984).

Court's instruction was proper which instructed the jury concerning the differences between direct and circumstantial evidence and charged that the comparative weight of circumstantial evidence and direct evidence on any given issue is a question of fact for the jury to decide. *Grier v. State*, 217 Ga. App. 409, 458 S.E.2d 139 (1995).

Defendant's request that the court give a "two theories" charge did not constitute a request for a charge on circumstantial evidence. *Grier v. State*, 217 Ga. App. 409, 458 S.E.2d 139 (1995).

Charge language describing two equal theories. — Charge language describing two equal theories, one of guilt and the other of innocence, did not accurately state the principle addressed. The charge related to the

weight of the evidence and therefore was not an accurate statement of the "two theories" principle. *Langston v. State*, 208 Ga. App. 175, 430 S.E.2d 365 (1993); *Blue v. State*, 212 Ga. App. 847, 433 S.E.2d 635 (1994).

Defendant was not entitled to an instruction that, when the facts, evidence and all reasonable deductions therefrom present two reasonable theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compels acceptance of the theory which is consistent with innocence; the requested charge was not substantially equivalent to the principle set forth in O.C.G.A. § 24-4-6. *Jones v. State*, 213 Ga. App. 11, 444 S.E.2d 89 (1994).

When the trial court properly charged the jury on the law of circumstantial evidence, the presumption of innocence and the need to prove the defendant's guilt beyond a reasonable doubt, it was not error to refuse to give the "two theories" charge. *Stephens v. State*, 214 Ga. App. 183, 447 S.E.2d 26 (1994).

It is never error to refuse to give a requested "two equal theories" charge when a trial court properly instructs the jury on circumstantial evidence. *Smith v. State*, 264 Ga. 857, 452 S.E.2d 494 (1995); *Mitchell v. State*, 233 Ga. App. 92, 503 S.E.2d 293 (1998).

Failure to charge circumstantial evidence harmless error since the case is not close or doubtful and the charge on reasonable doubt is full and fair. *Germany v. State*, 235 Ga. 836, 221 S.E.2d 817 (1976); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). But see *Stewart v. State*, 232 Ga. App. 565, 502 S.E.2d 502 (1998); *Playmate Cinema, Inc. v. State*, 154 Ga. App. 871, 269 S.E.2d 883 (1980); *Hinton v. State*, 215 Ga. App. 750, 452 S.E.2d 519 (1994); *Livery v. State*, 233 Ga. App. 882, 506 S.E.2d 165 (1998); *Burks v. State*, 246 Ga. App. 22, 538 S.E.2d 769 (2000).

Trial court's failure to instruct a jury on the burden of proof required to convict defendant of armed robbery with circumstantial evidence was harmless error given the overwhelming direct evidence of defendant's guilt, which included a videotape of the robbery, defendant's parent's identification of defendant as the person on the videotape with a gun, and defendant's accomplice's confession and implication of

Instructions (Cont'd)

defendant in the crime. *Bradwell v. State*, 262 Ga. App. 651, 586 S.E.2d 355 (2003).

Although the state's case against the defendant was based on both direct and circumstantial evidence, the trial court's failure to give the requested jury charge on circumstantial evidence under O.C.G.A. § 24-4-6 was harmless error given the overwhelming evidence of guilt. *Gregory v. State*, 277 Ga. App. 664, 627 S.E.2d 79 (2006).

With regard to defendant's malice murder conviction, the trial court did not err by refusing to give defendant's requested jury instruction in the language of O.C.G.A. § 24-4-6, which provides that a conviction based on circumstantial evidence can be affirmed only if every reasonable hypothesis other than guilt is excluded, as defendant's admission to having shot the victim, but claiming self-defense, removed the case from that rule. Even assuming that the state introduced circumstantial evidence to establish some item of proof, and that defendant's requested charge should have been given, any error was harmless in light of the overwhelming evidence of guilt. *Thompson v. State*, 283 Ga. 581, 662 S.E.2d 124 (2008).

Failure to charge reversible error. — Failure to give the defendant's requested charge, which tracked O.C.G.A. § 24-4-6, and instructed the jury that, to warrant a conviction on circumstantial evidence, the facts must exclude every reasonable theory other than guilt of the accused, was reversible error in a driving under the influence case, since the officer's opinion that the defendant was impaired was based on circumstantial evidence. *Taylor v. State*, 278 Ga. App. 181, 628 S.E.2d 611 (2006).

As the defendant's request to charge directed the trial court to the language in the pattern jury instructions on circumstantial evidence, which was a proper statement of the law as set forth in O.C.G.A. § 24-4-6, the case largely depended on circumstantial evidence, and evidence of the defendant's guilt was not overwhelming, the failure to give the requested instruction was reversible error. *Davis v. State*, 285 Ga. 176, 674 S.E.2d 879 (2009).

Defendant's conviction for serving alcohol to a minor, under O.C.G.A. § 3-3-23(a)(1), was reversed because: (1) the

state relied on circumstantial evidence to show that defendant knowingly served alcohol to a minor; and (2) the trial court erroneously refused defendant's request for an instruction on circumstantial evidence under O.C.G.A. § 24-4-6. *Butler v. State*, 298 Ga. App. 129, 679 S.E.2d 361 (2009).

Effect of jury discrediting direct evidence.

— When the only direct evidence comes from a witness who the jury was authorized to find had been impeached, and the trial court properly instructed the jury on the law of impeachment, it is error requiring the grant of a new trial for the trial court to fail to instruct the jury on the law of circumstantial evidence. *Horne v. State*, 93 Ga. App. 345, 91 S.E.2d 824 (1956); *Gibson v. State*, 150 Ga. App. 718, 258 S.E.2d 537 (1979).

It was not erroneous for the court, in the absence of a timely and appropriate request, to omit to charge the law of circumstantial evidence to be applied in the event the jury should not believe that the confession which had been introduced into evidence had been made. *Ellis v. State*, 51 Ga. App. 557, 181 S.E. 87 (1935).

Elaboration unnecessary. — When the judge sufficiently covered the provisions of this statute in the judge's charge to the jury, refusal of a request to elaborate upon this statute was not error. *Reynolds v. State*, 170 Ga. 810, 154 S.E. 229 (1930); *Dacus v. State*, 56 Ga. App. 439, 193 S.E. 93 (1937); *Flynn v. State*, 77 Ga. App. 791, 50 S.E.2d 91 (1948) (see O.C.G.A. § 24-4-6).

Extraneous charge concerning circumstantial evidence. — Charge relating to circumstantial evidence, if erroneous because of contention that only direct evidence was introduced, was not injurious to the accused, as it gave a rule more favorable than the accused could claim. *Latimer v. State*, 188 Ga. 775, 4 S.E.2d 631 (1939).

Charge invading province of jury. — When in a prosecution for possession of beer for purposes of sale, charge to the jury that frequent presence of quantities of beer was sufficient to meet the circumstantial evidence rule was error in that it constituted an invasion of the province of the jury. *Crider v. State*, 98 Ga. App. 164, 105 S.E.2d 506 (1958).

Charge containing opinion of court. — When in prosecution for larceny the state's evidence was wholly circumstantial, charge

that the state had introduced evidence tending to establish the fact that the defendant was guilty of the charge was clearly, though inadvertently, an intimation of the court's opinion as to what had been proved in the case and constituted reversible error. *Rowland v. State*, 71 Ga. App. 154, 30 S.E.2d 368 (1944).

Failure to recharge not error. — When the court defined direct and circumstantial evidence and then charged when circumstantial evidence was sufficient to convict after a conviction is sought on circumstantial evidence, an omission to recharge the law of circumstantial evidence in immediate connection with the law of reasonable doubt did not amount to an expression of opinion that direct evidence had been introduced, and did not exclude from the consideration of the jury the law that requires the evidence to be sufficient to exclude every reasonable hypothesis save that of the guilt of the accused before a conviction would be authorized in a case depending upon circumstantial evidence only. *Lucas v. State*, 48 Ga. App. 42, 171 S.E. 850 (1933).

Charge using "should" instead of "must", in quoting this statute, does not require a new trial. *Adams v. State*, 34 Ga. App. 144, 128 S.E. 924 (1925); *Poulos v. State*, 71 Ga. App. 730, 32 S.E.2d 101 (1944) (see O.C.G.A. § 24-4-6).

Effect of admission. — Rule of this statute should not have been omitted from the instructions to the jury since the state relied wholly on circumstantial evidence and on an admission. *Harvey v. State*, 111 Ga. App. 279, 141 S.E.2d 604 (1965) (see O.C.G.A. § 24-4-6).

Instruction held not erroneous. — When the trial court charged the jury that "when the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, justice and humanity of the law compel the acceptance of the theory that is consistent with innocence," instruction was at least as beneficial to defendant if not more so, than a charge in the exact language of O.C.G.A. § 24-4-6, and thus was not error. *Price v. State*, 180 Ga. App. 215, 348 S.E.2d 740 (1986).

In a prosecution for burglary, the trial court did not err in giving an instruction as

to recent possession of stolen property after a charge on circumstantial evidence. *Martin v. State*, 228 Ga. App. 59, 491 S.E.2d 142 (1997).

Direct evidence was presented in the following cases, obviating the need to charge circumstantial evidence. — See *Ellis v. State*, 51 Ga. App. 557, 181 S.E. 87 (1935) (confession); *Gilder v. State*, 52 Ga. App. 252, 183 S.E. 95 (1935) (presumption derived from direct evidence); *Kittle v. State*, 54 Ga. App. 231, 187 S.E. 611 (1936) (confession); *Walker v. State*, 63 Ga. App. 297, 11 S.E.2d 45 (1940) (confession); *Summers v. State*, 63 Ga. App. 445, 11 S.E.2d 409 (1940) (testimony that contract never existed); *Wilson v. State*, 76 Ga. App. 257, 45 S.E.2d 709 (1947) (admission); *Lyons v. State*, 90 Ga. App. 25, 81 S.E.2d 890 (1954) (statement of guilt); *Ryals v. State*, 193 Ga. App. 68, 387 S.E.2d 33 (1989) (confession); *Brown v. State*, 214 Ga. App. 481, 448 S.E.2d 259 (1994) (child molestation).

Instruction not warranted when evidence is not entirely circumstantial. — When a case is not entirely based on circumstantial evidence, a requested charge on circumstantial evidence is not warranted. *Fuller v. State*, 166 Ga. App. 734, 305 S.E.2d 463 (1983).

When there is direct evidence, the trial court does not err by not also charging that the defendant's explanation must be taken into consideration insofar as it is consistent with the circumstantial evidence properly admitted. *Brown v. State*, 251 Ga. 598, 308 S.E.2d 182 (1983); *Preston v. State*, 183 Ga. App. 20, 357 S.E.2d 825, cert. denied, 183 Ga. App. 906, 357 S.E.2d 825 (1987).

When the state's case included both direct and circumstantial evidence and the defendant did not request a charge on circumstantial evidence, the failure of the court to give such a charge was not error. *Livery v. State*, 233 Ga. App. 882, 506 S.E.2d 165 (1998).

No direct evidence presented in the following cases, hence charge on circumstantial evidence was required. — *Turner v. State*, 40 Ga. App. 662, 151 S.E. 120 (1929) (possession of stolen goods in burglary or larceny case); *Hodges v. State*, 52 Ga. App. 378, 183 S.E. 216 (1936) (whiskey on property adjoining defendant's); *De Loach v. State*, 57 Ga. App. 799, 196 S.E. 924 (1938) (possession of stolen goods in larceny case).

Sufficiency of Circumstantial Evidence

Sufficiency is for jury even though all evidence is circumstantial. — When, at the close of the state's case, all six defendants move for directed verdicts of acquittal, if there is any evidence of guilt, it is for the jury to decide whether that evidence, circumstantial though it may be, is sufficient to warrant a conviction. *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

Defendant must be connected with criminal act. *Newman v. State*, 26 Ga. 633 (1859); *Griffin v. State*, 2 Ga. App. 534, 58 S.E. 781 (1907); *Dougherty v. State*, 7 Ga. App. 91, 66 S.E. 276 (1909).

Despite defendant's assertion that the evidence against the defendant was completely circumstantial and did not exclude every reasonable hypothesis save that of the defendant's guilt, any inconsistencies in the evidence presented were for the jury to resolve, and resolution of such conflicts did not render the evidence insufficient. *Sims v. State*, 278 Ga. 587, 604 S.E.2d 799 (2004).

Evidence sufficient for DUI conviction. — When evidence of defendant's intoxication may have been circumstantial in nature, but the defense put up no evidence of a reasonable alternative hypothesis, and the arguments that were offered by the defense were rejected by the jury, the evidence was sufficient to find that defendant was intoxicated so as to support a DUI conviction. *Green v. State*, 244 Ga. App. 565, 536 S.E.2d 240 (2000).

Sufficient circumstantial evidence existed to support the defendant's convictions given that: (1) the defendant admitted to drinking and driving the vehicle that an officer testified to as having a warm engine; (2) the defendant had slurred speech, bloodshot eyes, and swaying movements; and (3) the surrounding circumstances helped to show that the defendant had been drinking and driving recently enough to satisfy the three-hour requirement under O.C.G.A. § 40-6-391(a)(5). *O'Connell v. State*, 285 Ga. App. 835, 648 S.E.2d 147 (2007).

Defendant's conviction of murder and armed robbery was supported by sufficient evidence; pursuant to O.C.G.A. § 24-4-6, to sustain a conviction based on circumstantial evidence, the evidence had to exclude all reasonable hypotheses other than the defendant's guilt, and there was sufficient evi-

dence from which a rational trier of fact could have excluded all reasonable hypotheses other than defendant's guilt, based on the facts that defendant was the last person in the victim's store on the night of the murder, the victim's blood was found on defendant's shoes, and defendant began spending money heavily after the crime even though the defendant did not have a job at the time. *Bibbs v. State*, 275 Ga. 659, 571 S.E.2d 770 (2002).

Evidence sufficient for armed robbery conviction. — Although defendant was convicted on circumstantial evidence, the conviction was properly supported by that evidence as the facts that were proven at trial were not only consistent with the hypothesis of guilt, but excluded every other reasonable hypothesis save that of the guilt of defendant since the defendant could not explain the presence of a distinctive boot print on the bathroom floor of the store defendant was accused of burglarizing, the presence of defendant's fingerprints on the bathroom wall seven feet off the ground, or defendant's fingerprints on a drink bottle in a space above the bathroom ceiling where defendant had hidden while defendant waited for the store to close so defendant could commit an armed robbery of the store. *Lighten v. State*, 259 Ga. App. 280, 576 S.E.2d 658 (2003).

From the defendant's words, demeanor, companionship, and conduct before and after an armed robbery, a jury could have concluded beyond a reasonable doubt that the state established the requisite intent; the evidence authorized the jury to find that before an armed robbery, the defendant had planned to take money from a convenience store, the defendant's accomplice went into the store, took the money from the clerk at gunpoint, and then joined the defendant with the money, and that when the cohorts realized moments later that the police suspected the pair of the armed robbery, the defendant disobeyed police commands to stop, acted as the getaway driver in a high speed chase, and then tried to flee the police on foot. *Espinosa v. State*, 285 Ga. App. 69, 645 S.E.2d 529 (2007), cert. denied, 2007 Ga. LEXIS 760 (Ga. 2007).

Evidence sufficient for assault and rape conviction. — State presented direct evidence of the defendant's assault and rape of

the victim in the form of the victim's testimony, and thus O.C.G.A. § 24-4-6 did not apply, and the state was not required to exclude every reasonable hypothesis save that of guilt. *Tarver v. State*, 280 Ga. App. 89, 633 S.E.2d 415 (2006).

Evidence sufficient for aggravated sexual battery conviction. — Circumstantial evidence that a defendant chastised the defendant's two-year-old child for soiling a diaper by poking the child's anus with a stick, resulting in perineal lacerations, was sufficient to support a conviction for aggravated sexual battery in violation of O.C.G.A. § 16-6-22.2(b). *Viers v. State*, No. A09A2293, 2010 Ga. App. LEXIS 202 (Mar. 8, 2010).

Evidence sufficient for conviction of sexual exploitation. — Evidence was sufficient to convict the defendant of five counts of sexual exploitation of children beyond a reasonable doubt because the evidence was more than sufficient to exclude every reasonable hypothesis that someone other than the defendant possessed a USB drive containing explicit sexual images of children, which was found at a hotel; given the testimony of a forensic computer specialist, coupled with the fact that the defendant possessed several computers, a digital camera, and another USB drive in the defendant's home in Arkansas, a rational trier of fact could find that the defendant inadvertently left the USB drive on the fifth floor of the hotel, and the jury could also conclude that the defendant knowingly possessed material depicting minors engaged in sexually explicit conduct in light of evidence that sexually explicit images of children were saved to the USB drive within seconds of the time two photographs of the defendant were saved to that drive. *Hunt v. State*, No. A10A0394, 2010 Ga. App. LEXIS 345 (Mar. 31, 2010).

Evidence sufficient for armed robbery and aggravated assault conviction. — When the testimonies of the victim, a doctor, and other witnesses were a sufficient indication under O.C.G.A. § 24-4-6 of the severity of the blow to show that a bludgeon device was used as an offensive weapon, there was sufficient competent evidence to find defendant guilty of armed robbery and aggravated assault under O.C.G.A. §§ 16-5-21(a) and 16-8-41(a). *Garrett v. State*, 263 Ga. App. 310, 587 S.E.2d 794 (2003).

Ample evidence concerning the child vic-

tim's condition and expert testimony regarding the child's condition was presented to authorize the jury to find defendant guilty of committing felony murder by holding the child in scalding water, and guilty of committing cruelty to a child by failing to provide medical attention, and to reject the evidence and hypotheses defendant presented in an attempt to refute the charges. *Robles v. State*, 277 Ga. 415, 589 S.E.2d 566 (2003).

Despite the defendant's claim of innocence, convictions for armed robbery and two counts of aggravated assault were upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not entitled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt as required by O.C.G.A. § 24-4-6. *Jordan v. State*, 281 Ga. App. 419, 636 S.E.2d 151 (2006).

Evidence sufficient for kidnapping conviction. — Because the eyewitness testimony showed that the defendant pushed, pulled, and then carried the victim out of a restaurant as the victim yelled for a coworker to call the police, and which was direct, not circumstantial, evidence that the victim did not go with the defendant willingly, sufficient evidence supported the defendant's kidnapping conviction. *Holden v. State*, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, 2008 Ga. LEXIS 153 (Ga. 2008).

Evidence sufficient for shoplifting conviction. — Evidence was sufficient to support the defendant's convictions on three counts of shoplifting following eyewitness testimony that the defendant had concealed cologne bottles under the defendant's shirt at a drugstore and had walked out of a grocery store carrying items that had not been paid for supported two of the counts; also, testimony that video games had been taken from a video store without being purchased, and that the defendant had the games on the defendant's person about 20 minutes after leaving the video store and at the time of the defendant's apprehension for shoplifting at the drug store was sufficient circumstantial evidence to exclude every reasonable hypothesis of the defendant's innocence under O.C.G.A. § 24-4-6. *Crosby v. State*, 287 Ga. App. 109, 650 S.E.2d 775 (2007).

Sufficiency of Circumstantial Evidence (Cont'd)

To the extent that a defendant's criminal intent to commit a shoplifting could only be shown by circumstantial evidence, based on the uncontroverted direct evidence that the defendant and the defendant's accomplice took a cart with merchandise into a restricted area, lied about their purpose of being in the area, surveyed various emergency exits from the store defendants were in, abandoned the merchandise when an emergency exit jammed, and lacked any means for paying for the merchandise, no reasonable hypothesis for the defendant's innocence existed that was consistent with the evidence. *Alford v. State*, 292 Ga. App. 514, 664 S.E.2d 870 (2008).

Evidence sufficient for marijuana conviction. — There was sufficient evidence to support a defendant's conviction for possession of more than an ounce of marijuana as although the evidence of the defendant's constructive possession of the marijuana found in a shoebox in the backseat of the car the defendant was operating was circumstantial, it was within the jury's province to exclude every other reasonable hypothesis other than the defendant's guilt. The car owner testified that the owner did not possess the vehicle for over three months and the defendant's passenger testified that the marijuana did not belong to the passenger; thus, the jury was entitled to find that the proved facts excluded the possibility that the car owner left the marijuana on the backseat where the marijuana had gone unnoticed for several months or that the passenger had left the marijuana in the backseat. *Prather v. State*, 293 Ga. App. 312, 667 S.E.2d 113 (2008).

Evidence sufficient for possession with intent to distribute. — Evidence of a defendant's unusual behavior in lifting up and kneeling next to the only doghouse in a dog pen that concealed contraband, the defendant's attempt to hide in the bushes when law enforcement officers arrived, and the defendant's previous history of selling drugs to passers-by from the same property, provided sufficient evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the defendant had knowledge of the presence of the contra-

band, access to it, and the power and intention to exercise control over it. *Price v. State*, No. A10A0448, 2010 Ga. App. LEXIS 377 (Apr. 7, 2010).

Evidence was sufficient to establish the defendant's conviction for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1) because during the execution of a search warrant at the defendant's residence, police officers seized eighteen baggies of marijuana individually packaged in a manner that was indicative of possession with intent to distribute, and the residence belonged to the defendant, which permitted an inference that the defendant controlled the premises and was in constructive possession of the drug contraband; the circumstantial evidence implied the defendant's consciousness of guilt and further supported the defendant's conviction because when the officers approached the residence, the defendant fled inside to the closet area where the drugs were later located, and when the officers searched the closet, the officers discovered that the jacket the defendant had been wearing was placed over the box containing the drugs. *Williams v. State*, No. A09A1854, 2010 Ga. App. LEXIS 321 (Mar. 29, 2010).

Evidence insufficient to convict defendant of possession of cocaine with intent to distribute. — There was insufficient evidence of intent to convict the defendant of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30 as there was no evidence that the cocaine had been divided and packaged for individual sale or as to a personal use quantity; thus, the circumstantial evidence did not permit a rational trier to exclude the reasonable hypothesis, pursuant to O.C.G.A. § 24-4-6, that the defendant intended to use the cocaine. *Florence v. State*, 282 Ga. App. 31, 637 S.E.2d 779 (2006).

While the evidence was sufficient to convict the defendant of possession of cocaine found in a pill bottle in the defendant's vehicle, it was insufficient to prove that the defendant intended to distribute the cocaine under O.C.G.A. § 16-13-30(b) because the state produced no evidence that the defendant had scales, cutting implements, weapons, a large amount of cash, a customer list, or drug packaging materials; there was no evidence of prior convictions of drug

possession with intent to distribute, no testimony that the defendant was seen selling or trying to sell drugs, no expert testimony that the amount of drugs seized was inconsistent with personal use, and no evidence as to the amount of cocaine seized. Under O.C.G.A. § 24-4-6, storing drugs in a pill bottle, and possessing an unidentified number of sales-size pieces of the drug, without more, equally supported the hypothesis that the person found with the drugs was a user rather than a dealer. *Hicks v. State*, 293 Ga. App. 830, 668 S.E.2d 474 (2008).

Evidence insufficient for criminal trespass conviction. — Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for criminal trespass under O.C.G.A. § 16-7-21 was inappropriate pursuant to O.C.G.A. § 24-4-6 because although the defendant was on the victim's property without permission, it was not proven that the defendant was there for a criminal purpose as the evidence indicated that the defendant was at the barn to drop off a saw that the defendant wanted to sell to the victim. *Parker v. State*, 297 Ga. App. 384, 677 S.E.2d 345 (2009).

Evidence insufficient for burglary conviction. — Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for burglary was inappropriate pursuant to O.C.G.A. § 24-4-6 as the evidence did not exclude the reasonable hypothesis that the defendant was only at the victim's barn to drop off a saw the defendant wanted to sell to the victim based on a telephone message left by the defendant for the victim and eyewitness testimony. *Parker v. State*, 297 Ga. App. 384, 677 S.E.2d 345 (2009).

Conspiracy may be shown by circumstantial evidence. *Dixon v. State*, 116 Ga. 186, 42 S.E. 357 (1902); *McLeroy v. State*, 125 Ga. 240, 54 S.E. 125 (1906); *Cook v. State*, 22 Ga. App. 770, 97 S.E. 264 (1918); *Sentell v. State*, 227 Ga. 153, 179 S.E.2d 234 (1971).

Corpus delicti may be shown by circumstantial evidence. *Hutchings v. State*, 4 Ga. App. 451, 61 S.E. 837 (1908); *Hurt v. State*, 18 Ga. App. 110, 88 S.E. 901 (1916); *Wright v. State*, 199 Ga. 576, 34 S.E.2d 879 (1945); *Hilliard v. State*, 92 Ga. App. 294, 88 S.E.2d 425 (1955); *Reese v. State*, 94 Ga. App. 387,

94 S.E.2d 741 (1956); *Brown v. State*, 98 Ga. App. 350, 105 S.E.2d 785 (1958); *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972).

Fingerprint evidence. — To warrant a conviction based solely on fingerprint evidence, the fingerprints corresponding to those of the defendant must have been found in the place where the crime was committed, and under such circumstances that the fingerprints could only have been impressed at the time when the crime was committed. *Jackson v. State*, 158 Ga. App. 530, 281 S.E.2d 252 (1981).

Fingerprints of the defendant found on bottles at the crime scene were sufficient to support the defendant's conviction for murder since the condition of the crime scene made it clear that the bottles were left just before the victim's death and the evidence suggested no occasion for the defendant to have left defendant's fingerprints there except during the crime. *Leonard v. State*, 269 Ga. 867, 506 S.E.2d 853 (1998).

Possession of pistol may be shown by circumstantial evidence. *Reese v. State*, 3 Ga. App. 532, 60 S.E. 122 (1908); *Williams v. State*, 12 Ga. App. 84, 76 S.E. 785 (1912).

Burglary conviction. — Sufficient circumstantial evidence of defendant's intent supported defendant's burglary conviction as defendant admitted entering the victim's home, and the victim testified that medications and cash were missing from the victim's home after the incident and that no one else had been in the victim's home from the time that the victim last saw the items until the victim noticed the items missing; the trial court's comments as to defendant's intent referred to the trial court's reason for finding defendant not guilty of burglary with intent to commit rape, and did not go to defendant's burglary with intent to commit theft. *Joyner v. State*, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Regarding defendants' convictions for burglary and theft by receiving stolen property, sufficient evidence authorized the jury's decision to reject one defendant's version of events — that defendants believed that the property involved belonged to an accomplice — because, with regard to one of the burglarized residences, the fact that defendants were unsuccessful in taking anything from the home was irrelevant to the burglary

Sufficiency of Circumstantial Evidence (Cont'd)

convictions since the crime was completed upon entry into the dwelling. As to the second residence, the fact that property from that residence was found in the vehicle in which defendants were in was sufficient to establish that the property had been stolen. *Clark v. State*, 289 Ga. App. 612, 658 S.E.2d 190 (2008).

Circumstantial evidence supported a defendant's conviction of burglarizing a garden center. On the morning the garden center burglary was discovered, the defendant was caught burglarizing a car dealership two doors down; gloves that fell from the defendant's pocket at the dealership came from the garden center; a shoe print on another glove from the center matched the defendant's boots; an investigator who drove by the area the previous evening testified that neither building showed signs of forced entry at that time; and the defendant stated that the defendant could have committed the garden center burglary but did not remember doing so. *Johnson v. State*, 291 Ga. App. 253, 661 S.E.2d 642 (2008).

Defendant's burglary conviction in violation of O.C.G.A. § 16-7-1 was supported by sufficient evidence because the defendant entered the victim's house without permission and there was circumstantial evidence that the defendant intended to commit a theft therein since there was money in the house before the defendant entered, but the money was gone after the defendant left. *Hall v. State*, 294 Ga. App. 274, 668 S.E.2d 880 (2008).

Although circumstantial, the evidence was sufficient to support the defendant's conviction of burglary under O.C.G.A. § 16-7-1(a). The victim's stolen computer was discovered in the attic area between the victim's side of a duplex and the defendant's side, and an officer noticed a path in the insulation from the defendant's side to the victim's attic access door. *Norful v. State*, 296 Ga. App. 387, 674 S.E.2d 633 (2009).

Burglary and aggravated assault. — Defendant's convictions of aggravated assault, O.C.G.A. § 16-5-21, and burglary, O.C.G.A. § 16-7-1, were affirmed as there was sufficient circumstantial evidence under

O.C.G.A. § 24-4-6 to prove that the defendant was the person who committed the acts in question, based on witness testimony and the discovery of clothes and a gun used in the robbery in the defendant's room. *Moore v. State*, 277 Ga. App. 474, 627 S.E.2d 107 (2006).

Aggravated battery. — Trial court properly denied a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a) since there was ample circumstantial evidence under O.C.G.A. § 24-4-6 for the jury to have found that the defendant was guilty of aggravated battery, in violation of O.C.G.A. § 16-5-24(a); defendant's claim that the defendant tripped and fell while carrying the infant son was contradicted by expert testimony that the injury to the infant's brain was caused by Shaken Baby Syndrome. *Lindo v. State*, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Victim was struck from behind with a beer bottle; the victim's head was cut, requiring stitches. The circumstantial evidence was sufficient to convict the defendant of aggravated assault because: (1) the victim saw the defendant standing close behind the victim after the blow was struck, and defendant began fighting with the victim; (2) similar transaction evidence showed the defendant's history of making unprovoked attacks on unsuspecting victims; and (3) a bartender's testimony that someone else committed the crime was internally inconsistent and uncorroborated. *Maiorano v. State*, 294 Ga. App. 726, 669 S.E.2d 678 (2008).

Malice murder. — Defendant's conviction for malice murder was affirmed as it could be concluded that the evidence of malice murder, though circumstantial, was sufficient to exclude every reasonable hypothesis, save that of the guilt of the accused since: (1) the defendant was upset with the victim; (2) the defendant got a rifle and carried the rifle into the bedroom; (3) the victim asked the defendant to put the rifle down twice, but the defendant refused; (4) the defendant then shot the victim in the head; and (5) the defendant gave the police three versions of the events and the first two were refuted by a firearms expert and a supervisor in the criminal investigations division. *Yeager v. State*, 281 Ga. 1, 635 S.E.2d 704 (2006).

Defendant's conviction for felony murder

and related charges was upheld on appeal because the evidence showed that the defendant had admitted to killing the defendant's girlfriend and others and the gun used to shoot the victim was the same that the defendant had shot at a party earlier in the evening; the defendant had asked the victim for a ride home from the party and the evidence indicated that defendant shot the victim twice and dumped the body in a wooded area. *Lee v. State*, 281 Ga. 511, 640 S.E.2d 287 (2007).

Circumstantial evidence was sufficient to support defendant's malice murder conviction of her husband because they had a tumultuous marriage; she was faced that day with explaining her entanglement with the victim's finances; she was in financial difficulty, as she had filed for bankruptcy, and she was the beneficiary of the victim's insurance policies; defendant could not account for 30 minutes of her whereabouts during the relevant time; and defendant's gun, which had recently been used, matched the type used to kill the victim. *Merritt v. State*, 285 Ga. 778, 683 S.E.2d 855 (2009).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of malice murder because the jury was authorized to find that the defendant met with the victim's husband and other codefendants on at least two occasions to discuss the murder of the victim, that the defendant accepted money from the husband prior to the murder, that the defendant instructed one of the codefendants on how to kill the victim, that the defendant drove to the victim's home with the husband and another codefendant on the morning of the murder, and that the defendant demanded and accepted money from the husband as compensation for the murder. *Owens v. State*, 286 Ga. 821, (2010).

Possession of stolen goods may authorize conviction. — Fact that stolen goods were in defendant's possession shortly after commission of the burglary would, in and of itself, authorize the jury to infer that defendant was guilty, unless the defendant explained satisfactorily the defendant's possession of such stolen goods. *McGee v. State*, 159 Ga. App. 763, 285 S.E.2d 224 (1981).

Circumstantial evidence was sufficient to show specific facts in the following cases. —

See *Johnson v. State*, 119 Ga. 446, 46 S.E. 634 (1904) (specific acts of sexual intercourse); *Jordan v. State*, 119 Ga. 443, 46 S.E. 679 (1904) (bar to statute of limitations); *Little v. State*, 3 Ga. App. 441, 60 S.E. 113 (1908) (weapon of assault); *Glover v. State*, 15 Ga. App. 44, 82 S.E. 602 (1914) (intention); *Burke v. State*, 183 Ga. 726, 189 S.E. 516 (1937) (identity of defendant); *Smith v. State*, 154 Ga. App. 497, 268 S.E.2d 714 (1980) (prior similar offense); *Baxter v. State*, 160 Ga. App. 181, 286 S.E.2d 460 (1981) (similar modus operandi); *Shaw v. State*, 211 Ga. App. 647, 440 S.E.2d 245 (1994) (burglary); *Alford v. State*, 224 Ga. App. 451, 480 S.E.2d 893 (1997) (attempted burglary); *Gooch v. State*, 249 Ga. App. 643, 549 S.E.2d 724 (2001) (possession of methamphetamine); *Hill v. State*, 276 Ga. 220, 576 S.E.2d 886 (2003) (felony murder, armed robbery, and possession of a firearm).

Robbery. — When a defendant was arrested for one robbery, but connected to three prior robberies by witnesses who identified the mask taken from the defendant's car as being the mask worn in the three prior robberies, and other similarities were shown between the methods used in all of the robberies, there was more than sufficient evidence to convict the defendant. *Gamble v. State*, 194 Ga. App. 765, 391 S.E.2d 801 (1990).

When the defendant jumped out of defendant's vehicle and began running away upon the approach of officers, narcotics were found in the immediate area of defendant's residence, the defendant was in possession of large amounts of money in small denominations, and no other persons were present in the area, there was more than sufficient evidence to convict the defendant. *Jones v. State*, 208 Ga. App. 559, 430 S.E.2d 877 (1993).

Even though the evidence that defendant forcibly entered the elderly victims' home, attacked and robbed the victims, inflicted fatal injuries, then later sold or attempted to sell items stolen from the victims, along with similar transaction evidence that defendant was involved in a pattern of conduct of forcing defendant's way into the homes of elderly victims, attacking the victims, and then stealing items from them to trade for crack cocaine, was largely circumstantial, the largely circumstantial evidence was sufficient

Sufficiency of Circumstantial Evidence (Cont'd)

for the jury to exclude every reasonable hypothesis except defendant's guilt of the armed robbery and murder of the victims. *Weston v. State*, 276 Ga. 680, 580 S.E.2d 204 (2003).

Evidence sufficient for robbery by sudden snatching conviction. — Although the victim never saw the defendant with the wallet, there was sufficient evidence to show that at the moment the defendant's companion darted in front of the victim's cart distracting the victim's attention, the defendant snatched the wallet from the victim's purse; despite the victim's detection of the defendant's efforts, nothing more was needed to prove the elements of the crime of robbery by sudden snatching. *Andrews v. State*, 270 Ga. App. 362, 606 S.E.2d 587 (2004).

Evidence sufficient for possession of tools for commission of crime conviction. — Items stolen from victims' vehicles found in the defendant's car, stopped as the vehicle left the area of the thefts were sufficient to sustain convictions of entering an auto with the intent to commit theft, O.C.G.A. § 16-8-18; however, as there was no similar testimony as to items stolen from different victims, insufficient evidence supported other convictions, because the defendant's presence at the scene of the crime, without any other direct evidence, was insufficient to convict the defendant of the crimes that a passenger admitted to committing. Along with the stolen items found in the defendant's vehicle, and the defendant's presence at the crime scene where cars were broken into with the kind of tools found in the defendant's vehicle, the evidence was sufficient to sustain a conviction for possession of tools for the commission of a crime. *Walker v. State*, 281 Ga. App. 94, 635 S.E.2d 577 (2006).

Evidence sufficient for felony murder and armed robbery convictions. — Given the testimony provided by both the codefendant and the codefendant's former wife, to whom the defendant admitted to firing the fatal shots killing the victim, which netted the victim's cellular phone and pager and evidence describing how the defendant participated in the events that happened before, during, and after the commission of the

crimes, sufficient evidence was presented to uphold the defendant's convictions for felony murder and armed robbery as a party to the crimes. *Pruitt v. State*, 282 Ga. 30, 644 S.E.2d 837 (2007).

Evidence sufficient for convictions for aggravated assault, burglary, and possession of a firearm. — Given that the circumstantial evidence presented against the defendant sufficiently showed that: (1) the victim shot one of the intruders who committed the burglary; (2) shortly after the burglary, the defendant was treated for a gunshot wound and arrived at the hospital in a vehicle matching the description of the automobile seen leaving the crime scene; (3) the DNA evidence on ski masks found at the scene matched that of the owner of the car and the other passenger, who was also the defendant's brother; and (4) according to the defendant's brother, the driver of the car admitted to shooting the victim, the defendant's convictions for aggravated assault, burglary, and possession of a firearm during the commission of a felony were affirmed on appeal. *Sherman v. State*, 284 Ga. App. 809, 644 S.E.2d 901 (2007).

Evidence sufficient for possession of drugs. — If the totality of the evidence was sufficient to connect defendant to possession of drugs, even though there was evidence to authorize a contrary finding, the conviction would be sustained. *Blair v. State*, 216 Ga. App. 545, 455 S.E.2d 97 (1995).

Evidence sufficient for cocaine possession and possession with intent to distribute conviction. — Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. *Allen v. State*, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

Evidence that cocaine was found in the roof of defendant's vehicle and almost \$1,000 in cash was found in defendant's pocket, although circumstantial, was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt

of possession of cocaine with intent to distribute. *Johnson v. State*, 274 Ga. App. 282, 617 S.E.2d 252 (2005), rev'd on other grounds, 280 Ga. 511, 630 S.E.2d 377 (2006); vacated, in part, 283 Ga. App. 630, 642 S.E.2d 340 (2007).

Given an alternative school's security officer's actual observation of a hand-to-hand exchange from a juvenile to another student at the school and the discovery of marijuana in the recipient's hand immediately thereafter, the only reasonable hypothesis was that the juvenile had just possessed the marijuana satisfying O.C.G.A. § 24-4-6. In the Interest of T.M., No. A10A0211, 2010 Ga. App. LEXIS 351 (Apr. 1, 2010).

Evidence sufficient for methamphetamine possession conviction. — An officer found methamphetamine in a portion of a truck where the defendant kept personal belongings; the defendant was the sole occupant of the vehicle. The defendant's testimony denying possession of the drugs and stating that others had equal access to the truck did not establish under O.C.G.A. § 24-4-6 that the circumstantial evidence was insufficient to convict the defendant of possession of methamphetamine. *Bryson v. State*, 293 Ga. App. 392, 667 S.E.2d 170 (2008).

Evidence sufficient for involuntary manslaughter conviction. — There was sufficient evidence to support a defendant's conviction for involuntary manslaughter of the defendant's romantic friend given the evidence of the defendant's admission that the defendant placed the friend in a headlock during a fight, and the medical examiner's findings that the friend was strangled to death. As a result, the jury was authorized to exclude all other reasonable hypotheses and conclude that the defendant unintentionally caused the friend's death while committing simple battery. *Lemon v. State*, 293 Ga. App. 488, 667 S.E.2d 654 (2008).

Evidence sufficient for armed robbery, burglary, and possession of a firearm conviction. — After two intruders burglarized and robbed a home at gunpoint, a pickup truck near the home fled from a patrol car and crashed, then two people matching the victims' description of the intruders fled from the truck. Since the defendant was trapped behind the steering wheel, and the items stolen from the home and a handgun were found in the truck, the circumstantial evi-

dence was sufficient to convict the defendant as a party to armed robbery, burglary, and possession of a firearm during the commission of a burglary. *Olds v. State*, 293 Ga. App. 884, 668 S.E.2d 485 (2008).

Flight may be shown by circumstantial evidence. *Terry v. State*, 15 Ga. App. 108, 82 S.E. 635 (1914); *Blakely v. State*, 78 Ga. App. 262, 50 S.E.2d 762 (1948).

Flight of the accused is a circumstance which may be considered by the jury in determining the accused's guilt. *Brooks v. State*, 63 Ga. App. 575, 11 S.E.2d 688 (1940); *Kirkland v. State*, 67 Ga. App. 256, 19 S.E.2d 787 (1942); *Tyler v. State*, 91 Ga. App. 87, 84 S.E.2d 843 (1954).

Flight considered alone. — Mere fact of flight alone is not an incriminatory circumstance of sufficient probative value of itself to authorize a conviction for a crime. *Burchfield v. State*, 40 Ga. App. 506, 150 S.E. 459 (1929); *Seay v. State*, 63 Ga. App. 286, 11 S.E.2d 54 (1940).

Flight is generally not sufficient to support a conviction even if the flight was from the scene of the crime. *Muckle v. State*, 165 Ga. App. 873, 303 S.E.2d 54 (1983).

Flight of concealment considered with other circumstances is sufficient to convict. *Diggs v. State*, 90 Ga. App. 853, 84 S.E.2d 611 (1954).

Inference of participation. — Confession of facts that are matter from which an inference of participation arises are circumstantial. *Eberhart v. State*, 41 Ga. 598 (1873); *Riley v. State*, 1 Ga. App. 651, 57 S.E. 1031 (1907).

Others having access. — Evidence that cocaine was found hidden on the outside of defendant's mobile home, which was parked in an area to which a large number of persons, not only visitors to the unit occupied by defendant but anyone having business in the mobile home park had potential access was insufficient to sustain defendant's conviction for possession of cocaine. *Prescott v. State*, 164 Ga. App. 671, 297 S.E.2d 362 (1982).

Trial court erred in denying the defendant's motion for new trial after a jury found the defendant guilty of possession of more than one ounce of marijuana in violation of O.C.G.A. § 16-13-30(j) because the evidence adduced at trial was insufficient to show that the defendant was in sole constructive pos-

Sufficiency of Circumstantial Evidence (Cont'd)

session of the contraband when the defendant alone was charged with possessing the marijuana although the passenger in his car had equal access to it, and the only legal evidence linking the defendant to the marijuana in the back seat was his spatial proximity to it; an officer's testimony concerning scales that were found in the car, to the extent it suggested some deception on the passenger's part, that deception did not give rise to the sole, reasonable inference that defendant was in sole constructive possession of the marijuana, and because the inference did not exclude every other reasonable hypothesis save the guilt of defendant, it was insufficient to prove beyond a reasonable doubt that he was in sole constructive possession of the marijuana. *Rogers v. State*, 302 Ga. App. 65, 690 S.E.2d 437 (2010).

Mere presence of contraband on premises occupied by an accused is insufficient to sustain a conviction when there is also evidence of access by others. *Shockley v. State*, 166 Ga. App. 182, 303 S.E.2d 519 (1983).

Presence, and approval of act, not sufficient. — Presence at the scene of a crime is not sufficient to show that a defendant is a party to the crime under O.C.G.A. § 16-2-20, and even approval of the act, not amounting to encouragement, will not suffice. This is so because of O.C.G.A. § 24-4-6 as to a conviction on circumstantial evidence. *Ridgeway v. State*, 187 Ga. App. 381, 370 S.E.2d 216 (1988).

Acquaintance, proximity, and dress insufficient. — Fact that defendant knew a momentarily detained drug suspect, had been seen associating with the suspect in the past, and was dressed in a fashion not uncommon to drug vendors was insufficient circumstantial evidence to establish beyond a reasonable doubt that defendant had joint constructive possession over controlled substances found in a nearby cache. *Brooks v. State*, 206 Ga. App. 485, 425 S.E.2d 911 (1992).

Evidence held sufficient to support conviction for arson. — Given evidence of defendant's serious altercation with a woman-resident of the subject arson house prior to the house's burning, defendant's identification at and around the premises

minutes prior to, and after the fire, and other circumstantial indicia of motive, opportunity, and inconsistency, the evidence, though wholly circumstantial, was sufficient to sustain a conviction for arson. *Jenkins v. State*, 207 Ga. App. 500, 428 S.E.2d 410 (1993).

Circumstantial evidence presented at trial: that the defendant and the defendant's family were to leave a house they bought for failure to make payments, that the defendant was upset about the fact that the defendant was not going to receive the return of the earnest money, that defendant was alone in the house at the time of the fire, and that defendant appeared nervous was sufficient to convict defendant of arson. *Burchette v. State*, 260 Ga. App. 739, 580 S.E.2d 609 (2003), *aff'd*, 278 Ga. 1, 596 S.E.2d 162 (2004).

Jury was authorized to find defendant guilty of arson even though the evidence was circumstantial as the proven facts were consistent with the hypothesis of guilt and excluded every other reasonable hypothesis other than defendant's guilt as defendant's burning of three trucks using gasoline at a truck-driving school where defendant failed truck-driving courses, defendant's presence at a gas station around the time of the fire, and defendant's admission that defendant burned the trucks because an instructor "burned" defendant, meant defendant's conviction was supportable as a matter of law. *Denson v. State*, 259 Ga. App. 342, 577 S.E.2d 29 (2003).

Evidence insufficient for arson conviction. — Conviction of first degree arson, O.C.G.A. § 16-7-60(a)(2), was not supported by sufficient evidence since there was no showing that a truck allegedly burned by the defendant was designed for use as a dwelling, and there was no showing of a lack of consent to the burning by the lienholder on the truck or by the joint owner, the defendant's wife; neither the wife's insurance claim form stating that she did not procure the loss, nor an insurance payment to the lienholder showed the required lack of consent, and there was no evidence in the entirely circumstantial case from which a jury could have excluded the very reasonable alternate hypothesis that the lienholder consented to the fire so as to recover the insurance proceeds for payment on a

loan owed by a financially-troubled debtor, the defendant. *Prater v. State*, 279 Ga. App. 527, 631 S.E.2d 746 (2006).

Evidence was sufficient for aggravated battery conviction. — Defendant's attempt to invoke the circumstantial evidence rule of O.C.G.A. § 24-4-6 was rejected and the evidence was sufficient to support defendant's conviction of aggravated battery as the evidence was not entirely circumstantial since there was direct evidence that: (1) defendant said that defendant was going to set the victim on fire; (2) defendant was present and poured the gasoline on the victim; (3) defendant reached in defendant's pocket for something just before the fire started; and (4) the victim questioned why defendant had done it. *Miller v. State*, 265 Ga. App. 402, 593 S.E.2d 943 (2004).

Convictions of arson, O.C.G.A. § 16-7-60(a), and stalking, O.C.G.A. § 16-5-90, were proper because the circumstantial evidence presented at trial included a kerosene-soaked, partially burned, mailing label addressed to the defendant found at the scene of a fire at the victim's home; the state also presented evidence of the defendant's escalating obsession with the victim and the threatening phone calls the defendant made to the victim shortly before the fire. Although the circumstantial evidence must have excluded every other reasonable hypothesis save defendant's guilt, the evidence need not have excluded every inference or hypothesis. *Ransom v. State*, 297 Ga. App. 902, 678 S.E.2d 574 (2009).

Direct evidence required. — Circumstances relied upon must be proved by direct evidence. *Georgia Ry. & Elec. Co. v. Harris*, 1 Ga. App. 714, 57 S.E. 1076 (1907).

Evidence sufficient. — Evidence sufficient to exclude every reasonable hypothesis except that of defendant's guilt. *Brown v. State*, 260 Ga. 153, 391 S.E.2d 108 (1990); *Grover v. State*, 215 Ga. App. 907, 452 S.E.2d 586 (1994).

Evidence adduced at trial was sufficient to authorize a rational jury to find the defendant and the codefendant guilty beyond a reasonable doubt of the malice murder, directly or as a party to the crimes, because questions as to the reasonableness of alternative hypotheses were for the jury to decide, and the evidence was sufficient to enable the jury to reject every alternative

hypothesis of the crimes, save that of the guilt of the defendant and the codefendant. *Krause v. State*, 286 Ga. 745, 691 S.E.2d 211 (2010).

Evidence held sufficient to support conviction. — See *Griffin v. State*, 2 Ga. App. 534, 58 S.E. 781 (1907) (gaming); *Perry v. State*, 9 Ga. App. 871, 72 S.E. 446 (1911) (larceny); *Brown v. State*, 13 Ga. App. 144, 78 S.E. 868 (1913) (larceny); *Smith v. State*, 148 Ga. 332, 96 S.E. 632 (1918) (murder); *Shirley v. State*, 168 Ga. 344, 148 S.E. 91 (1929) (murder); *Cheatham v. State*, 57 Ga. App. 858, 197 S.E. 70 (1938) (larceny); *Johnson v. State*, 79 Ga. App. 210, 53 S.E.2d 498 (1949) (illegal possession whiskey); *Fouts v. State*, 96 Ga. App. 876, 101 S.E.2d 925 (1958) (possession of beer); *Blackwell v. State*, 99 Ga. App. 579, 109 S.E.2d 62 (1959) (larceny); *Harvey v. State*, 111 Ga. App. 279, 141 S.E.2d 604 (1965) (larceny and burglary); *Anderson v. State*, 120 Ga. App. 147, 169 S.E.2d 629 (1969) (burglary); *Brown v. State*, 125 Ga. App. 300, 187 S.E.2d 301 (1972) (larceny or burglary); *Brown v. State*, 133 Ga. App. 56, 209 S.E.2d 721 (1974) (burglary); *Cosby v. State*, 151 Ga. App. 676, 261 S.E.2d 424 (1979) (burglary); *Prescott v. State*, 164 Ga. App. 671, 297 S.E.2d 362 (1982) (no one other than self and wife had access to the bedroom closet); *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983) (armed robbery); *Smith v. State*, 250 Ga. 729, 300 S.E.2d 798 (1983) (murder); *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983) (murder and unlawful concealment of death); *Fields v. State*, 167 Ga. App. 400, 306 S.E.2d 695 (1983) (entering motor vehicle with intent to commit theft); *Fredericks v. State*, 176 Ga. App. 40, 335 S.E.2d 154 (1985) (driving while under the influence of alcohol); *Holland v. State*, 176 Ga. App. 343, 335 S.E.2d 739 (1985) (possession of controlled substances; no evidence that anyone other than defendants had access to bedroom where controlled substances were found); *Childs v. State*, 176 Ga. App. 549, 336 S.E.2d 309 (1985) (burglary); *Turner v. State*, 176 Ga. App. 785, 338 S.E.2d 37 (1985) (robbery); *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987) (murder and concealment of death); *Smith v. State*, 257 Ga. 381, 359 S.E.2d 662 (1987) (murder); *Chews v. State*, 187 Ga. App. 600,

Sufficiency of Circumstantial Evidence (Cont'd)

371 S.E.2d 124 (1988) (drug violation); *Beach v. State*, 258 Ga. 700, 373 S.E.2d 210 (1988); *Rich v. State*, 191 Ga. App. 312, 381 S.E.2d 567 (1989) (burglary); *Horton v. State*, 194 Ga. App. 797, 392 S.E.2d 259 (1990) (drug violation); *Ware v. State*, 198 Ga. App. 24, 400 S.E.2d 384 (1990) (attempt to commit burglary); (intent to distribute cocaine); *Anderson v. State*, 225 Ga. App. 727, 484 S.E.2d 783 (1997); *Savage v. State*, 229 Ga. App. 560, 494 S.E.2d 359 (1997) (possession of cocaine); *Ross v. State*, 240 Ga. App. 563, 524 S.E.2d 255 (1999) (malice murder); *Lindsey v. State*, 271 Ga. 657, 522 S.E.2d 459 (1999) (murder); *Foster v. State*, 273 Ga. 34, 537 S.E.2d 659 (2000) (burglary); *Peek v. State*, 247 Ga. App. 364, 542 S.E.2d 517 (2000) (burglary); *Gresham v. State*, 246 Ga. App. 705, 541 S.E.2d 679 (2000) (entering automobile with intent to commit theft); *Withers v. State*, 282 Ga. 656, 653 S.E.2d 40 (2007) (felony murder and possession of a firearm); *Davis v. State*, 285 Ga. App. 315, 645 S.E.2d 753 (2007) (drug violation).

Comparing the child's condition at the time the defendant took the child from the child's mother and shortly thereafter, with the child's condition at the time the child and the defendant appeared at the fire station, and considering the acts of abuse admitted by the defendant, the evidence, when viewed most favorably to the verdict, was sufficient to have authorized a rational trier of fact in finding beyond a reasonable doubt that the defendant caused the child's death. *Phipps v. State*, 203 Ga. App. 128, 416 S.E.2d 319, cert. denied, 203 Ga. App. 907, 416 S.E.2d 319 (1992).

Trial court did not err in convicting the defendant of possession of cocaine with the intent to distribute, O.C.G.A. § 16-13-30(b), and possession of marijuana, O.C.G.A. § 16-13-2(b), because the circumstantial evidence established a meaningful connection between the defendant and the contraband, evidence which showed the defendant exercising power and dominion over the drugs found inside the wheel well on the front passenger's side of a car; the jury could infer that the drugs had been recently placed in the wheel well, and because the defendant

had fled from the police, had been caught within arm's reach of the drugs, and had a large amount of cash in his pockets, the jury could infer that the defendant was a drug dealer and that the defendant had placed the drugs in the wheel well to avoid being prosecuted for possessing them. *Wright v. State*, 302 Ga. App. 332, 690 S.E.2d 654 (2010).

Trial court did not err in convicting the defendant of trafficking in methamphetamine because the evidence sufficed to sustain the conviction, and the jury was authorized to conclude that the circumstances excluded the hypothesis that another passenger had placed drugs in the bed of a truck; the passenger testified at trial that the passenger did not place the drugs in the truck bed, and a police officer testified that the passenger, whom the officer had in sight the entire time, never came within five-to-six feet of the truck and that the officer not only saw the defendant place the defendant's arm in the truck bed but heard an accompanying thump. *Haggard v. State*, 302 Ga. App. 502, 690 S.E.2d 651 (2010).

Evidence sufficient for murder conviction. — Physical evidence of signs of struggle at victim's residence, defendant's attempts to remove these, and defendant's subsequent behavior regarding the disposal of victim's body sufficed to permit the jury to exclude every other hypothesis save the guilt of the accused in a prosecution for murder. *White v. State*, 263 Ga. 94, 428 S.E.2d 789 (1993).

Evidence sufficient for burglary convictions. — Circumstantial evidence of the burglary was sufficient to exclude every other reasonable hypothesis save defendants' guilt as was required by O.C.G.A. § 24-4-6 since defendants were seen at the burglarized property at the time that the burglary occurred, defendants fled the scene, and one of the defendants gave the police inconsistent stories as to what defendants were doing on the property. *Bollinger v. State*, 259 Ga. App. 102, 576 S.E.2d 80 (2003).

Circumstantial evidence supported defendant's burglary conviction because: (1) defendant drove a truck that exactly matched the truck in the surveillance tape; (2) defendant had a board in defendant's truck with glass particles embedded in the board that were of the same thickness and physical chemical properties as the glass of the win-

dow that was broken during the crime; (3) a sweater cap and white gloves found in the truck appeared to match those worn by the perpetrator in the surveillance tape; and (4) the stolen television and videocassette recorder were found approximately 500 yards from the defendant's mother's home. *Brooks v. State*, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Evidence sufficient for trafficking in cocaine and possession of heroine with intent to distribute. — Defendant's convictions for trafficking in cocaine and possession of heroin with intent to distribute, in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(a), were supported by sufficient circumstantial evidence, pursuant to O.C.G.A. § 24-4-6, since it was shown that a witness stated that defendant was residing in an apartment and selling drugs, a search of the apartment revealed drugs, cash, and photographs and papers with defendant's name on them, as well as a sweater which defendant was seen wearing, and defendant had changed the locks on the apartment; accordingly, the trial court's denial of defendant's motions for a directed verdict pursuant to O.C.G.A. § 17-9-1 and for a new trial pursuant to O.C.G.A. § 5-5-23 were properly denied. *Williams v. State*, 262 Ga. App. 67, 584 S.E.2d 625 (2003).

Evidence sufficient for malice murder conviction. — There was sufficient evidence to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of malice murder after the victim, found in defendant's home, had been beaten and died from a severe blow to the head. *Hannah v. State*, 278 Ga. 195, 599 S.E.2d 177 (2004).

Evidence was sufficient to support a malice murder conviction since witnesses saw the defendant arguing with the victim, go with the victim into an area behind a motel where the victim lived, heard shots from the area behind the motel, and later the victim's body was found in that area; also, the defendant was seen at a house with an item wrapped in cloth, and later, the defendant's gun, the murder weapon, was found in the yard of that house, wrapped in cloth. *Smith v. State*, 280 Ga. 161, 625 S.E.2d 766 (2006).

Bloody jogging suit belonging to the defendant found at the defendant's girlfriend's

house with the victim's blood on it, witnesses' description of the defendant wearing that same jogging suit after the shooting, and a .380 pistol found hidden in a cinder block at the girlfriend's house that matched the type of gun used to kill the victim were sufficient evidence to support convictions for malice murder and other related crimes with regard to the killing of the girlfriend's neighbor. *Hooks v. State*, 280 Ga. 164, 626 S.E.2d 114 (2006).

Evidence that the defendant threatened to kill the victim on numerous occasions, sometimes while brandishing a knife; that shortly before the victim was fatally stabbed, the defendant was seen in the victim's front yard; and that police matched the boots the defendant was wearing that night to a footprint at the crime scene was sufficient to convict the defendant of malice murder. *Smith v. State*, 284 Ga. 304, 667 S.E.2d 65 (2008).

Evidence sufficient for robbery convictions. — There was sufficient evidence of defendant's intent to participate in the robbery of a delivery man since the evidence showed that defendant was privy to the robbery plan, participated in the robbery, and convened with the codefendants after the robbery. In the Interest of C.L.B., 267 Ga. App. 456, 600 S.E.2d 407 (2004).

Denial of defendant's motion for a new trial was affirmed as defendant's fingerprint was on the robbery note, the victim eliminated all but the defendant's and one other's photos from a photo lineup, the victim's description matched the defendant's appearance, and the victim in a similar robbery positively identified the defendant as the robber; a defense witness's testimony that the witness saw defendant playing with cards in the hotel lobby a few days before the robbery did not exonerate the defendant as the witness did not see the defendant playing with cards similar to the one on which the robbery note was written. *Dailey v. State*, 271 Ga. App. 492, 610 S.E.2d 126 (2005).

Evidence sufficient for criminal attempt to commit armed robbery. — Jury was authorized to conclude that the evidence excluded every reasonable hypothesis except the defendant's guilt of criminal attempt to commit armed robbery because the defendant surreptitiously watched others at a fast food restaurant, wore a mask, and drew a BB

Sufficiency of Circumstantial Evidence (Cont'd)

handgun that resembled a semi-automatic weapon when the defendant was confronted by a police officer. *New v. State*, 270 Ga. App. 341, 606 S.E.2d 865 (2004).

Evidence sufficient for possession of drugs conviction. — Jury could rationally find from circumstantial evidence that defendant committed the offenses of possession of both amphetamine and GHB because substances found in defendant's gym locker were tested and found to be amphetamine and GHB, the amount of GHB found could be for personal use over a long period of time, and the containers in which the substances were found contained several prints that could not be identified but contained one that matched defendant's finger. *Hobbs v. State*, 272 Ga. App. 148, 611 S.E.2d 775 (2005).

As the defendant was the driver, owner, and sole occupant of a vehicle, and 250 grams of methamphetamine were found hidden beneath the steering column, within arm's reach of the driver, the circumstantial evidence was sufficient to establish the defendant's "knowing" possession of the drugs as required by O.C.G.A. § 16-13-31(e). The mere possibility that someone other than the defendant committed the crime was not such a reasonable hypothesis as had to be excluded in order for circumstantial evidence to authorize a verdict of guilty under O.C.G.A. § 24-4-6. *Garcia v. State*, 293 Ga. App. 422, 667 S.E.2d 205 (2008).

Evidence sufficient for possession of cocaine conviction. — Circumstantial evidence under O.C.G.A. § 24-4-6 was sufficient to support defendant's conviction for possession of cocaine, in violation of O.C.G.A. § 16-13-30, as the defendant was approached by two undercover officers and upon seeing that one of the officers had a badge, defendant turned around and made a throwing motion with a clenched fist in the direction of a trash barrel; defendant was in an area known for drug sales, and three pieces of crack cocaine were found in the vicinity of the trash barrel. *Woods v. State*, 275 Ga. App. 471, 620 S.E.2d 660 (2005).

Police officer testified about searching a patrol car before transporting the defendant in the car, and about the officer's suspicions

that the defendant had stuffed something underneath the backseat because the officer saw debris on the back of the defendant's pants and on the backseat. This circumstantial evidence was sufficient under O.C.G.A. § 24-4-6 to convict the defendant of possessing the cocaine found wedged underneath the backseat. *Simmons v. State*, 299 Ga. App. 21, 681 S.E.2d 712 (2009).

Evidence sufficient for rape conviction. — Combination of circumstantial and direct evidence, including the victim's identification of the attacker, DNA evidence, and the testimony of several eyewitnesses who saw a man fitting the defendant's description in the area near the time of the attack, was sufficient to sustain a rape conviction. *McKeehan v. State*, 274 Ga. App. 14, 616 S.E.2d 489 (2005).

Evidence sufficient for malice murder and attempted arson convictions. — Malice murder and attempted arson convictions were upheld as: (1) the evidence presented showed that an attempted arson was inextricably linked to the victim's murder, and the jury was authorized to find beyond a reasonable doubt that the defendant was guilty; (2) the admission of two handwritten documents that defendant had penned was proper, as their prejudicial impact did not outweigh their probative value; and (3) the trial court did not abuse the court's discretion in determining that any prejudicial impact of a religious prayer asking for strength, and an expression of uncertainty as to what "makes me tick," did not outweigh the probative value of the evidence. *Fortson v. State*, 280 Ga. 376, 628 S.E.2d 104 (2006).

Evidence sufficient for felony murder while in commission of cruelty to children conviction. — Evidence that a defendant's 13-month-old child died while in the defendant's care from brain trauma caused by being struck by or against an object or violently shaken at a time when one other person and that person's child were in the defendant's apartment provided sufficient circumstantial evidence under O.C.G.A. § 24-4-6 to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder while in the commission of cruelty to a child; questions as to the reasonableness of hypotheses were to be decided by the jury, and the jury's finding was not to be disturbed unless the

guilty verdict was insupportable as a matter of law. *Scott v. State*, 281 Ga. 373, 637 S.E.2d 652 (2006).

Evidence sufficient for possession of cocaine with intent to distribute and proximity to housing project convictions. — Defendant's convictions for possession of cocaine with intent to distribute and possession of a controlled substance within 1,000 feet of a housing project, in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-32.5(b), were based on sufficient evidence since the state proved by circumstantial evidence pursuant to O.C.G.A. § 24-4-6 that defendant had been walking back and forth to an overturned bucket when people approached from the street in what appeared to be drug transactions, and the drugs were found under the bucket; there was evidence that the amount of drugs recovered were more than one would use for personal use, indicating an intent to distribute, and there was also evidence indicating the proximity of the bucket to a nearby public housing complex. *Reason v. State*, 283 Ga. App. 608, 642 S.E.2d 236 (2007).

Evidence sufficient for malice murder and armed robbery convictions. — Evidence, which included uncontroverted testimony from an eyewitness who saw the defendant order a store employee into the street shortly before the employee was shot, the testimony of two other eyewitnesses, and the fact that calls had been made from the employee's stolen cellular phone to the defendant's mother, was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, armed robbery, and a number of other associated crimes. *Horne v. State*, 281 Ga. 799, 642 S.E.2d 659 (2007).

Evidence sufficient for felony murder and arson convictions. — Circumstantial evidence was sufficient under O.C.G.A. § 24-4-6 to support the defendant's arson and felony murder convictions and to exclude the theory that an intruder set the fire in the house since the defendant rented a room from the victim: (1) testimony of neighbors contradicted the defendant's claim that the defendant was asleep and unaware of the fire; (2) there was no evidence of a forced entry other than that of the neighbors who tried to save the victim; (3) the layout of the house authorized the

jury to find that the defendant would have noticed an intruder; and (4) a motive could be inferred from the fact that the defendant owed rent to the victim and that the victim was planning to ask the defendant for the rent. *Green v. State*, 283 Ga. 126, 657 S.E.2d 221 (2008).

Evidence sufficient for trafficking marijuana conviction. — There was sufficient evidence to support the defendant's conviction for trafficking marijuana as the jury was authorized to conclude that it was not reasonable, as the defendant suggested, that someone other than the defendant placed over 21 pounds of marijuana in open view in the back of a trailer of which the defendant had the only key, without the defendant's knowledge. *Mora v. State*, 292 Ga. App. 860, 666 S.E.2d 412 (2008).

Evidence sufficient for felony murder conviction. — Circumstantial evidence supported the defendant's conviction of the felony murder of the defendant's two-month-old child. The victim's grandparent had not had contact with the victim on the day of the murder, and the evidence that the victim was well when the victim's other parent left the house, combined with a medical examiner's testimony and time line regarding the time of the child's death, excluded the other parent's guilt as well. *Nixon v. State*, 284 Ga. 800, 671 S.E.2d 503 (2009).

Evidence authorized the jury to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a crime because there was substantial corroborating evidence in addition to the accomplice's testimony; the defendant stated that the defendant had killed someone, other witnesses corroborated the accomplice's testimony regarding the arrival and departure of the two men on the night of the shooting, and blood was found on the shirt the defendant wore that night and tried to have destroyed. *Gonnella v. State*, 286 Ga. 211, 686 S.E.2d 644 (2009).

Evidence sufficient for felony murder and aggravated assault conviction. — Contrary to a defendant's contention that the state presented only circumstantial evidence under O.C.G.A. § 24-4-6 that did not exclude all reasonable hypotheses except that of the defendant's guilt, the evidence was sufficient to support the conviction for felony murder and aggravated assault; the defendant's in-

Sufficiency of Circumstantial Evidence (Cont'd)

fant child died of a massive closed head trauma complicated by blunt force chest trauma, and the defendant had the sole care of the child just before the child suffered rib injuries allegedly due to the defendant pushing on the child's chest while the child was choking and just before the child suffered seizure-like symptoms. *Berryhill v. State*, 285 Ga. 198, 674 S.E.2d 920 (2009).

Evidence authorized the jury to find the defendant guilty beyond a reasonable doubt of murder, felony murder, aggravated assault, and possession of a weapon during the commission of a felony because contrary to the defendant's arguments, the evidence showed that the person who was sitting in the back seat of the victim's car was not sitting directly behind the victim, but instead, that person was in the rear seat on the passenger's side of the car; the forensics testing showed that the murderer was located to the left of the victim, not the right, and there was blood spatter on the seat behind the victim from which the jury could have inferred that no one was sitting there at the time of the shooting. *Julius v. State*, 286 Ga. 413, 687 S.E.2d 828 (2010).

Evidence sufficient for aggravated child molestation conviction. — Evidence, including that defendant had access and opportunity to infect a victim at least two weeks prior to the victim exhibiting symptoms, and that the victim's immediate outcry was consistent with the victim's statement to a doctor identifying defendant, and excluding the hypothesis that the victim's father was present prior to the onset of the victim's symptoms, was sufficient to convict defendant of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). *Zuniga v. State*, 300 Ga. App. 45, 684 S.E.2d 77 (2009), cert. denied, No. S10C0169, 2010 Ga. LEXIS 125 (Ga. 2010).

Evidence sufficient as there is direct evidence. — Evidence was sufficient to support defendant's conviction for shoplifting, and the state was not required under O.C.G.A. § 24-4-6 to present evidence excluding every other reasonable hypothesis except defendant's guilt because the state's case was not based on circumstantial evidence, but on the direct testimony of an eyewitness to the shoplifting. *Fitzpatrick v. State*, 271 Ga. App. 804, 611 S.E.2d 95 (2005).

Defendant's claim that the evidence was insufficient to support defendant's conviction for theft by shoplifting because the evidence was completely circumstantial and did not exclude every reasonable hypothesis save that of the defendant's guilt failed; contrary to the defendant's contention, the testimony from a store's loss prevention employee that the employee observed the defendant remove an item from a shelf, place the item in the defendant's back pocket, and then leave the store without presenting the item to a cashier was direct not circumstantial evidence. *Walton v. State*, 291 Ga. App. 736, 662 S.E.2d 820 (2008).

Evidence held insufficient to support conviction. — See *Park v. State*, 123 Ga. 164, 51 S.E. 317 (1905) (murder); *Bush v. State*, 7 Ga. App. 607, 67 S.E. 685 (1910) (larceny); *Calhoun v. State*, 9 Ga. App. 501, 71 S.E. 765 (1911) (burglary); *Henderson v. State*, 147 Ga. 134, 92 S.E. 871 (1917) (murder); *Haire v. State*, 38 Ga. App. 116, 142 S.E. 697 (1928) (cattle stealing); *Wallin v. State*, 38 Ga. App. 194, 143 S.E. 597 (1928) (burglary); *Smith v. State*, 38 Ga. App. 741, 145 S.E. 500 (1928) (larceny); *Hughie v. State*, 52 Ga. App. 73, 182 S.E. 197 (1935) (larceny of automobile); *Graham v. State*, 183 Ga. 881, 189 S.E. 910 (1937) (murder); *Orr v. State*, 62 Ga. App. 774, 9 S.E.2d 917 (1940) (manufacturing whiskey); *Cheney v. State*, 61 Ga. App. 726, 7 S.E.2d 335 (1940) (arson); *Wells v. State*, 75 Ga. App. 588, 44 S.E.2d 66 (1947) (larceny); *Woody v. State*, 99 Ga. App. 857, 109 S.E.2d 896 (1959) (burglary); *Purser v. State*, 104 Ga. App. 728, 122 S.E.2d 749 (1961) (voluntary manslaughter); *Crane v. State*, 123 Ga. App. 226, 180 S.E.2d 289 (1971) (burglary); *Williams v. State*, 126 Ga. App. 350, 190 S.E.2d 785 (1972) (burglary); *Ennis v. State*, 130 Ga. App. 716, 204 S.E.2d 519 (1974) (possession of marijuana); *Russell v. State*, 132 Ga. App. 35, 207 S.E.2d 619 (1974) (possession of marijuana); *Wright v. State*, 147 Ga. App. 111, 248 S.E.2d 183 (1978) (burglary); *Kametches v. State*, 242 Ga. 721, 251 S.E.2d 232 (1978) (possession for sale of obscene materials); *Hall v. State*, 155 Ga. App. 211, 270 S.E.2d 377 (1980) (burglary); *Smith v. State*, 188 Ga. App. 415, 373 S.E.2d 97 (1988) (entering an automobile); *Krull v. State*, 211 Ga. App. 37, 438 S.E.2d 152 (1993) (DUI, no proof of insurance, driving with suspended license, and failure to main-

tain lane); *Calhoun v. State*, 213 Ga. App. 375, 444 S.E.2d 405 (1994) (shoplifting); *Jordan v. State*, 225 Ga. App. 424, 484 S.E.2d 60 (1997) (trafficking in cocaine); *Mitchell v. State*, 268 Ga. 592, 492 S.E.2d 204 (1997) (possession with intent to distribute marijuana); *In re A.D.C.*, 228 Ga. App. 829, 493 S.E.2d 38 (1997) (possession with intent to distribute marijuana); *Greene v. State*, 230 Ga. App. 155, 495 S.E.2d 634 (1998) (drug violation); *Johnson v. State*, 245 Ga. App. 583, 538 S.E.2d 481 (2000) (possession of cocaine).

When the defendant drove a codefendant away from the crime scene in a subdivision after the codefendant shot the victim, to the extent that the evidence that the defendant's car had been parked at some point with the car's front end facing in the direction going out of the subdivision constituted circumstantial evidence of the defendant's guilt as a party, the evidence did not exclude every other reasonable hypothesis, as required by O.C.G.A. § 24-4-6. *Ratana v. State*, 297 Ga. App. 747, 678 S.E.2d 193 (2009).

Except as to one incident, the evidence was insufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, because the record showed that the mother had no knowledge of seven of the eight incidents until she took the children to therapy, and the prosecution's circumstantial evidence—including the fact of the family's nudist lifestyle, the existence of pornographic movies in the home, and the fact that during therapy, the mother advised the girls to not talk about their father—was insufficient to prove aiding and abetting beyond a reasonable doubt. *Naylor v. State*, 300 Ga. App. 401, 685 S.E.2d 383 (2009).

Evidence insufficient for cocaine possession conviction. — When: (1) defendant's only connection to cocaine that was found in a jacket was that defendant picked up the jacket after the jacket had been lying outside on an air conditioner in close proximity to a juvenile who was suspected in drug transactions and an unidentified woman; and (2) there was no evidence as to who placed the jacket on the air conditioner, the evidence against defendant was entirely circumstantial and did not exclude every other hypothesis except guilt; therefore, the evidence was

insufficient under O.C.G.A. § 24-4-6 to support defendant's conviction of possessing cocaine in violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. *Stephens v. State*, 258 Ga. App. 774, 575 S.E.2d 661 (2002).

State failed to prove the state's case that defendant, a minor, was delinquent under O.C.G.A. § 15-11-2 for trafficking in cocaine in violation of O.C.G.A. § 16-13-31 as the state did not prove the necessary connection between defendant and the drugs, other than spatial proximity, which was insufficient; the fact that defendant was in a house in the middle of the night with non-family members, that a large amount of cocaine and cash were found in the house, although not visible, and that defendant was sitting on a couch where a bag containing crack cocaine was found did not establish the necessary connection, and did not exclude all other possibilities except the guilt of defendant under O.C.G.A. § 24-4-6. *In re E.A.D.*, 271 Ga. App. 531, 610 S.E.2d 153 (2005).

Evidence insufficient for financial identity fraud. — Because the state's evidence failed to demonstrate that the defendant accessed the resources of another by using identifying information to procure a cell phone, and a service contract for the cell phone, and failed to establish that defendant either knew that a store clerk: (1) could not issue a phone without accessing the resources of a specific individual; (2) would need to use the identifying information of that individual to access such resources; or (3) in fact used such identifying information to access the resources of another for the purpose of providing defendant with a cell phone, the evidence was insufficient to sustain the defendant's conviction of financial identity fraud. *Jones v. State*, 285 Ga. App. 822, 648 S.E.2d 133 (2007).

Evidence insufficient for theft by taking conviction. — Evidence did not support the finding that a juvenile defendant committed theft by taking. Although there was circumstantial evidence that the defendant had a key to the home from which items were taken and had been in and out of the home at the time of the theft, the defendant testified that the defendant had left the door unlocked and returned to the home to find the home ransacked; the circumstantial evidence supported the defendant's version of

Sufficiency of Circumstantial Evidence (Cont'd)

the facts as well as the state's and thus did not warrant a finding of guilt under O.C.G.A. § 24-4-6. In the Interest of M.H., 288 Ga. App. 663, 655 S.E.2d 249 (2007).

Evidence insufficient for methamphetamine possession. — Evidence of a defendant's unconsciousness, possibly due to consumption of alcohol or other legal substances, and the defendant's spatial proximity to methamphetamine and pipes used to smoke it, to which two codefendants had equal access, was insufficient circumstantial evidence under O.C.G.A. § 24-4-6 to exclude every other reasonable hypothesis save that the defendant possessed methamphetamine. Therefore, the evidence was insufficient to support the defendant's conviction. O'Neill v. State, 285 Ga. 125, 674 S.E.2d 302 (2009).

Circumstantial evidence was insufficient to show constructive possession of methamphetamine found in a car, in which defendant was a passenger, because there was no evidence, besides spatial proximity, connecting the defendant with the contraband since there was no evidence showing that the defendant knew that a baggy found in the car contained contraband or the defendant hid the baggy in the car. Millsaps v. State, 300 Ga. App. 383, 685 S.E.2d 371 (2009).

Evidence insufficient for aggravated battery, aggravated assault, and firearm possession conviction. — Convictions of aggravated battery, O.C.G.A. § 16-5-24, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106, were not supported by sufficient evidence because, although the defendant's conduct before the crime was suspicious, the circumstantial evidence against the defendant was insufficient under O.C.G.A. § 24-4-6; the state did not show that the defendant was anywhere near the scene at the time of the shooting, did not present evidence connecting a weapon used in the shooting to the defendant, and, although a witness testified that three days before the shooting, the witness saw the defendant's brother hand the defendant a gun, the witness could not identify the type of gun involved, and this

testimony did not connect the defendant with the shooting. The state also failed to adduce evidence that the defendant intentionally aided, abetted, or encouraged the commission of the crimes of which the defendant was convicted. Gresham v. State, 298 Ga. App. 136, 679 S.E.2d 344 (2009).

Evidence insufficient for theft by receiving property conviction. — Circumstantial evidence of a larcenous taking was insufficient to sustain defendant's conviction for theft by receiving beyond a reasonable doubt because the officer's testimony that radio dispatch identified the pistol as stolen was non-probative hearsay and the fact that the weapon was labeled for law enforcement use only and loaded with police-issue ammunition did not exclude the possibility that the weapon may have been given away or sold "on the black market" in violation of the warning. Lopez v. State, 259 Ga. App. 720, 578 S.E.2d 304 (2003).

Evidence insufficient for malice murder, aggravated assault, and firearm possession convictions. — Evidence did not show that defendant intentionally or knowingly provided handguns to two cousins who used the guns to commit murder and other crimes, and because defendant was not present when the crimes were committed and the evidence did not exclude all possibilities except guilt, the state supreme court reversed defendant's convictions for malice murder, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Clyde v. State, 276 Ga. 839, 584 S.E.2d 253 (2003).

Evidence insufficient for weapons conviction. — Circumstantial evidence was insufficient under O.C.G.A. § 24-4-6 to prove that defendant had constructive possession of a gun found in a car in which defendant was riding as a passenger or to support defendant's convictions for carrying a concealed weapon under O.C.G.A. § 16-11-126(a) or possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b) since: (1) the car was stopped for a traffic offense, and was searched, revealing the gun; (2) all of the occupants in the car denied possessing the gun; (3) the gun was found under a seat where defendant had been sitting; (4) the arresting officers did not see defendant bend over or appear to put anything under

the seat; and (5) because defendant was only a passenger in a car that defendant did not own or control, there was no presumption that defendant possessed the gun. *Wofford v. State*, 262 Ga. App. 291, 585 S.E.2d 207 (2003).

Evidence insufficient for marijuana possession conviction. — Evidence did not support defendant's conviction for possession of marijuana with intent to distribute as the mere fact that a package of marijuana was addressed, but not delivered, to an apartment leased by defendant did not tie defendant to the drugs; the evidence was circumstantial and it was equally plausible that the codefendants were independently dealing in marijuana. *Patten v. State*, 275 Ga. App. 574, 621 S.E.2d 550 (2005).

Intoxication causing accident. — Circumstantial evidence that defendant's alleged intoxication caused the accident was sufficient under O.C.G.A. § 24-4-6 to exclude defendant's reasonable hypotheses of innocence due to mechanical failure. *Griffin v. State*, 242 Ga. App. 878, 531 S.E.2d 752 (2000).

Appeal

Question on appeal is whether there were sufficient circumstances to enable twelve men who found the facts to conclude that the accused was guilty. *Brown v. State*, 13 Ga. App. 144, 78 S.E. 868 (1913).

Appellate courts do not undertake to weigh circumstantial evidence, but look only to seek if there is sufficient competent evidence to support the verdict, when viewed in the light most favorable to the verdict. *Hopkins v. State*, 167 Ga. App. 811, 307 S.E.2d 707 (1983).

Presumption in favor of verdict. — After the verdict, the testimony is construed in the testimony's most favorable light to the prevailing party, which is in this case, the state, for every presumption and inference is in favor of the verdict. This rule has been applied when the evidence is circumstantial. *Townsend v. State*, 127 Ga. App. 797, 195 S.E.2d 474 (1972).

Should a trial court decline to direct the verdict and the jury then finds the defendant guilty, the appellate court is obliged to review the evidence in a light most favorable to the jury verdict. *Muckle v. State*, 165 Ga. App. 873, 303 S.E.2d 54 (1983).

Verdict will not be disturbed when circumstances are aided by direct evidence. *McGinnis v. State*, 31 Ga. 236 (1860); *Hudson v. State*, 92 Ga. 472, 17 S.E. 847 (1893); *Coney v. State*, 101 Ga. 582, 28 S.E. 918 (1897).

Verdict not disturbed unless unsupportable as matter of law. — If a jury is authorized to find that the evidence, circumstantial though it may be, is sufficient to exclude every reasonable hypothesis save that of guilt, the verdict of the jury will not be disturbed by the appellate court unless the verdict is insupportable as a matter of law. *Brewer v. State*, 156 Ga. App. 468, 274 S.E.2d 817 (1980); *Lawhorn v. State*, 200 Ga. App. 451, 408 S.E.2d 425 (1991).

Questions of reasonableness are generally decided by the jury, and the appellate court will not disturb the jury's finding that the evidence was sufficient to exclude every reasonable hypothesis save that of guilt unless the verdict is unsupportable as a matter of law. *Shockley v. State*, 166 Ga. App. 182, 303 S.E.2d 519 (1983).

Questions as to reasonableness are generally to be decided by the jury which heard the evidence and when the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, the appellate court will not disturb the finding, unless the verdict is unsupportable as a matter of law. *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983).

When verdict overturned. — Supreme Court is admittedly without authority to interfere with a verdict supported by direct evidence; it may declare, however, even though the jury has found otherwise, and the trial judge has approved their finding, that the proven circumstances do not sustain by their consistency the claim of the state as to the guilt of the defendant. *Willoughby v. City of Atlanta*, 50 Ga. App. 180, 177 S.E. 527 (1934).

Hypothesis consistent with innocence. — When there appears a hypothesis from the evidence, or from the lack of evidence and the defendant's statement, pointing to the innocence of the accused and which, tested by all human experience, is a reasonable one, an appellate court, may declare it so as a matter of law. *Wood v. State*, 156 Ga. App. 810, 275 S.E.2d 694 (1980); *Walker v. State*, 157 Ga. App. 728, 278 S.E.2d 487 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1390.

C.J.S. — 32A C.J.S., Evidence, §§ 1604, 1605.

ALR. — May conviction of perjury rest on circumstantial evidence, 15 ALR 634; 27 ALR 857; 42 ALR 1063; 88 ALR2d 852.

Character and sufficiency of evidence to show that letter was mailed, 25 ALR 9; 86 ALR 541.

Instruction on circumstantial evidence in criminal case, 89 ALR 1379.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 ALR 119; 91 ALR2d 1046.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 ALR 1199.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Homicide: identification of victim as person named in indictment or information, 86 ALR2d 722.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 ALR2d 852.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle, 35 ALR3d 1418.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking, 51 ALR3d 727.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 ALR3d 1319.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial — state cases, 36 ALR4th 1046.

24-4-7. Positive testimony preferred over negative; exception.

The existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many other witnesses who had the same opportunity of observation swear that they did not see or know of its having existed. This rule shall not apply when two parties have equal facilities for seeing or hearing a thing and one swears that it occurred while the other swears that it did not. (Civil Code 1895, § 5165; Penal Code 1895, § 985; Civil Code 1910, § 5751; Penal Code 1910, § 1011; Code 1933, § 38-111.)

History of Code section. — This Code section is derived from the decisions in Cobb

v. State, 27 Ga. 648 (1859) and Atlanta & W.P.R.R. v. Johnson, 66 Ga. 260 (1881).

JUDICIAL DECISIONS

Reason for this statute is probably that the law would not care to attribute perjury to a witness unless necessary, and negative testimony as a result may be taken as an oversight on the part of a witness to observe the fact in question. The last provision of the statute provides for those cases where a witness may swear positively to the nonoccurrence of a

fact. Such testimony is of as much weight as positive testimony. *Skinner v. State*, 108 Ga. 747, 32 S.E. 844 (1899); *Nelms v. State*, 123 Ga. 575, 51 S.E. 588 (1905); *Hunter v. State*, 4 Ga. App. 761, 62 S.E. 466 (1908) (see O.C.G.A. § 24-4-7).

Rule of this statute is so aptly stated that to instruct the jury in the language of the

statute is ordinarily error. *Warrick v. State*, 125 Ga. 133, 53 S.E. 1027 (1906); *Moore v. State*, 57 Ga. App. 287, 195 S.E. 320 (1938); *Great Am. Indem. Co. v. Oxford*, 68 Ga. App. 884, 24 S.E.2d 726 (1943) (see O.C.G.A. § 24-4-7).

Failure to charge not error in absence of request. — In the absence of a request, it is not error for the court to fail to charge this statute as to positive and negative testimony. *Grice v. State*, 224 Ga. 376, 162 S.E.2d 432 (1968) (see O.C.G.A. § 24-4-7).

Witnesses of equal credibility. — Statute applies only if the witnesses are of equal credibility. *Great Am. Indem. Co. v. Oxford*, 68 Ga. App. 844, 24 S.E.2d 726 (1943); *Rider v. State*, 196 Ga. 767, 27 S.E.2d 667 (1943); *Kaylor v. Kaylor*, 199 Ga. 516, 35 S.E.2d 1 (1945) (see O.C.G.A. § 24-4-7).

Qualification of rule. — This statute does not apply when two parties have equal facilities for seeing or hearing a thing and one swears that it occurred and the other that it did not. *Weeks v. State*, 79 Ga. 36, 3 S.E. 323 (1887); *Skinner v. State*, 108 Ga. 747, 32 S.E. 844 (1899); *Nelms v. State*, 123 Ga. 575, 51 S.E. 588 (1905); *Wood v. State*, 1 Ga. App. 684, 58 S.E. 271 (1907); *Benton v. State*, 3 Ga. App. 453, 60 S.E. 116 (1908) (see O.C.G.A. § 24-4-7).

Credibility of witnesses. — When this statute is applicable, it is error for the court to give the statute in charge to the jury without further instructing the jury that in weighing such testimony the jury should take into consideration the credibility of the witnesses. *Central of Ga. Ry. v. Sowell*, 3 Ga. App. 142, 59 S.E. 323 (1907); *Georgia R.R. & Banking Co. v. Radford*, 144 Ga. 22, 85 S.E. 1006 (1915); *Georgia Ry. & Power Co. v. Pounds*, 20 Ga. App. 201, 92 S.E. 1026 (1917); *McDuffie v. State*, 24 Ga. App. 653, 101 S.E. 812 (1920); *Green v. State*, 26 Ga. App. 109, 105 S.E. 634 (1920); *Carter v. State*, 34 Ga. App. 230, 129 S.E. 10 (1925); *Moore v. State*, 57 Ga. App. 287, 195 S.E. 320 (1938); *Progressive Life Ins. Co. v. Archer*, 73 Ga. App. 639, 37 S.E.2d 713 (1946); *Goodyear Clearwater Mills v. Wheeler*, 77 Ga. App. 570, 49 S.E.2d 184 (1948).

Jurors not obliged to discard negative evidence merely because of the existence of positive evidence in conflict with it. *Innis v. State*, 42 Ga. 473 (1871); *Hunter v. State*, 4 Ga. App. 761, 62 S.E. 466 (1908);

Pendergrast v. Greeson, 6 Ga. App. 47, 64 S.E. 282 (1909); *Pollard v. Gorman*, 52 Ga. App. 127, 182 S.E. 678 (1935); *Jefferson Std. Life Ins. Co. v. Bentley*, 55 Ga. App. 272, 190 S.E. 50 (1937); *Progressive Life Ins. Co. v. Smith*, 71 Ga. App. 157, 30 S.E.2d 411 (1944); *Abbot Inv. Co. v. Jefferson County*, 77 Ga. App. 76, 49 S.E.2d 918 (1948); *Ellis v. Southern Ry.*, 96 Ga. App. 687, 101 S.E.2d 230 (1957); *Allison v. Cobb County*, 97 Ga. App. 331, 103 S.E.2d 195 (1958).

Reconciliation of testimony. — When the testimony of witnesses who testified positively may be true without it being necessary to reject any of the negative testimony as untrue, and the testimony can be harmonized without discrediting any witness, it is the duty of the jury to prefer the positive testimony. *Gamblin v. State*, 33 Ga. App. 51, 125 S.E. 517 (1924).

Types of evidence. — Law and logic both recognize the fact that testimony as to a thing may be positive, negative, or contradictory. *Hughes v. Etheridge*, 39 Ga. App. 730, 148 S.E. 358 (1929).

Failure to explain meaning of positive and negative evidence is not error in the absence of a special request. *Southern Ry. v. Maddox*, 63 Ga. App. 508, 11 S.E.2d 501 (1940).

Instruction on latter part of statute is usually necessary to fully explain to the jury the distinction between testimony which is negative in character and that which is contradictory of positive testimony, and which otherwise might be thought to be negative. *Benton v. State*, 3 Ga. App. 453, 60 S.E. 116 (1908) (see O.C.G.A. § 24-4-7).

Positive and negative evidence defined in the following cases: *McConnell v. State*, 67 Ga. 633 (1881); *Hunter v. State*, 4 Ga. App. 761, 62 S.E. 466 (1908); *Heywood v. State*, 12 Ga. App. 643, 77 S.E. 1130 (1913); *Progressive Life Ins. Co. v. Archer*, 73 Ga. App. 639, 37 S.E.2d 713 (1946).

Charge favorable to losing party. — If the positive evidence in regard to the facts under consideration was introduced by the losing party, and the negative evidence in regard to such facts was introduced by the successful party, a charge to the effect that positive testimony should outweigh that which is negative without qualification, would be more favorable to the losing party than the losing party would have a right to ask; and such error in favor of the unsuccessful liti-

gant would not furnish ground for a reversal on the losing party's motion. *Rider v. State*, 196 Ga. 767, 27 S.E.2d 667 (1943).

Testimony sufficient to charge on positive and negative evidence as to whether automobile turned over in accident. *Progressive Life Ins. Co. v. Archer*, 73 Ga. App. 639, 37 S.E.2d 713 (1946).

Issue properly submitted to jury. — When the existence of a fact was affirmed by positive evidence and denied by negative evidence, an issue was raised, and the trial judge committed no error in properly submitting such issue to the jury. *Pollard v. Gorman*, 52 Ga. App. 127, 182 S.E. 678 (1935); *Abbot Inv. Co. v. Jefferson County*, 77 Ga. App. 761, 49 S.E.2d 918 (1948).

Positive and negative testimony at play. — When there was testimony that immediately before plaintiff's mule was struck by a train, a horse and colt crossed the track in front of the train and this testimony, by a section hand was corroborated by the section foreman, but the engineer of the train testified that the engineer did not see such a horse or colt cross the track in front of the train, although there was nothing which could have obstructed the engineer's view of them, the rule relative to positive and negative testimony is called into play, and, under a proper instruction from the court, the jury was authorized to believe the positive testimony of the section hand and section foreman rather than that of the engineer. *Atlantic Coast Line R.R. v. Hodges*, 90 Ga. App. 870, 84 S.E.2d 711 (1954).

Refusal to charge O.C.G.A. § 24-4-7 was not error. — See *Green v. State*, 253 Ga. 693, 324 S.E.2d 181 (1985).

On appeal. — Statute will not justify the setting aside of the jury's verdict on appeal when there is evidence to support the verdict. *Kelly v. Gaskins*, 238 Ga. 730, 235 S.E.2d 386 (1977) (see O.C.G.A. § 24-4-7).

Cited in *Phillips v. State*, 1 Ga. App. 687, 57 S.E. 1079 (1907); *Gamblin v. State*, 33 Ga. App. 51, 125 S.E. 517 (1924); *Yeates v. Yeates*, 162 Ga. 153, 132 S.E. 768 (1926); *Warren v. State*, 44 Ga. App. 235, 161 S.E. 161 (1931); *Southern Ry. v. Lee*, 59 Ga. App. 316, 200 S.E. 569 (1938); *Corbin v. State*, 64 Ga. App. 294, 13 S.E.2d 82 (1941); *English v. Georgia Power Co.*, 66 Ga. App. 363, 17 S.E.2d 891 (1941); *Blackshear v. Liberty Mut. Ins. Co.*, 26 S.E.2d 793 (1943); *Rogers v. State*, 72 Ga. App. 791, 35 S.E.2d 473 (1945); *Thompson v. State*, 204 Ga. 407, 50 S.E.2d 74 (1948); *Dixie Ohio Express Co. v. Poston*, 170 F.2d 446 (5th Cir. 1948); *Middleton v. Waters*, 205 Ga. 847, 55 S.E.2d 359 (1949); *Atlantic Coast Line R.R. v. Kammerer*, 239 F.2d 115 (5th Cir. 1956); *Lowry v. Rosenfeld*, 213 Ga. 578, 100 S.E.2d 447 (1957); *Norris v. Sikes*, 102 Ga. App. 609, 117 S.E.2d 214 (1960); *City of Villa Rica v. Couch*, 281 F.2d 284 (5th Cir. 1960); *Georgia S. & Fla. Ry. v. Strickland*, 106 Ga. App. 411, 126 S.E.2d 884 (1962); *Independent Life Ins. Co. v. Smith*, 150 Ga. App. 121, 257 S.E.2d 29 (1979); *Wallace v. Lessard*, 158 Ga. App. 772, 282 S.E.2d 153 (1981); *Thomas v. State*, 199 Ga. App. 49, 404 S.E.2d 315 (1991); *Denny v. State*, 226 Ga. App. 432, 486 S.E.2d 417 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1368.

C.J.S. — 32A C.J.S., Evidence, § 1602.

ALR. — Conclusiveness of uncontradicted testimony of interested witness where opposed to presumption, 72 ALR 94.

Comparative value of positive and negative testimony, 98 ALR 161.

Relative weight of testimony of attesting witnesses in support of mental competency of testator, 123 ALR 88.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 ALR 1266.

Distinction between positive and negative evidence, 140 ALR 530.

Probative force of testimony offered to show that crossing signals were not given on approach of train, 162 ALR 9.

244-8. Number of witnesses required generally; exceptions; effect of corroboration.

The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice, the testimony of a single witness is not sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason. (Orig. Code 1863, § 3678; Code 1868, § 3702; Code 1873, § 3755; Code 1882, § 3755; Civil Code 1895, § 5156; Penal Code 1895, § 991; Civil Code 1910, § 5742; Penal Code 1910, § 1017; Code 1933, § 38-121.)

Law reviews. — For article, “The Demise of the Corroboration Requirement — Its History in Georgia Rape Law,” see 26 Emory L.J. 805 (1977).

For comment on *Drummond v. State*, 87 Ga. App. 105, 73 S.E.2d 43 (1952), see 16 Ga. B.J. 226 (1953).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- WHO IS AN ACCOMPLICE
- SUFFICIENCY OF CORROBORATING EVIDENCE
- EVIDENCE CONSTITUTING CORROBORATION
- PERJURY
- JURY

General Consideration

Statute inapplicable. — Exception stated in this statute does not apply when the state does not rely solely on the testimony of a single accomplice. *Ross v. State*, 245 Ga. 173, 263 S.E.2d 913 (1980) (see O.C.G.A. § 24-4-8).

Admissibility of other crimes evidence is not governed by O.C.G.A. § 24-4-8. *Turner v. State*, 268 Ga. 213, 486 S.E.2d 839 (1997).

Failure to charge on accomplice testimony and corroboration was not error as the prosecution largely relied on other evidence, not accomplice testimony, to prove defendant’s guilt. *Dillard v. State*, 272 Ga. App. 523, 612 S.E.2d 804 (2005).

Victim’s testimony that the victim knew both robbers and recognized the robbers during the robbery and the next day, even without the accomplice’s pretrial statement implicating the defendant, was direct and circumstantial evidence of the defendant’s participation in the crime and O.C.G.A. § 24-4-8 was inapplicable. *Jordan v. State*,

278 Ga. App. 126, 628 S.E.2d 221 (2006).

Testimony of a single witness was sufficient to establish venue. — See *Moreno v. State*, 255 Ga. App. 88, 564 S.E.2d 505 (2002).

When a victim of an aggravated assault and battery testified that the incident, wherein her former boyfriend was following her closely in his car and then shot her, occurred in a particular county at a stated location, such was sufficient to establish venue for those crimes. *Morris v. State*, 263 Ga. App. 115, 587 S.E.2d 272 (2003).

Testimony of single witness to establish fact. — Testimony of a single witness is generally sufficient to establish a fact, and an officer’s testimony that the officer saw defendant’s hands on a plastic bag containing cocaine was sufficient to authorize a rational trier of fact to find that defendant possessed the cocaine. *Lester v. State*, 226 Ga. App. 373, 487 S.E.2d 25 (1997).

Testimony of a single witness was sufficient to authorize a jury’s verdict that defendant was guilty beyond a reasonable doubt of

General Consideration (Cont'd)

committing aggravated assault with a deadly weapon and that the defendant committed simple battery by intentionally kicking the victim on the ankle, causing a bruise. *Ringo v. State*, 236 Ga. App. 38, 510 S.E.2d 893 (1999).

Where the 14-year-old victim allegedly consented to having sex with defendant, the sexual molestation conviction under O.C.G.A. § 16-6-4(a) was supported by sufficient evidence; under O.C.G.A. § 16-2-1, consent by the victim was irrelevant due to the inability of the victim to legally consent to intercourse, and it was for the jury to determine, in accordance with the testimony of at least a single witness pursuant to O.C.G.A. § 24-4-8, whether defendant's conduct was immoral or indecent under O.C.G.A. § 16-6-4(a). *Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

When an eye-witness identified defendant as the individual the witness saw leave the witness's storage shed with the witness's goods, the evidence sufficed to sustain a verdict of guilty on the charge of burglary under O.C.G.A. § 16-7-1(a). Pursuant to O.C.G.A. § 24-4-8, a single witness is generally sufficient to establish a fact. *Gibson v. State*, 268 Ga. App. 696, 603 S.E.2d 319 (2004).

Evidence was sufficient to support defendant's burglary conviction after an employee of the burglarized store testified that the employee encountered defendant between 3:30 and 4:30 a.m. in the store, while defendant was trying to pry open the lock on a jewelry counter with a knife, the employee identified defendant from a photographic lineup and at trial, and under O.C.G.A. § 24-4-8, the testimony of one witness is sufficient to establish a fact. *Standfill v. State*, 267 Ga. App. 612, 600 S.E.2d 695 (2004).

Defendant's multiple convictions for armed robbery, aggravated assault, kidnapping, possessing a firearm during the commission of a felony, burglary, and kidnapping with bodily injury, were supported by sufficient evidence because defendant and another robbed a store while holding the two owners at gunpoint, defendant led police on a high-speed car chase, and the defendant broke into and robbed two homes, one of which had an occupant that

defendant beat; only one store owner's testimony was needed to establish the facts to support the aggravated assault conviction. *Owens v. State*, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

There was sufficient evidence to support defendant's convictions for child molestation, aggravated child molestation, statutory rape, and incest, in violation of O.C.G.A. §§ 16-6-3, 16-6-4, 16-6-4(c), and 16-6-22, because defendant's step-daughter gave detailed testimony as to the continuing sexual conduct that defendant inflicted on the step-daughter over a period of years as the testimony from just that witness was sufficient to support the convictions, pursuant to O.C.G.A. § 24-4-8; further, there was corroborative testimony from a friend of the step-daughter who witnessed at least one incident, and from an aunt who testified that the older step-daughter had sat in defendant's lap and that defendant rubbed her legs, which was properly admitted for purposes of corroboration, bent of mind, lustful disposition toward children, and motive. *Lewis v. State*, 275 Ga. App. 41, 619 S.E.2d 699 (2005).

Defendant's new trial motion under O.C.G.A. § 5-5-22 was properly denied as the fact that the state failed to turn over two videotaped statements from defendant's sons, arising from criminal charges due to a domestic dispute, was based on inadvertence rather than bad faith, there was unimpeached eyewitness testimony from other witnesses that was sufficient to support defendant's convictions pursuant to O.C.G.A. § 24-4-8, and there was no showing that defendant suffered the kind of prejudice that undermined confidence in the outcome of the trial; accordingly, defendant's Brady rights were not violated and there was no violation of O.C.G.A. §§ 17-16-6 and 17-16-7. *Ely v. State*, 275 Ga. App. 708, 621 S.E.2d 811 (2005).

Testimony of a single witness was sufficient to establish a fact under O.C.G.A. § 24-4-8, and the defendant's convictions for rape was supported by sufficient evidence since the victim testified that defendant forced her into a train boxcar, threatened to kill her, and had vaginal and oral sex with her against her will and without her consent. *Davis v. State*, 278 Ga. App. 628, 629 S.E.2d 537 (2006).

On appeal from convictions of armed robbery, aggravated assault, kidnapping, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon, the defendant's sufficiency of the evidence claim lacked merit as independent corroboration of the alleged victim's testimony was unnecessary, given that testimony from a single witness was generally sufficient to establish a fact, and this included a victim's uncorroborated identification of an assailant; moreover, even if corroboration were needed, the similar transaction provided sufficient evidence of the defendant's identity, which was one of the purposes for which it was introduced. *Pringle v. State*, 281 Ga. App. 230, 635 S.E.2d 843 (2006).

In a prosecution for felony theft by taking of a van, the trial court was entitled to conclude that the victim was an innocent purchaser for value, believing the seller to be the owner, the defendant's claim to the contrary notwithstanding; moreover, pursuant to O.C.G.A. § 24-4-8, the testimony of a single witness was sufficient to establish this fact. *Coursey v. State*, 281 Ga. App. 494, 636 S.E.2d 669 (2006).

Because the victim's testimony, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt, when the evidence showed: (1) two separate aggravated assaults, one with a knife and one with a hammer; (2) two separate instances of simple battery; and (3) a hours-long detention of the victim by the defendant, the evidence amply supported the jury's conviction on the charges of false imprisonment, aggravated assault, and simple battery. *Brigman v. State*, 282 Ga. App. 481, 639 S.E.2d 359 (2006).

Defendant's convictions for aggravated assault, aggravated battery, and first-degree child cruelty pursuant to O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) for participating in a drive-by shooting were supported by sufficient evidence because the testimony of a single witness was generally sufficient to establish a fact pursuant to O.C.G.A. § 24-4-8 and it was the function of the jury to evaluate the credibility of witnesses; based on the testimony of the witnesses to the shooting, a reasonable jury could have rejected the defendant's claims and determined that the defendant was a

party to each of the crimes. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

Because sufficient evidence was presented via the testimony of the victim regarding the defendant's attack with a screwdriver, which was corroborated by the defendant's own admissions at trial, the defendant's simple battery conviction was upheld on appeal; moreover, the defendant's characterization of the incident as one involving mutual argument did not in and of itself justify the actions. *Rainey v. State*, 286 Ga. App. 682, 649 S.E.2d 871 (2007).

There was sufficient evidence to support defendant's conviction for armed robbery because the state met the state's burden of proving that defendant took the property of another from the person or the immediate presence of another by use of an offensive weapon; the state offered the testimony of the bus counter clerk as to the facts of the robbery and as to the identification of defendant as the gunman. That testimony, standing alone, was sufficient to support defendant's conviction. *Range v. State*, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

Identification of officer sufficient. — Police detective's in-court identification of defendant as the drug seller was sufficient to sustain conviction. *James v. State*, 233 Ga. App. 516, 504 S.E.2d 533 (1998).

Undercover agent's in-court identification of defendant as the seller of crack cocaine was sufficient to authorize the jury's guilty verdict. *Ivory v. State*, 234 Ga. App. 858, 508 S.E.2d 421 (1998).

Although a videotape of the transaction provided helpful confirmation of an undercover officer's identification of the defendant as the seller of cocaine, the testimony of the officer, by itself, was sufficient to support the jury's determination of guilt. *Williams v. State*, 277 Ga. App. 633, 627 S.E.2d 196 (2006).

Testimony of a single witness is generally sufficient to establish a fact. *Barber v. State*, 236 Ga. App. 294, 512 S.E.2d 48 (1999); *Moton v. State*, 242 Ga. App. 397, 530 S.E.2d 31 (2000); *Cecil v. State*, 263 Ga. App. 48, 587 S.E.2d 197 (2003).

Victim's testimony sufficient. — Victim's statement in a videotape made by police that the victim was 16-years-old at the time defendant gave the victim marijuana and alcohol was sufficient to support defendant's conviction.

General Consideration (Cont'd)

tion for contributing to the delinquency of a minor as the testimony of a single witness was generally sufficient to establish a fact, such as the fact that the victim was a minor at the time the acts giving rise to the charge occurred. *Little v. State*, 262 Ga. App. 377, 585 S.E.2d 677 (2003).

Evidence was sufficient to support convictions against defendant for aggravated assault in violation of O.C.G.A. § 16-5-21 and aggravated battery in violation of O.C.G.A. § 16-5-24 since the victim identified defendant from a pre-trial photograph and from an in-court identification, a codefendant and a witness testified against defendant, and the gun that was used to shoot the victim was found near the car with shell casings in the car; it was noted that the testimony of just the victim was sufficient to establish a fact pursuant to O.C.G.A. § 24-4-8. *Dunn v. State*, 262 Ga. App. 643, 586 S.E.2d 352 (2003).

Victim's testimony, alone, was sufficient to establish the time frame for the charged offenses. *Henry v. State*, 274 Ga. App. 139, 616 S.E.2d 883 (2005).

Evidence supported convictions for armed robbery and aggravated assault since after using defendant's mother's telephone number, defendant contacted the victim and arranged a meeting to buy shoes, the victim identified the car defendant was driving, which was registered to defendant's mother, the victim identified defendant from a pre-trial police photo array and at trial, and where, at the meeting arranged by the victim was shot in the face and defendant then rummaged through the victim's car where the victim kept the shoes. *Waddell v. State*, 277 Ga. App. 772, 627 S.E.2d 840 (2006), cert. denied, 127 S. Ct. 731, 2006 U.S. LEXIS 9304, 166 L.Ed.2d 567 (2006).

In a case in which the victim was allegedly bound and beaten by the defendant and thrown into a camper, which the defendant towed to a motel, the victim's testimony was sufficient to support a conviction for kidnapping with bodily injury under O.C.G.A. § 16-5-40 as the testimony of a single witness was all that was necessary under O.C.G.A. § 24-4-8. *Johnson v. State*, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

Trial court properly denied the defen-

dant's motion for a directed verdict of acquittal, and the defendant's rape conviction was upheld on appeal, as the victim's testimony at trial that the defendant's sexual organ penetrated hers after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement. *Scott v. State*, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

Despite the defendant's contentions that insufficient evidence as to a child's presence in the room when the victim was accosted required reversal of a cruelty to children conviction, such conviction was upheld, supported by the victim's testimony notifying the defendant of the presence of the child before the defendant fired a shot next to the victim's head. *Price v. State*, 281 Ga. App. 844, 637 S.E.2d 468 (2006).

Victim's testimony alone was sufficient under O.C.G.A. § 24-4-8 to establish the elements of a charge against the defendant of child molestation, in violation of O.C.G.A. § 16-6-4(a), as the victim testified that while she was at the defendant's home visiting his daughter, he requested that she kiss him and have sexual intercourse with him, and that he showed her his erect penis; there was also testimony from a jail nurse who confirmed that the defendant had a tattoo on his penis as described by the victim, and there was an internet instant-message conversation between the defendant and the victim, during which he apologized to her for his actions. *Hammontree v. State*, 283 Ga. App. 736, 642 S.E.2d 412 (2007).

Defendant's family violence battery conviction was affirmed on appeal as testimony from the victim, standing alone, describing the defendant's attack, when coupled with testimony regarding two prior incidents, sufficiently supported the conviction. *Simmons v. State*, 285 Ga. App. 129, 645 S.E.2d 622 (2007).

Despite the defendant's claim that the victim's testimony was too uncertain to support a conviction for aggravated sexual battery, the conviction was upheld on appeal as: (1) it was not for the appeals court to determine or question how the jury resolved any apparent conflicts or uncertainties in the evidence; (2) in general, the testimony of the victim was sufficient to establish a fact; and (3) corroboration was not required, and if corroboration were, the bite mark on the

defendant's shoulder, which was testified to by the victim, provided sufficient corroboration. *Boyt v. State*, 286 Ga. App. 460, 649 S.E.2d 589 (2007).

Evidence was sufficient to support armed robbery conviction since the victim testified that defendant took the victim's cell phone while defendant pointed a gun at the victim and threatened to shoot the victim; under O.C.G.A. § 24-4-8, testimony of a single witness was generally sufficient to establish a fact. *Burden v. State*, 290 Ga. App. 734, 660 S.E.2d 481 (2008).

Sufficient evidence existed to support a defendant's convictions for incest and child molestation with regard to actions the defendant took toward the defendant's own children based on the children's recorded police interviews that were played for the jury; the testimony from a licensed clinical social worker who was admitted as an expert in child sexual abuse and the abuse's effect on children; and the testimony of the pediatric nurse practitioner who examined the victims and stated that, although the victims' physical exams were normal, the results were consistent with their reports of sexual abuse. The victims' testimony, standing alone, would have been sufficient to support the convictions; therefore, the trial court did not err by denying the defendant's motion for a directed verdict. *Hubert v. State*, 297 Ga. App. 71, 676 S.E.2d 436 (2009).

Sufficient evidence was presented to support a defendant's conviction for armed robbery because the victim, a taxi driver, identified the defendant as one of the perpetrators based, inter alia, on the victim's knowledge of the defendant from living in the same townhome complex; a single witness's testimony was sufficient to establish a fact under O.C.G.A. § 24-4-8. *Troutman v. State*, 297 Ga. App. 196, 676 S.E.2d 836 (2009).

Because O.C.G.A. § 24-4-8 provided that a victim's testimony, standing alone, was sufficient, the victim's testimony that defendant twice shot at the victim was sufficient to find defendant guilty of violating O.C.G.A. § 16-5-21(a)(2) despite testimony to the contrary. *Hartley v. State*, 299 Ga. App. 534, 683 S.E.2d 109 (2009).

Testimony of rape victim sufficient. — Evidence was more than sufficient to authorize a jury's verdict that the defendant was

guilty, beyond a reasonable doubt, of rape because the victim's testimony that "it hurt" when the defendant pushed his penis in her vagina and that he threatened to put her family out of his house if she told her parents or if she refused sexual contact was more than sufficient evidence of force; the jury was authorized to consider that the victim failed to initially disclose the incidents because she was fearful of the defendant and that the defendant yelled at the victim when she moved during intercourse as additional evidence of his forcible acts, and the victim's testimony, together with her immediate and consistent outcry to her father, law enforcement, and an emergency room pediatrician, provided the jury with ample evidence of penetration. *Matlock v. State*, 302 Ga. App. 173, 690 S.E.2d 489 (2010).

Testimony of single informant sufficient to sustain conviction. — Because the informant's testimony was the only testimony in which defendant was identified as the person who sold the methamphetamine to the informant in violation of O.C.G.A. § 16-13-31, there was sufficient evidence to support the conviction; under O.C.G.A. § 24-4-8, the testimony of one witness was sufficient to establish defendant's identity. *Vasquez v. State*, 275 Ga. App. 548, 621 S.E.2d 764 (2005).

Testimony of motorist sufficient. — Motorist's identification of defendant as the driver of a pick-up truck that hit the motorist's vehicle and then drove away was sufficient under O.C.G.A. § 24-4-8 to establish defendant's identity for purposes of defendant's conviction for leaving the scene of an accident and following too closely, in violation of O.C.G.A. §§ 40-6-270(a)(1) and 40-6-49. *Craig v. State*, 276 Ga. App. 329, 623 S.E.2d 518 (2005).

Officer's testimony sufficient. — Because the testimony of a single witness was generally sufficient to establish a fact, and there was no requirement that an actual exchange of money for drugs be witnessed by more than one person or be recorded on videotape, the defendant's sale of cocaine conviction was upheld on appeal, based on a law enforcement agent's actions of handing the defendant \$40 in exchange for two pieces of a substance that tested positive for cocaine. *Hicks v. State*, 281 Ga. App. 217, 635 S.E.2d 830 (2006).

General Consideration (Cont'd)

When a deputy testified that the defendant resisted the deputy's efforts to break up a prison fight, then turned on the deputy, punched the deputy, and swung at the deputy repeatedly, injuring the deputy, there was sufficient evidence of mutiny in a penal institution and felony obstruction of an officer; the trial court was authorized under O.C.G.A. § 16-2-6 to infer from the circumstances that the defendant both knowingly and willfully obstructed the deputy by the use of violence and intended to cause the deputy serious bodily injury by striking the deputy with a fist, and under O.C.G.A. § 24-4-8 testimony of a single witness was sufficient. *Butler v. State*, 284 Ga. App. 802, 644 S.E.2d 898 (2007).

Sufficient evidence existed to support a finding that the arresting officer had a clear and unobstructed view of the defendant not wearing a seat belt as required by O.C.G.A. § 40-8-76.1(f), based solely on that officer's testimony, as the testimony of a single witness was sufficient to establish a fact. *Schramm v. State*, 286 Ga. App. 156, 648 S.E.2d 392 (2007).

Given that two officers testified that the officers saw the defendant, in plain view, packaging 35 grams of cocaine and 94 grams of marijuana into smaller packages, and the testimony of a single witness was generally sufficient to establish a fact, the defendant's convictions for trafficking in cocaine and possession of marijuana with the intent to distribute were upheld on appeal. *King v. State*, 289 Ga. App. 461, 657 S.E.2d 570 (2008).

Testimony of arresting officer sufficient to convict. — Defendant was properly convicted of felony possession of marijuana as a deputy sheriff testified that the defendant admitted that the marijuana found in the trunk of a rental car belonged to the defendant. Even though the defendant denied saying this, or possessing the drugs, the credibility of witnesses was for the jury to determine, and under O.C.G.A. § 24-4-8, the testimony of a single witness was sufficient to establish the facts. *McKinney v. State*, 293 Ga. App. 419, 667 S.E.2d 210 (2008).

With regard to a defendant's convictions for obstruction of a police officer and other

related crimes, there was sufficient evidence to support the convictions based on the single testimony of the officer involved. Because it was the function of the jury to determine the credibility of witnesses and weigh any conflict in the evidence, the testimony of a single witness is generally sufficient to establish a fact; therefore, the testimony of the police officer who was involved in the altercation with the defendant was sufficient evidence for the jury to convict the defendant. *Whatley v. State*, 296 Ga. App. 72, 673 S.E.2d 510 (2009).

Testimony of police investigator sufficient. — Police investigator's testimony that the defendant held a three-inch knife to the investigator's throat amply supported a conviction under O.C.G.A. § 24-4-8. *Lloyd v. State*, 280 Ga. 187, 625 S.E.2d 771 (2006).

Victim's testimony that the defendant raped the victim at knifepoint, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt. *Johnson v. State*, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

Under O.C.G.A. § 24-4-8, the victim's testimony that the defendant pulled a knife out of the defendant's pocket with the defendant's right hand and lunged at the victim was sufficient in itself to support convictions for aggravated assault and carrying a concealed weapon under O.C.G.A. §§ 16-5-21 and 16-11-126. Testimony that the defendant had arthritis in the right hand at most created a conflict in the evidence, as there was also testimony that the defendant, a carpenter, used both hands in the defendant's trade. *Carder v. State*, 291 Ga. App. 265, 661 S.E.2d 632 (2008).

Victim testified that as the victim walked in front of the defendant's car, the defendant hit the gas pedal, throwing the victim onto the hood; accelerated when the victim asked the defendant to stop; and slammed on the brakes, causing the victim to slide down the hood, and the victim's legs and foot to be broken as they went underneath the car. As the victim's testimony alone was sufficient to establish these facts under O.C.G.A. § 24-4-8, the defendant was properly convicted of aggravated battery. *Cash v. State*, 293 Ga. App. 702, 667 S.E.2d 691 (2008).

Victim's testimony that the defendant kicked in the door of the victim's residence, entered without permission, pointed a shot-

gun at the victim, and threatened to shoot the victim if the victim did not give defendant money was sufficient in and of itself to support the defendant's conviction for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. *Reed v. State*, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. *Kashamba v. State*, 295 Ga. App. 540, 672 S.E.2d 512 (2009).

Victim's uncorroborated testimony that the defendant entered the victim's home by removing the back door from the door's hinges, ordered the victim at gunpoint to get in the defendant's truck, and did not bring the victim back home for hours, was sufficient to convict the defendant of burglary and kidnapping. *Hollis v. State*, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. *Kashamba v. State*, 295 Ga. App. 540, 672 S.E.2d 512 (2009).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false imprisonment charge. *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

In child molestation case, the victim's testimony did not require corroboration because: (1) the defendant's 15-year-old granddaughter testified that the defendant molested her in his home and in his pickup truck between the time she was in kindergarten until about the time she was in the sixth grade; (2) a physician testified that she found physical evidence that was consistent with penetration and sexual abuse; (3) an older granddaughter testified that she was molested by defendant 25 years ago; and (4) evidence was presented that defendant molested his five-year-old great granddaughter. *Delk v. State*, 274 Ga. App. 261, 619 S.E.2d 310 (2005).

Defendant's convictions of two counts of child molestation required no corroboration and could be sustained based on the testimony of the victims alone, each of whom testified that the defendant fondled the victim's breasts or private parts. *Hill v. State*, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

Testimony alone sufficient to prove mental suffering. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991) (on motion for rehearing).

Statute not controlling in federal court. — Georgia law requires independent corroboration of an accomplice's testimony; this Georgia rule is not controlling upon collateral review by a federal court. *Llewellyn v. Stynchcombe*, 609 F.2d 194 (5th Cir. 1980).

Juvenile proceedings. — Requirement of independent corroboration of an accomplice's testimony now set forth in O.C.G.A. § 24-4-8 is applicable to a juvenile proceeding. *In re J.H.M.*, 202 Ga. App. 79, 413 S.E.2d 515 (1991).

Basis for principle of requiring corroboration in a felony when the only witness is an accomplice is to safeguard against one person falsely maintaining that the person and the defendant were accomplices to commit the crime. *Coleman v. State*, 227 Ga. 769, 183 S.E.2d 379 (1971).

At common law one could be convicted on the uncorroborated testimony of an accomplice; in Georgia, in felony cases, when the only witness is an accomplice, the accomplice's testimony must be corroborated and at common law, the doctrine did not amount to a rule of evidence, but merely to a "counsel of caution" given by the judge to a jury.

General Consideration (Cont'd)

LaFrays v. State, 48 Ga. App. 133, 172 S.E. 155 (1933).

If witness not accomplice. — Unless a witness sought to be impeached is an accomplice of the accused, the witness's testimony, without any corroboration, may authorize the conviction of the accused in a felony case. *Preston v. State*, 42 Ga. App. 280, 155 S.E. 774 (1930).

Uncorroborated testimony of accomplice is not sufficient to authorize a felony conviction. *Holton v. State*, 61 Ga. App. 654, 7 S.E.2d 202 (1940); *Dye v. State*, 77 Ga. App. 517, 48 S.E.2d 742 (1948); *Potts v. State*, 86 Ga. App. 779, 72 S.E.2d 553 (1952); *Edenfield v. State*, 95 Ga. App. 2, 96 S.E.2d 533 (1957); *Harris v. State*, 96 Ga. App. 395, 100 S.E.2d 120 (1957); *Famber v. State*, 134 Ga. App. 112, 213 S.E.2d 525 (1975); *Adams v. State*, 140 Ga. App. 621, 231 S.E.2d 547 (1976); *Dudley v. State*, 148 Ga. App. 560, 251 S.E.2d 815 (1978); *Stinson v. State*, 151 Ga. App. 533, 260 S.E.2d 407 (1979); *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981).

Defendant may not be convicted on the uncorroborated testimony of an accomplice. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984).

Rule applies only when accomplice is sole witness. — Rule that a felony conviction is not to be had on the uncorroborated testimony of an accomplice applies only when the accomplice is the sole witness upon whose testimony the state relies. *McDaniel v. State*, 158 Ga. App. 320, 279 S.E.2d 762 (1981).

Corroboration of accomplice not necessary to sustain a misdemeanor conviction. *Parsons v. State*, 43 Ga. App. 197 (1871); *Grant v. State*, 89 Ga. 393, 15 S.E. 488 (1892); *Martin v. State*, 17 Ga. App. 372, 86 S.E. 945 (1915); *Carson v. State*, 37 Ga. App. 100, 138 S.E. 920 (1927); *Dobbs v. State*, 44 Ga. App. 749, 162 S.E. 845 (1932); *Johnson v. State*, 57 Ga. App. 813, 197 S.E. 61 (1938); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Bell v. State*, 85 Ga. App. 242, 68 S.E.2d 925 (1952); *Drummond v. State*, 87 Ga. App. 105, 73 S.E.2d 43 (1952), *for comment*, see 16 Ga. B.J. 226 (1953); *Bridges v. State*, 106 Ga. App. 363, 126 S.E.2d 903 (1962); *C.C.R. v. State*, 145 Ga. App. 27, 243 S.E.2d 601

(1978); *Neal v. State*, 152 Ga. App. 270, 262 S.E.2d 561 (1979); *Dabney v. State*, 154 Ga. App. 355, 268 S.E.2d 408 (1980).

When several crimes are charged, each offense must be corroborated if accomplices are involved. *Whitfield v. State*, 159 Ga. App. 398, 283 S.E.2d 627 (1981).

Distinction between general and specific testimony. — Distinction must be made between evidence which tends to prove the truth of the accomplice's general testimony and that which tends to prove the identity and participation of the accused. *Gaudin v. State*, 133 Ga. App. 252, 211 S.E.2d 189 (1974); *Boggus v. State*, 136 Ga. App. 917, 222 S.E.2d 686 (1975); *Hill v. State*, 236 Ga. 831, 225 S.E.2d 281 (1976); *Vaughn v. State*, 139 Ga. App. 565, 228 S.E.2d 741 (1976); *Adams v. State*, 140 Ga. App. 621, 231 S.E.2d 547 (1977).

Corroboration as to material facts. — If the accomplice is corroborated in material parts of the accomplice's testimony, then the accomplice may be believed by the jury as to other material parts as to which there is no corroboration. *Pitts v. State*, 128 Ga. App. 434, 197 S.E.2d 495 (1973); *Quaid v. State*, 132 Ga. App. 478, 208 S.E.2d 336 (1974).

Partial corroboration. — Simply because an accomplice's testimony is corroborated in most details, it does not follow that the accomplice's testimony alone as to the identity and participation of the accused is sufficient to justify conviction. *Nix v. State*, 133 Ga. App. 417, 211 S.E.2d 26 (1974); *Gaudin v. State*, 133 Ga. App. 252, 211 S.E.2d 189 (1974); *Hill v. State*, 236 Ga. 831, 225 S.E.2d 281 (1976); *Vaughn v. State*, 139 Ga. App. 565, 228 S.E.2d 741 (1976); *Hobbs v. State*, 142 Ga. App. 782, 237 S.E.2d 16 (1977).

Two crimes in unified transaction. — When armed robbery was an integral part of a murder transaction and was simultaneous with the murder, independent corroboration of the murder is adequate to corroborate an accomplice's testimony as to the entire unified transaction including the armed robbery. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

Witness as party. — Fact that the witness is a party and is a prisoner convicted of a crime does not afford any basis to disregard the witness's testimony. *Balkcom v. Vickers*, 220 Ga. 345, 138 S.E.2d 868 (1964).

Testimony of victim. — When the alleged victim of the attack was the only witness to

positively identify the defendant as the perpetrator, but when the victim's testimony was in many material respects corroborated, the jury had the right to believe the victim's testimony. *Finney v. State*, 51 Ga. App. 545, 181 S.E. 144 (1935).

While the victim had just pulled into the parking lot of the victim's employer when defendant pointed a gun at the victim and demanded the victim's wallet, the victim's positive identification of defendant as the robber was sufficient to establish defendant's guilt and to support defendant's armed robbery conviction. *Parks v. State*, 257 Ga. App. 25, 570 S.E.2d 350 (2002).

Because the victim's statement of sexual abuse was sufficient under O.C.G.A. § 24-4-8 to convict defendant of kidnapping with bodily injury, aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

Evidence that the defendant intentionally struck the victim with a stick and that either the defendant or one of the other parties to the assault intentionally struck the victim with their fists and a concrete block supported an aggravated assault conviction; further, although the victim was the only person who testified about having been hit with a concrete block, and was not sure which of the victim's attackers struck that blow, this testimony was sufficient to establish that the victim was hit with a concrete block because it made no difference whether an accomplice, and not the defendant, assaulted the victim in the manner alleged in the indictment. *Oliver v. State*, 278 Ga. App. 425, 629 S.E.2d 63 (2006).

Even if a burglary victim had not testified that the checks were missing, an intent to steal could have been inferred since the evidence showed the defendant's unlawful entry into the building of another where valuable goods were kept, and the trial court did not err in charging the jury that it was allowed to "infer" an intent to steal in the context of burglary; while the defendant denied the burglary upon a defense of alibi, the testimony of a single witness was generally sufficient to establish a fact, and the defendant's challenge to the sufficiency of

the evidence was without merit. *Studiemeyer v. State*, 278 Ga. App. 756, 629 S.E.2d 593 (2006).

Victim's testimony as to the non-consensual and forcible nature of the victim's sexual contact with the defendant, standing alone, was sufficient to sustain the defendant's conviction of rape in violation of O.C.G.A. § 16-6-1(a)(1). *Brown v. State*, 293 Ga. App. 633, 667 S.E.2d 899 (2008).

While the state failed to produce a weapon, fingerprints, or other physical evidence tying defendant to the crimes, pursuant to O.C.G.A. § 24-4-8, the jury was authorized to accept the cashier's identification testimony; accordingly, the evidence was sufficient to support defendant's conviction for armed robbery. *Clowers v. State*, 299 Ga. App. 576, 683 S.E.2d 46 (2009).

The testimony of an armed robbery victim and the victim's love interest, who were eyewitnesses to the defendant's crimes of armed robbery and aggravated assault, and who separately identified the defendant as the perpetrator of the robbery and assault, standing alone, was sufficient to establish the defendant's identity as the perpetrator. *Crawford v. State*, 301 Ga. App. 633, 688 S.E.2d 409 (2009).

Jury could have found the defendant guilty beyond a reasonable doubt of two counts of aggravated assault because the victim's testimony that the defendant pointed a gun at the victim and that a shot was subsequently fired wounding the victim was sufficient circumstantial evidence that the defendant committed a violent injury to the victim. *Wright v. State*, 302 Ga. App. 101, 690 S.E.2d 220 (2010).

Testimony of child victim. — Even though child victim's testimony was the only direct evidence proving the essential elements, the child's testimony was sufficient to authorize defendant's conviction. *Cantrell v. State*, 231 Ga. App. 629, 500 S.E.2d 386 (1998).

Georgia law does not require corroboration of a child molestation victim's testimony. *Atkins v. State*, 243 Ga. App. 489, 533 S.E.2d 152 (2000).

In a child molestation prosecution, the victim's testimony that defendant touched the victim "down there" was sufficient to support defendant's conviction. *Kidd v. State*, 257 Ga. App. 744, 572 S.E.2d 80 (2002).

General Consideration (Cont'd)

Victim's testimony alone was sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggravated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant to O.C.G.A. § 24-4-8. The testimony of the victim's cousin, two school friends, and the interviewing detective, was admissible as substantive evidence under the Child Hear-say Statute, O.C.G.A. § 24-3-16. *Vaughn v. State*, 301 Ga. App. 391, 687 S.E.2d 651 (2009).

Victim need not be corroborated. — There is no requirement that the testimony of the victim of an alleged assault be corroborated in order to legally convict the accused. *Gay v. State*, 143 Ga. App. 857, 240 S.E.2d 226 (1977); *Samuels v. State*, 223 Ga. App. 275, 477 S.E.2d 414 (1996).

When the victim's testimony established each and every element of the four offenses, the victim's testimony, alone, was sufficient to support a finding of guilt beyond a reasonable doubt. *Thompson v. State*, 203 Ga. App. 339, 416 S.E.2d 755, cert. denied, 203 Ga. App. 908, 416 S.E.2d 755 (1992).

Testimony of three victims of armed robbery was sufficient to support conviction, and the testimony did not require corroboration. *Johnson v. State*, 213 Ga. App. 194, 444 S.E.2d 334 (1994).

When a third person testifies that a witness for the prosecution was an accomplice of the third person, and that the defendant was not a party to the crime, the testimony of the witness for the prosecution may not be excluded on the principle of requiring corroboration in a felony since the only witness is an accomplice. *Coleman v. State*, 227 Ga. 769, 183 S.E.2d 379 (1971).

Subscribing witnesses. — Bill of sale to personalty, though attested by two subscribing witnesses, is admissible in evidence upon due proof of the document's execution by only one of the witnesses, without calling or accounting for the other. *Cooper v. O'Brien*, 98 Ga. 773, 26 S.E. 470 (1896).

Transaction with deceased person. — Generally, the testimony of one witness is sufficient to establish a fact, even though such witness may be testifying to a transaction or communications with a deceased person. *Donald v. Groves*, 160 Ga. 163, 126 S.E. 583 (1925).

Grounds for new trial. — Motion to rule out testimony of a witness who is a coindictor on the ground that such testimony shows the witness to be an accomplice is not a legal ground of objection, but the argument can be considered in connection with the general grounds of a motion for a new trial which contend that there is insufficient corroboration to warrant a conviction. *Patterson v. State*, 109 Ga. App. 582, 137 S.E.2d 74 (1964).

Crime of illegally selling drugs is not one of those listed in this statute which would require the testimony of a second witness to support a conviction. *Crews v. State*, 133 Ga. App. 764, 213 S.E.2d 34 (1975); *Johnson v. State*, 153 Ga. App. 771, 266 S.E.2d 551 (1980) (see O.C.G.A. § 24-4-8).

Corroboration of facts in perjury prosecution. — State complied with O.C.G.A. § 24-4-8 in producing more than two fact witnesses to testify about the facts alleged to have been falsely sworn to, i.e., the underlying acts the defendants used as a basis to swear out arrest warrants, but the state was not required to produce opinion witnesses to testify that the defendants swore falsely and committed perjury. *Watson v. State*, 235 Ga. App. 381, 509 S.E.2d 87 (1998).

Witness testimony about inaccurate date-time stamp. — Trial court did not err in admitting under O.C.G.A. § 24-4-48(b) still photographs taken from an ATM's videotapes in a defendant's theft by deception prosecution because while a bank investigator testified that the date-time stamp was inaccurate by approximately one hour, such an inaccuracy went to the weight to be given the evidence but not to the evidence's admissibility. *Parks v. State*, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Testimony was sufficient to sustain adjudication of child deprivation. — Juvenile court did not err in adjudicating a child deprived and granting temporary custody of the child to the Department of Family and Children Services because, under O.C.G.A. § 24-4-8, the testimony of the pediatrician, the detective, and the caseworker were sufficient to sustain the adjudication that the child was deprived. *In the Interest of K.B.*, 302 Ga. App. 50, 690 S.E.2d 627 (2010).

Cited in *Knighton v. State*, 40 Ga. App. 489, 150 S.E. 432 (1929); *Payton v. Turner*, 50 Ga. App. 519, 179 S.E. 162 (1935); South-

ern Ry. v. Lunsford, 57 Ga. App. 53, 194 S.E. 602 (1937); Lanier v. State, 187 Ga. 534, 1 S.E.2d 405 (1939); Chambers v. State, 194 Ga. 773, 22 S.E.2d 487 (1942); Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949); Robinson v. State, 207 Ga. 337, 61 S.E.2d 475 (1950); Evans v. State, 91 Ga. App. 819, 87 S.E.2d 228 (1955); Young v. State, 125 Ga. App. 204, 186 S.E.2d 805 (1971); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861 (1973); Davis v. State, 132 Ga. App. 335, 208 S.E.2d 172 (1974); Pitts v. Hopper, 402 F. Supp. 119 (N.D. Ga. 1974); Sims v. State, 234 Ga. 177, 214 S.E.2d 902 (1975); Christy v. State, 134 Ga. App. 504, 215 S.E.2d 267 (1975); West v. State, 136 Ga. App. 249, 220 S.E.2d 767 (1975); Campbell v. State, 136 Ga. App. 338, 221 S.E.2d 212 (1975); McVickers v. State, 235 Ga. 856, 221 S.E.2d 604 (1976); Fair v. State, 140 Ga. App. 754, 231 S.E.2d 817 (1976); Hill v. State, 239 Ga. 278, 236 S.E.2d 626 (1977); Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978); Kendrick v. State, 146 Ga. App. 513, 246 S.E.2d 505 (1978); Jones v. State, 147 Ga. App. 583, 249 S.E.2d 627 (1978); Handsford v. State, 147 Ga. App. 665, 249 S.E.2d 768 (1978); Dudley v. State, 148 Ga. App. 560, 251 S.E.2d 815 (1978); Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980); Chafin v. State, 246 Ga. 709, 273 S.E.2d 147 (1980); Stroud v. State, 246 Ga. 717, 273 S.E.2d 155 (1980); Altman v. State, 156 Ga. App. 185, 273 S.E.2d 923 (1980); Sosebee v. State, 156 Ga. App. 325, 274 S.E.2d 717 (1980); Walker v. State, 247 Ga. 746, 280 S.E.2d 333 (1981); Cape v. State, 160 Ga. App. 336, 287 S.E.2d 63 (1981); Smith v. State, 160 Ga. App. 302, 287 S.E.2d 306 (1981); Solomon v. State, 161 Ga. App. 566, 288 S.E.2d 342 (1982); Powers v. State, 161 Ga. App. 415, 288 S.E.2d 680 (1982); Phillips v. State, 162 Ga. App. 199, 290 S.E.2d 142 (1982); Walker v. State, 162 Ga. App. 173, 290 S.E.2d 502 (1982); Osborn v. State, 161 Ga. App. 132, 291 S.E.2d 22 (1982); Kesler v. State, 249 Ga. 462, 291 S.E.2d 497 (1982); Searcy v. State, 162 Ga. App. 695, 291 S.E.2d 557 (1982); Harris v. State, 163 Ga. App. 585, 295 S.E.2d 545 (1982); Holloway v. State, 164 Ga. App. 589, 298 S.E.2d 296 (1982); Massey v. State, 165 Ga. App. 67, 299 S.E.2d 148 (1983); Harbin v. State, 165 Ga. App. 631, 302 S.E.2d 386 (1983); Hendrixson v. State, 167 Ga. App. 517, 306 S.E.2d 350 (1983); Fowler v. State, 171 Ga.

App. 491, 320 S.E.2d 219 (1984); Sparks v. State, 176 Ga. App. 8, 335 S.E.2d 298 (1985); McCauley v. State, 177 Ga. App. 426, 339 S.E.2d 399 (1986); Dixon v. State, 177 Ga. App. 506, 339 S.E.2d 775 (1986); In re G.G., 177 Ga. App. 639, 341 S.E.2d 13 (1986); Dobbs v. State, 180 Ga. App. 714, 350 S.E.2d 469 (1986); Barrett v. State, 183 Ga. App. 729, 360 S.E.2d 400 (1987); Johnson v. State, 258 Ga. 506, 371 S.E.2d 396 (1988); Brennon v. State, 191 Ga. App. 720, 382 S.E.2d 682 (1989); Mason v. State, 197 Ga. App. 534, 398 S.E.2d 822 (1990); Day v. State, 197 Ga. App. 875, 399 S.E.2d 741 (1990); Austin v. State, 199 Ga. App. 539, 405 S.E.2d 499 (1991); Smarr v. State, 199 Ga. App. 572, 405 S.E.2d 561 (1991); Jones v. State, 201 Ga. App. 102, 410 S.E.2d 199 (1991); Snyder v. State, 201 Ga. App. 529, 411 S.E.2d 524 (1991); Young v. State, 205 Ga. App. 357, 422 S.E.2d 244 (1992); Clanton v. State, 208 Ga. App. 669, 431 S.E.2d 453 (1993); Woods v. State, 208 Ga. App. 810, 432 S.E.2d 249 (1993); Sampson v. State, 209 Ga. App. 213, 433 S.E.2d 136 (1993); Denny v. State, 210 Ga. App. 406, 436 S.E.2d 526 (1993); Fain v. State, 211 Ga. App. 399, 439 S.E.2d 64 (1993); Odom v. State, 214 Ga. App. 354, 447 S.E.2d 704 (1994); Steele v. State, 216 Ga. App. 276, 454 S.E.2d 590 (1995); Dolphus v. State, 218 Ga. App. 565, 462 S.E.2d 453 (1995); Gaskin v. State, 221 Ga. App. 142, 470 S.E.2d 531 (1996); Gay v. State, 221 Ga. App. 263, 471 S.E.2d 49 (1996); Williams v. State, 221 Ga. App. 296, 471 S.E.2d 258 (1996); Ferguson v. State, 221 Ga. App. 415, 471 S.E.2d 528 (1996); Leigh v. State, 223 Ga. App. 726, 478 S.E.2d 905 (1996); Moody v. State, 232 Ga. App. 499, 502 S.E.2d 323 (1998); Murray v. State, 269 Ga. 871, 505 S.E.2d 746 (1998); Michael v. State, 235 Ga. App. 16, 508 S.E.2d 426 (1998); Davidson v. State, 237 Ga. App. 580, 516 S.E.2d 90 (1999); Bacon v. State, 239 Ga. App. 874, 521 S.E.2d 695 (1999); Dixon v. State, 239 Ga. App. 798, 521 S.E.2d 926 (1999); Maloy v. State, 240 Ga. App. 3, 522 S.E.2d 490 (1999); Willingham v. State, 242 Ga. App. 472, 530 S.E.2d 224 (2000); Scott v. State, 242 Ga. App. 553, 530 S.E.2d 257 (2000); Welch v. State, 243 Ga. App. 798, 534 S.E.2d 471 (2000); Bartlett v. State, 244 Ga. App. 49, 537 S.E.2d 362 (2000); Donaldson v. State, 244 Ga. App. 89, 534 S.E.2d 839 (2000); In re E.G.W., 244 Ga.

General Consideration (Cont'd)

App. 119, 534 S.E.2d 869 (2000); Shuman v. State, 244 Ga. App. 335, 535 S.E.2d 526 (2000); Davis v. State, 244 Ga. App. 345, 535 S.E.2d 528 (2000); Parker v. State, 244 Ga. App. 419, 535 S.E.2d 795 (2000); Sewell v. State, 244 Ga. App. 449, 536 S.E.2d 173 (2000); Jackson v. State, 244 Ga. App. 477, 535 S.E.2d 818 (2000); Mashburn v. State, 244 Ga. App. 524, 536 S.E.2d 208 (2000); Barnett v. State, 244 Ga. App. 585, 536 S.E.2d 263 (2000); Williams v. State, 244 Ga. App. 692, 536 S.E.2d 572 (2000); McLeod v. State, 245 Ga. App. 668, 538 S.E.2d 759 (2000); Johnson v. State, 245 Ga. App. 690, 538 S.E.2d 766 (2000); Vickers v. State, 246 Ga. App. 734, 541 S.E.2d 694 (2000); Etheridge v. State, 249 Ga. App. 111, 547 S.E.2d 744 (2001); Johnson v. State, 251 Ga. App. 455, 554 S.E.2d 587 (2001); Baker v. State, 252 Ga. App. 238, 555 S.E.2d 899 (2001); Susan v. State, 254 Ga. App. 276, 562 S.E.2d 233 (2002); Guild v. State, 255 Ga. App. 285, 564 S.E.2d 862 (2002); Armstead v. State, 255 Ga. App. 385, 565 S.E.2d 579 (2002); McDonald v. State, 256 Ga. App. 369, 568 S.E.2d 588 (2002); Joncamlae v. State, 257 Ga. App. 459, 571 S.E.2d 461 (2002); Conley v. State, 257 Ga. App. 563, 571 S.E.2d 554 (2002); Jones v. State, 258 Ga. App. 852, 576 S.E.2d 18 (2002); Roberts v. State, 258 Ga. App. 107, 572 S.E.2d 744 (2002); Turner v. State, 258 Ga. App. 867, 575 S.E.2d 727 (2002); Thomas v. State, 261 Ga. App. 493, 583 S.E.2d 207 (2003); Lee v. State, 267 Ga. App. 834, 600 S.E.2d 825 (2004); Moss v. State, 278 Ga. App. 362, 629 S.E.2d 5 (2006); Bills v. State, 283 Ga. App. 660, 642 S.E.2d 352 (2007); Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); In the Interest of E.G., 286 Ga. App. 137, 648 S.E.2d 699 (2007); Grayer v. State, 282 Ga. 224, 647 S.E.2d 264 (2007); Brown v. State, 287 Ga. App. 115, 650 S.E.2d 780 (2007); Cail v. State, 287 Ga. App. 547, 652 S.E.2d 190 (2007); Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540 (2008); Duncan v. State, 283 Ga. 584, 662 S.E.2d 122 (2008); Slade v. State, 289 Ga. App. 877, 658 S.E.2d 439 (2008); Allen v. State, 290 Ga. App. 604, 659 S.E.2d 900 (2008); Carlos v. State, 292 Ga. App. 419, 664 S.E.2d 808 (2008); Brown v. State, 293 Ga. App. 224, 666 S.E.2d 600 (2008); Pritchett v. Afzal, 293 Ga. App. 302, 666 S.E.2d 641 (2008); Brown v.

State, 293 Ga. App. 564, 667 S.E.2d 410 (2008); Frasier v. State, 295 Ga. App. 596, 672 S.E.2d 668 (2009); Cornette v. State, 295 Ga. App. 877, 673 S.E.2d 531 (2009); Smallwood v. State, 296 Ga. App. 16, 673 S.E.2d 537 (2009); Johnson v. State, 296 Ga. App. 112, 673 S.E.2d 596 (2009); Barnes v. State, 296 Ga. App. 493, 675 S.E.2d 233 (2009); Williams v. State, 297 Ga. App. 723, 678 S.E.2d 95 (2009); Smith v. State, 297 Ga. App. 658, 678 S.E.2d 496 (2009); Kessinger v. State, 298 Ga. App. 479, 680 S.E.2d 546 (2009); Duffie v. State, 301 Ga. App. 607, 688 S.E.2d 389 (2009).

Who Is an Accomplice

Test for determining. — Test for determining whether a witness is an accomplice is: “could the witness himself have been indicted for the offense, either as principal or as accessory?” Stone v. State, 118 Ga. 705, 45 S.E. 630, 98 Am. St. R. 145 (1903); Montiford v. State, 144 Ga. 582, 87 S.E. 797 (1916); LaFray v. State, 48 Ga. App. 133, 172 S.E. 115 (1933); Kearce v. State, 178 Ga. 220, 172 S.E. 643 (1934); Head v. State, 59 Ga. App. 451, 1 S.E.2d 227 (1939); Lanier v. State, 187 Ga. 534, 1 S.E.2d 405 (1939); Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504 (1941); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592 (1949); Harris v. State, 96 Ga. App. 395, 100 S.E.2d 120 (1957); Fortner v. State, 96 Ga. App. 855, 101 S.E.2d 908 (1958); Aimer v. State, 116 Ga. App. 204, 156 S.E.2d 367 (1967); Payne v. State, 135 Ga. App. 245, 217 S.E.2d 476 (1975); Herrin v. State, 138 Ga. App. 729, 227 S.E.2d 498 (1976), overruled on other grounds, Patterson v. State, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 97 S. Ct. 2932, 53 L. Ed. 2d 1067 (1977).

O.C.G.A. § 24-4-8 provides, in part, that in felony cases when the only witness is an accomplice, the testimony of a single witness is not sufficient. This rule has been applied to juvenile proceedings. In re A.Z., 301 Ga. App. 524, 687 S.E.2d 887 (2009), cert. denied, No. S10C0492, 2010 Ga. LEXIS 335 (Ga. 2010).

Accessory before the fact and principals in the first and second degrees are all accomplices. Kearce v. State, 178 Ga. 220, 172 S.E. 643 (1934); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592 (1949).

Accessory after the fact is not an accomplice within the meaning of this statute. *Allen v. State*, 74 Ga. 769 (1885); *Springer v. State*, 102 Ga. 447, 30 S.E. 971 (1897); *Kearce v. State*, 178 Ga. 220, 172 S.E. 643 (1934); *Mills v. State*, 193 Ga. 139, 17 S.E.2d 719 (1941); *Moore v. State*, 240 Ga. 210, 240 S.E.2d 68 (1977); *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984); *Givens v. State*, 273 Ga. 818, 546 S.E.2d 509 (2001) (see O.C.G.A. § 24-4-8).

Association in crime. — An accomplice is one who is associated with others in the commission of a crime, all being principals. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941).

An accomplice is defined as one who is associated with others in the commission of a crime, all being principals. *Johnson v. State*, 153 Ga. App. 771, 266 S.E.2d 551 (1980).

Aiding and abetting. — An “accomplice” is one who is present at the commission of a crime, aiding and abetting the perpetrator, or who could be convicted of the crime as an accessory before the fact. *Venable v. State*, 56 Ga. App. 366, 192 S.E. 646 (1937).

An “accomplice” is one who is present at the commission of the crime, aiding and abetting the perpetrator, or who could be convicted of such crime as an accessory before the fact. *Lanier v. State*, 187 Ga. 534, 1 S.E.2d 405 (1939).

Definition of an accomplice is one who was present at the commission of a crime, aiding and abetting the perpetrator. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

Participation in the commission of the same criminal act and in the execution of a common criminal intent is necessary to render one criminal, in a legal sense, an accomplice of another. *Venable v. State*, 56 Ga. App. 366, 192 S.E. 646 (1937); *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941); *Cooper v. State*, 197 Ga. 611, 30 S.E.2d 177 (1944); *Johnson v. State*, 153 Ga. App. 771, 266 S.E.2d 551 (1980); *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

An accessory after the fact is not an accomplice. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984).

Voluntary participation in the commission of the same criminal act is necessary to make one an accomplice; a participation that is

the result of the will of another is not such participation as will make such a participant guilty. *Perryman v. State*, 63 Ga. App. 819, 12 S.E.2d 388 (1940); *Fortner v. State*, 96 Ga. App. 855, 101 S.E.2d 908 (1958); *Aimar v. State*, 116 Ga. App. 204, 156 S.E.2d 367 (1967), overruled on other grounds, *Motes v. State*, 161 Ga. App. 173, 288 S.E.2d 256 (1982).

Criminal intent is a necessary ingredient of crime and is essential to render one an accomplice. It follows that when this element is absent, one is not an accomplice. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941); *Johnson v. State*, 153 Ga. App. 771, 266 S.E.2d 551 (1980).

Presence at scene of crime. — Although a witness may have been present at or near the scene of the crime, and may have concealed the fact for a time, yet if the witness did not in any way aid, abet, procure, or participate in the crime, the witness is not an accomplice. *Venable v. State*, 56 Ga. App. 366, 192 S.E. 646 (1937).

Witness guilty only of concealing evidence of a crime after the crime's commission is not an “accomplice” within the meaning of this statute. *Ford v. State*, 232 Ga. 511, 207 S.E.2d 494 (1974) (see O.C.G.A. § 24-4-8).

Joint indictment and plea of guilty. — Neither the joinder of a witness in an indictment with the defendant, nor a plea of guilty entered by the witness, necessarily makes the witness an accomplice with the defendant so as to require corroboration of the witness's testimony on the latter's trial. *Maddox v. State*, 131 Ga. App. 86, 205 S.E.2d 31 (1974).

Parties jointly indicted. — Statute has no application to one who, while jointly indicted with the accused, is not shown by the evidence to have been the accused's accomplice or to have participated in the crime. *Walker v. State*, 118 Ga. 757, 45 S.E. 608 (1903); *Davis v. State*, 122 Ga. 564, 50 S.E. 376 (1905).

Evidence of conviction or plea of guilty is admissible to show the guilt of the accomplice and thereby show the status or relationship of the parties and thus lay the foundation for determining the character of testimony against the defendant and whether or not corroboration thereof is required. *Dye v. State*, 77 Ga. App. 517, 48 S.E.2d 742 (1948).

Concealment of crime constitutes complicity. — Fact that witness concealed the

Who Is an Accomplice (Cont'd)

crime for which defendant was on trial made the witness an accomplice within the meaning of O.C.G.A. § 24-4-8. *Collins v. State*, 251 Ga. 521, 307 S.E.2d 496 (1983).

Accomplice is one who acts as result of free will and not of duress or coercion. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

Action was not free will of an accomplice. — Trial court did not err by allowing the uncorroborated testimony of a witness to be admitted against two defendants as, contrary to the defendants' contentions, the witness was not an accomplice since the evidence authorized the jury to have found that the witness was coerced into participating in the racketeering crimes for which the defendants were convicted. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Indictment for same crime does not make witness an accomplice. — Fact that witness was indicted for the same murder as the defendant does not, without more, make the witness an accomplice. *Collins v. State*, 251 Ga. 521, 307 S.E.2d 496 (1983).

Fact that witness was jointly indicted with defendant on trial does not of itself render such witness an accomplice. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

In sex crimes generally, if the victim is able to and does consent to the crime, such person is an accomplice within the meaning of this statute. *Curry v. State*, 87 Ga. App. 451, 74 S.E.2d 249 (1953); *Neel v. State*, 140 Ga. App. 691, 231 S.E.2d 394 (1976); *Andrews v. State*, 144 Ga. App. 243, 240 S.E.2d 744 (1977); *Morris v. State*, 150 Ga. App. 310, 257 S.E.2d 378 (1979) (see O.C.G.A. § 24-4-8).

Testimony of a consenting partner to a sexual offense needs no corroboration. *Babb v. State*, 157 Ga. App. 757, 278 S.E.2d 495 (1981); thus, *Aimar v. State*, 116 Ga. App. 204, 156 S.E.2d 367 (1967), and any other cases indicating that corroborative testimony must be introduced in cases involving consenting partners in order to convict of the offense of sodomy are overruled. *Motes v. State*, 161 Ga. App. 173, 288 S.E.2d 256 (1982).

Woman who consents to incestuous act of sexual intercourse is an accomplice of the

man. *Yother v. State*, 120 Ga. 204, 47 S.E. 555 (1904); thus, *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941); *Wilkins v. State*, 96 Ga. App. 841, 101 S.E.2d 912 (1958).

Testimony of a consenting partner to a sexual offense needs no corroboration. *Babb v. State*, 157 Ga. App. 757, 278 S.E.2d 495 (1981); thus, *Aimar v. State*, 116 Ga. App. 204, 156 S.E.2d 367 (1967), and any other cases indicating that corroborative testimony must be introduced in cases involving consenting partners in order to convict of the offense of sodomy are overruled. *Motes v. State*, 161 Ga. App. 173, 288 S.E.2d 256 (1982).

Female under the age of consent cannot be convicted of incestuous adultery and thus cannot be an accomplice. *Mosley v. State*, 65 Ga. App. 800, 16 S.E.2d 504 (1941).

Victim of seduction is not an accomplice. *Keller v. State*, 102 Ga. 506, 31 S.E. 92 (1897).

Informer for law enforcement agency who was cooperating with law enforcement at the time the evidence against the defendant was being gathered was not an accomplice. *Marshall v. State*, 98 Ga. App. 429, 105 S.E.2d 748 (1958).

Principal thief is not an accomplice of the receiver of stolen goods. *Birdsong v. State*, 120 Ga. 850, 48 S.E. 329 (1904).

Thief and one who receives stolen property from the thief are not accomplices. *Stover v. State*, 158 Ga. App. 644, 281 S.E.2d 642 (1981).

If a thief and a receiver of stolen goods have acted pursuant to a common criminal enterprise, they are accomplices. *Selvidge v. State*, 252 Ga. 243, 313 S.E.2d 84, cert. denied, 469 U.S. 823, 105 S. Ct. 99, 83 L. Ed. 2d 44 (1984).

Presenter of check was not accomplice. — Uttering element was established by sufficient evidence that the defendant's friend presented the check to a bank for cashing at the defendant's behest; the trial court properly charged the jury on the corroboration requirement for accomplice testimony even though the jury determined that the friend was not an accomplice. *King v. State*, 277 Ga. App. 190, 626 S.E.2d 161 (2006).

Buyer of whiskey is not an accomplice of the seller. *Gamble v. State*, 4 Ga. App. 845, 62 S.E. 544 (1908).

Person is not an accomplice to murder when the person does not know who the

intended victim is or when the attempt on the victim's life is to be made, and the person does not in any way participate in or encourage the murder. *Kilgore v. State*, 251 Ga. 291, 305 S.E.2d 82 (1983).

Self incrimination. — Joint principals to a crime as accomplices are competent witnesses against each other, and while the one sought to be used as a witness has the right to claim the protection afforded by Ga. Const. 1983, Art. I, Sec. I, Para. XVI, providing that no person shall be competent to give testimony tending in any manner to criminate oneself, yet this constitutional guaranty is a personal privilege belonging to the witness and cannot be claimed for the witness for the benefit of another party. *Dye v. State*, 77 Ga. App. 517, 48 S.E.2d 742 (1948).

Sufficiency of Corroborating Evidence

Rules concerning extent of corroboration required are: (1) it is not essential that the testimony of the accomplice should be corroborated in every material particular; (2) it is not required that this corroboration shall of itself be sufficient to warrant a verdict, or that the testimony of the accomplice be corroborated in every material particular; (3) such corroborating circumstances need not be enough to amount to another witness or sufficient to support one to that extent; (4) slight evidence of corroboration connecting defendant with the crime is sufficient; and (5) the sufficiency of corroboration of the accomplice is entirely a matter for the jury. *Quaid v. State*, 132 Ga. App. 478, 208 S.E.2d 336 (1974).

Although a defendant may not be convicted on the uncorroborated testimony of an accomplice, the corroborating evidence need not of itself be sufficient to warrant a conviction of the crime charged, the corroborating evidence may be circumstantial, and the sufficiency of the corroborating evidence is a matter for the jury to determine. An accomplice's testimony combined with a videotape of defendant in the front seat of a car while talking to a confidential police informant during a drug buy was sufficient corroboration to justify defendant's convictions for selling drugs. *Etchison v. State*, 266 Ga. App. 528, 597 S.E.2d 583 (2004).

Defendant's claim to the contrary notwithstanding, the record was replete with evidence corroborating the testimony of defen-

dant's accomplice which identified defendant as one of the perpetrators of an armed robbery; there was no claim that a store clerk's opinion as to the identity of the perpetrators was unfounded, the clerk's testimony that the clerk heard a customer identify one of the perpetrators as defendant was undisputed *res gestae*, and the clerk's testimony that the clerk had been sprayed in the face with mace corroborated this aspect of the accomplice's testimony as well. *Carter v. State*, 266 Ga. App. 691, 598 S.E.2d 76 (2004).

Independent inference of defendant's guilt. — To sustain a conviction upon the testimony of an accomplice, there must be corroborating circumstances which in themselves and independently of the testimony of the accomplice directly connect the defendant with the crime, or lead to the inference that defendant is guilty. *Childers v. State*, 52 Ga. 106 (1874); *McCrory v. State*, 101 Ga. 779, 28 S.E. 92 (1897); *Taylor v. State*, 110 Ga. 150, 35 S.E. 161 (1900); *Braxley v. State*, 17 Ga. App. 196, 86 S.E. 425 (1915); *Allen v. State*, 40 Ga. App. 657, 150 S.E. 863 (1929); *Jolly v. State*, 41 Ga. App. 494, 153 S.E. 432 (1930); *Bradshaw v. State*, 44 Ga. App. 783, 163 S.E. 295 (1932); *Whitehead v. State*, 46 Ga. App. 176, 167 S.E. 204 (1932); *Sanders v. State*, 46 Ga. App. 175, 167 S.E. 207 (1932); *Austin v. State*, 47 Ga. App. 217, 169 S.E. 729 (1933); *Thompson v. State*, 52 Ga. App. 105, 182 S.E. 414 (1935); *Perkins v. State*, 59 Ga. App. 335, 200 S.E. 812 (1939); *Worley v. State*, 60 Ga. App. 557, 4 S.E.2d 417 (1939); *Smith v. State*, 189 Ga. 169, 5 S.E.2d 762 (1939); *Newman v. State*, 63 Ga. App. 417, 11 S.E.2d 248 (1940); *Middleton v. State*, 72 Ga. App. 817, 35 S.E.2d 317 (1945); *Blakely v. State*, 78 Ga. App. 282, 50 S.E.2d 762 (1948); *Stebbins v. State*, 78 Ga. App. 534, 51 S.E.2d 592 (1949); *Crowe v. State*, 83 Ga. App. 325, 63 S.E.2d 682 (1951); *Ivey v. State*, 91 Ga. App. 455, 85 S.E.2d 829 (1955); *McPherson v. State*, 96 Ga. App. 839, 101 S.E.2d 750 (1958); *Allen v. State*, 215 Ga. 455, 111 S.E.2d 70 (1959); *Patterson v. State*, 109 Ga. App. 582, 137 S.E.2d 74 (1964); *Waldrop v. State*, 221 Ga. 319, 144 S.E.2d 372 (1965); *Sutton v. State*, 223 Ga. 313, 154 S.E.2d 578 (1967); *Powell v. State*, 123 Ga. App. 795, 182 S.E.2d 677 (1971); *West v. State*, 232 Ga. 861, 209 S.E.2d 195 (1974); *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428 U.S.

Sufficiency of Corroborating Evidence (Cont'd)

910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976); *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976); *Hill v. State*, 236 Ga. 831, 225 S.E.2d 281 (1976); *Vaughn v. State*, 139 Ga. App. 565, 228 S.E.2d 741 (1976); *Green v. State*, 139 Ga. App. 652, 229 S.E.2d 129 (1976); *Baker v. State*, 238 Ga. 389, 233 S.E.2d 347, cert. denied, 431 U.S. 970, 97 S. Ct. 2931, 53 L. Ed. 2d 1066 (1977); *Smith v. State*, 238 Ga. 640, 235 S.E.2d 17 (1977); *Hobbs v. State*, 142 Ga. App. 782, 237 S.E.2d 16 (1977); *Felix v. State*, 143 Ga. App. 376, 238 S.E.2d 734 (1977); *J.B.L. v. State*, 144 Ga. App. 223, 241 S.E.2d 40 (1977); *Eubanks v. State*, 240 Ga. 544, 242 S.E.2d 41 (1978); *Llewellyn v. State*, 241 Ga. 192, 243 S.E.2d 853 (1978); *Reaves v. State*, 146 Ga. App. 409, 246 S.E.2d 427 (1978); *Mulligan v. State*, 245 Ga. 266, 264 S.E.2d 204 (1980); *Stanford v. State*, 157 Ga. App. 633, 278 S.E.2d 175 (1981); *Gilbert v. State*, 159 Ga. App. 326, 283 S.E.2d 361 (1981).

Contrary to defendant's argument, the testimony of defendant's accomplice, corroborated by two witnesses, provided sufficient evidence for the jury to find defendant guilty; the jury did not have to find that the corroborating evidence was itself sufficient to support the verdict, or that that evidence matched the testimony of the accomplice in every detail, as slight evidence identifying defendant as a participant in the criminal act was sufficient corroboration. *Mitchell v. State*, 279 Ga. 158, 611 S.E.2d 15 (2005).

Testimony of a single witness was generally sufficient to establish a fact, and the defendant's conviction of burglary, O.C.G.A. § 16-7-1, was supported by sufficient evidence, including a neighbor's eyewitness testimony that the neighbor saw the defendant taking property out of the victim's house during the time when the burglary happened, which was corroborated by the discovery of an item of stolen property at the place where the defendant was residing, evidence which was entitled to even greater weight was the discovery of a business card from the defendant's probation officer at the victim's home. *Walker v. State*, 279 Ga. App. 390, 631 S.E.2d 413 (2006).

Corroboration must be independent of the accomplice's testimony, and the corroboration must connect the defendant to the crime or lead to the inference that the defendant is guilty. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984); *Allen v. State*, 175 Ga. App. 128, 333 S.E.2d 11 (1985); *Hanson v. State*, 193 Ga. App. 246, 387 S.E.2d 441 (1989); *In re P.A.W.*, 224 Ga. App. 329, 480 S.E.2d 347 (1997).

Sufficient evidence supported defendant's felony murder conviction because the defendant's polygraph results, which the defendant stipulated to admitting at trial, corroborated the defendant's accomplice's inculpatory testimony. *Thornton v. State*, 279 Ga. 676, 620 S.E.2d 356 (2005).

Testimony of an accomplice must be corroborated by independent evidence as to the identity and participation of the accused which tends to connect the accused with the crime or leads to the inference that the accused is guilty. *Gaddis v. Kemp*, 638 F. Supp. 819 (S.D. Ga. 1986).

Evidence independent of accomplice's out-of-court statements constituted sufficient corroboration to support the verdict of guilty. *Slaughter v. State*, 257 Ga. 104, 355 S.E.2d 660 (1987), overruled on other grounds, *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998).

Connection of defendant with crime. — Corroborating circumstances must connect the defendant with the crime independently of the testimony of the accomplice, and this requirement is not met by merely corroborating the accomplice as to time, place, and circumstances of the transaction, if there is nothing to connect the defendant therewith. *Lanier v. State*, 187 Ga. 534, 1 S.E.2d 405 (1939); *Newman v. State*, 63 Ga. App. 417, 11 S.E.2d 248 (1940); *Rozier v. State*, 68 Ga. App. 797, 24 S.E.2d 137 (1943); *Croker v. State*, 101 Ga. App. 742, 115 S.E.2d 413 (1960); *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968); *Pritchard v. State*, 224 Ga. 776, 164 S.E.2d 808 (1968); *Nix v. State*, 133 Ga. App. 417, 211 S.E.2d 26 (1974); *Gaudin v. State*, 133 Ga. App. 252, 211 S.E.2d 189 (1974).

Defendant's conduct before, during, and after the fatal strangulation of the victim including: (1) volunteering to kill the victim

after an accomplice claimed that the victim's brother was responsible for the death of the accomplice's cousin; (2) participating in the strangulation death of the victim; (3) concealing the victim's dead body; and (4) disposing of the victim in the woods provided ample evidence to support defendant's guilt as a party to a malice murder and other crimes. *Mitchell v. State*, 279 Ga. 158, 611 S.E.2d 15 (2005).

Trial court did not err in entering judgments of conviction on defendant's three burglary convictions in two cases following jury verdicts finding defendant guilty of those offenses; the state introduced sufficient evidence apart from the testimony of defendant's accomplice to warrant convictions, primarily based on the three homeowners' identification of the property taken and the homeowners' testimony about the circumstances under which the relevant property went missing. *Daniel v. State*, 275 Ga. App. 70, 619 S.E.2d 770 (2005).

In an armed robbery prosecution, when an investigator who had viewed and heard a videotape of the crime, in which one of the perpetrators made a high-pitched yell, testified that, while at the jail, the officer heard defendant make a sound that was so much like the sound on the tape that, "it was unreal," this testimony authorized the jury to convict this defendant. *Shannon v. State*, 275 Ga. App. 550, 621 S.E.2d 540 (2005).

On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the conviction as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under O.C.G.A. § 24-9-80, the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. *Reid v. State*, 281 Ga. App. 640, 637 S.E.2d 62 (2006).

Passenger's testimony stating that the defendant passed marijuana to the passenger and told the passenger to discard the marijuana was sufficiently corroborated under O.C.G.A. § 24-4-8 to support a finding of guilt of possession of more than an ounce of marijuana under O.C.G.A. § 16-13-30; the

marijuana found near the defendant was packaged the same way as the marijuana found outside the car, and it could, therefore, be inferred that the marijuana found outside the car had previously been in the back seat beside the defendant. *Curtis v. State*, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, 2007 Ga. LEXIS 203 (Ga. 2007).

While the testimony of an accomplice standing alone was insufficient to convict, when the evidence identifying two of the three defendants as participants to an armed robbery of a female victim was not limited to the uncorroborated testimony of the driver of the getaway car, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that both were guilty. *Williamson v. State*, 285 Ga. App. 779, 648 S.E.2d 118 (2007).

Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. *Allen v. State*, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

Despite a juvenile's challenge to the sufficiency of the evidence, an adjudication entered by the juvenile court on a charge of attempted rape was proper because the charge was supported not only by the testimony of the victim, but also by the corroborating testimony offered by both the victim's neighbor, who witnessed the attack, and the victim's sister, who chased the juvenile away from the scene. In the Interest of J.L.H., 289 Ga. App. 30, 656 S.E.2d 160 (2007).

Despite waiving error regarding a show up identification because: (1) a victim's identification of the defendant as one of the perpetrators of a burglary, robbery, and battery was sufficient and non-suggestive; and (2) the corroborating testimony from the defendant's two accomplices was admissible to support the defendant's convictions, as both accomplices testified as to the defendant's involvement in the crimes, those convictions were upheld on appeal; thus a new

Sufficiency of Corroborating Evidence (Cont'd)

trial was properly denied. *Carr v. State*, 289 Ga. App. 875, 658 S.E.2d 419 (2008).

With regard to a defendant's convictions on one count of enticing a child for indecent purposes, ten counts of child molestation, one count of aggravated child molestation, and three counts of cruelty to children in the first degree, regarding actions the defendant took toward three children and what the children were forced to do to each other by gunpoint while the defendant was a babysitter for the children, the state proved the charged offenses beyond a reasonable doubt based on the testimony of the three victims and the victims' videotaped forensic interviews. It was within the province of the jury to disbelieve the defendant's testimony that the defendant did not commit the charged crimes. *Sullivan v. State*, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009).

Trial court did not err in convicting the defendant of armed robbery of a restaurant, O.C.G.A. § 16-8-41(a), and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), because sufficient evidence corroborated an accomplice's testimony that the defendant participated in the robbery; the driver corroborated that the driver picked the defendant up and dropped the defendant and the accomplice off at the defendant's residence near the restaurant about two-and-one-half hours before the robbery, the driver overheard the defendant speaking to the accomplice about committing a robbery, and two more witnesses confirmed that the two were together that evening. *Jones v. State*, 302 Ga. App. 147, 690 S.E.2d 460 (2010).

Accomplice to felony exception not applicable. — Sufficient evidence supported defendant's O.C.G.A. § 16-7-1 burglary conviction. The O.C.G.A. § 24-4-8 "accomplice to a felony" exception did not apply and the defendant's codefendant's evidence was admissible (and subject to cross-examination) since a neighbor also testified that the neighbor saw the defendant enter the victim's home and remove items which were later recovered from the codefendant. *Millirons v. State*, 268 Ga. App. 644, 602 S.E.2d 346 (2004).

Knowledge and use of home security code. — Accomplice's testimony was sufficiently corroborated when the victim's body was found in a manner consistent with the accomplice's testimony, other witnesses corroborated various details of the accomplice's testimony, and defendant left town, as the accomplice testified defendant warned the accomplice to do likewise. *Hinely v. State*, 275 Ga. 777, 573 S.E.2d 66 (2002).

Sufficient evidence to convict the defendant of burglary, assault, and battery included an accomplice's testimony (sufficiently corroborated under O.C.G.A. § 24-4-8 by accomplice's knowledge and use of the defendant's grandmother's security code) that defendant hired an accomplice to kill the grandmother. *Hill v. State*, 268 Ga. App. 642, 602 S.E.2d 348 (2004).

Identity of accomplice alone is insufficient corroboration. — Under O.C.G.A. § 24-4-8, testimony which concerns the identity of other participants must be corroborated by some means independent of the testimony of the accomplice. One who is guilty of a crime in which one participated will always be able to relate the facts of the case and if the corroboration goes only to the truth of that history, without identifying the person accused, it is really no corroboration at all. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

Corroboration required by O.C.G.A. § 24-4-8 need not be sufficient to warrant guilty verdict or prove every material element of the crime; it need only tend to connect and identify the defendant with the crime charged. *Whitfield v. State*, 159 Ga. App. 398, 283 S.E.2d 627 (1981); *Raines v. State*, 186 Ga. App. 239, 366 S.E.2d 841 (1988); *Hanson v. State*, 193 Ga. App. 246, 387 S.E.2d 441 (1989).

Accomplice's testimony was corroborated for bank robbery conviction since: (1) the security guard identified defendant as a perpetrator; (2) a baseball cap dropped by the gunman was scientifically linked to defendant; (3) defendant gave the accomplice a gun before the later robberies, and the gun the accomplice discarded after a later robbery was the weapon taken from the bank security guard at the bank robbery; and (4) a still photograph of the gunman made from the bank surveillance videotape was shown to the jury. *Smith v. State*, 257 Ga. App. 595,

571 S.E.2d 817 (2002).

Accomplice's identification of participants in crime must be corroborated. — When an accomplice's testimony is corroborated in material part, other uncorroborated testimony may be believed by the jury, with one important exception: testimony which concerns the identity of other participants must be corroborated by some means independent of the testimony of the accomplice. *Cofer v. State*, 166 Ga. App. 436, 304 S.E.2d 537 (1983).

Testimony of a defendant's accomplice implicating the defendant in several robberies was sufficiently corroborated based on the defendant's admission, eyewitnesses confirming that two persons participated, and the defendant's use of the victims' bank cards after the robberies. Thus, the defendant's participation as an accessory was sufficiently corroborated by evidence other than from the accomplice. *Epps v. State*, 296 Ga. App. 92, 673 S.E.2d 608 (2009).

Slight evidence sufficient to prove identity. — Corroborating evidence of testimony of an accomplice, albeit slight, tended to prove defendant's identity and participation in the crime and therefore was sufficient as a matter of law. *Walker v. State*, 57 Ga. App. 868, 197 S.E. 67 (1938); *McPherson v. State*, 96 Ga. App. 839, 101 S.E.2d 750 (1958); *Trull v. State*, 221 Ga. 442, 145 S.E.2d 242 (1965); *Pitts v. State*, 128 Ga. App. 434, 197 S.E.2d 495 (1973); *Harris v. State*, 165 Ga. App. 186, 299 S.E.2d 393 (1983); *Williams v. State*, 198 Ga. App. 725, 402 S.E.2d 796 (1991); *Brown v. State*, 199 Ga. App. 18, 404 S.E.2d 154 (1991); *Tucker v. State*, 205 Ga. App. 683, 423 S.E.2d 422 (1992); *Young v. State*, 213 Ga. App. 278, 444 S.E.2d 598 (1994); *Knott v. State*, 225 Ga. App. 604, 484 S.E.2d 342 (1997).

Slight evidence of corroboration, which may be entirely circumstantial, that connects a defendant with the crime satisfies the requirements of O.C.G.A. § 24-4-8, and the sufficiency of the corroboration of an accomplice's testimony is peculiarly a matter for the jury; thus, the evidence presented at defendant's trial for multiple burglary counts was sufficient to support defendant's convictions since the testimony of defendant's nephew, who acted as an accomplice, was corroborated by the testimony of the victims describing the methods used to

break into their homes and the items that were taken. *Gibson v. State*, 267 Ga. App. 473, 600 S.E.2d 417 (2004).

There was at least slight evidence from sources extraneous to the defendant's accomplice as to the defendant's identity and participation in a robbery, and the evidence was sufficient to support a guilty verdict on that count. Extraneous evidence connected the defendant to at least one robbery in which the defendant employed the same modus operandi as the accomplice employed. *Grimes v. State*, 291 Ga. App. 585, 662 S.E.2d 346 (2008).

Testimony of other witnesses sufficient. — Finding of delinquency by virtue of the minor's having committed acts which if done by an adult would have constituted motor vehicle theft and burglary was not based solely upon the uncorroborated testimony of an accomplice; rather, many of the details were also corroborated by the testimony of two investigators, a relative of the minor, the owner of one of the stolen vehicles and the minor personally. *In re J.B.*, 223 Ga. App. 429, 477 S.E.2d 874 (1996).

When a former detective testified without objection that a witness to a robbery gave a statement positively identifying the defendant as the gunman in an armed robbery, this testimony corroborated testimony of a co-participant, and whether it was sufficient for a conviction was for the jury to determine. *Kenney v. State*, 236 Ga. App. 359, 511 S.E.2d 923 (1999).

Evidence was sufficient to support defendant's convictions for armed robbery and kidnapping as the testimony of at least one witness that was presented against defendant as to each offense was sufficient to establish as a fact that defendant committed the offenses. *Singleton v. State*, 259 Ga. App. 184, 577 S.E.2d 6 (2003).

Trial court properly denied defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because there was sufficient evidence to support the convictions for aggravated assault and reckless conduct, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-5-60(b), respectively; defendant and the codefendants were involved in a physical altercation with two restaurant patrons, and a codefendant's testimony that defendant retrieved a gun and shot the victim was sufficiently repeated by

Sufficiency of Corroborating Evidence (Cont'd)

the testimony of other witnesses, who also connected defendant with the shooting pursuant to the corroboration requirement in O.C.G.A. § 24-4-8. *Baker v. State*, 273 Ga. App. 297, 614 S.E.2d 904 (2005).

Evidence was sufficient to support defendant's conviction for violation of O.C.G.A. § 16-13-30 of the Georgia Controlled Substances Act because a passenger in the defendant's truck testified that defendant purchased crack cocaine from an individual in a high drug area, a rock of crack cocaine was found in defendant's truck, and a police officer corroborated that testimony pursuant to O.C.G.A. § 24-4-8 with the officer's own observations that the individual that defendant was talking to had money in a hand as the individual lowered the hand from defendant's truck window. *Millsap v. State*, 275 Ga. App. 732, 621 S.E.2d 837 (2005).

Because testimony from a single witness was sufficient to establish a fact, testimony from both victims of an armed robbery that the defendant was the gunman during that robbery was sufficient direct evidence to establish that fact; moreover, the fact that the defendant offered another explanation for the defendant's presence at the scene, did not render the other evidence against the defendant insufficient or circumstantial. *Bakyayita v. State*, 278 Ga. App. 624, 629 S.E.2d 539 (2006).

Because sufficient evidence was presented that a juvenile was a party to the crime of entering an automobile with the intent to commit a theft or felony, and the evidence was corroborated by a police officer who questioned the juvenile's cohort, an adjudication based on the juvenile's commission of the act was upheld on appeal; thus, the juvenile's motion for a directed verdict was properly denied. *In the Interest of B.D.*, 287 Ga. App. 185, 651 S.E.2d 129 (2007).

In defendant's conviction for child molestation, the trial court properly denied defendant's motion for a directed verdict of acquittal as sufficient evidence existed based on testimony of the child victim's parent, who testified as to discovery of defendant on top of the victim; further evidence in support of defendant's conviction included the

child's videotaped police interviews describing what happened. *Lopez v. State*, 291 Ga. App. 210, 661 S.E.2d 618 (2008).

Evidence was sufficient for the jury to find a defendant guilty of child molestation beyond a reasonable doubt as it was within the jury's province to reject the defendant's defense denying the crime with regard to the victim as well as with regard to the witnesses who testified as to similar transactions with the defendant. The testimony of the victim was corroborated by an investigator and a forensic interviewer, who testified as to what the victim had told had occurred; the victim's statements were corroborated by the sheriff's investigator; and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. *Lamb v. State*, 293 Ga. App. 65, 666 S.E.2d 462 (2008).

There was sufficient evidence to support a defendant's convictions for aggravated assault and possession-of-a-firearm based on the testimony of three separate witnesses, including the victim, that the defendant threateningly pointed a gun at the victim's head. Further, regarding the need to show the victim's reasonable apprehension of immediately receiving a violent injury, the state presented evidence from the victim's mouth that the victim feared the gun and that the fear resulted in the victim urinating on the victim's person and in the victim lying to an officer at the front door to protect the victim's children. *Hardy v. State*, 293 Ga. App. 265, 666 S.E.2d 730 (2008).

The testimony of a victim and the victim's neighbor that the defendant was the person who held a gun to the victim's side and led the victim outside to search for money in the victim's truck, as well as a letter from the defendant to a co-defendant implicating the defendant, was sufficient corroboration under O.C.G.A. § 24-4-8 to create a jury question as to whether the defendant was guilty of aggravated assault. *Decoteau v. State*, 302 Ga. App. 451, 691 S.E.2d 328 (2010).

Corroboration need not extend to every material detail. — Testimony of one accomplice adequately corroborated that of another accomplice to the murder of appellant's former husband since although there were inconsistencies in that each attempted to place more culpability on the other in

carrying out the scheme, they amply corroborated each other on the ultimate question of appellant's involvement in the scheme to have her former husband killed. *Blalock v. State*, 250 Ga. 441, 298 S.E.2d 477 (1983).

Need not warrant conviction. — Corroborating evidence need not be in and of itself so strong as to support a verdict of guilty. *Nance v. State*, 126 Ga. 95, 54 S.E. 932 (1906); *Parham v. State*, 3 Ga. App. 468, 60 S.E. 123 (1908); *Smith v. State*, 189 Ga. 169, 5 S.E.2d 762 (1939); *Smith v. State*, 238 Ga. 640, 235 S.E.2d 17 (1977); *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984).

Grave suspicion not sufficient. — Corroborating evidence which merely casts a grave suspicion upon the defendant is not sufficient. *McCalla v. State*, 66 Ga. 346 (1881); *Baker v. State*, 14 Ga. App. 578, 81 S.E. 805 (1914); *Thompson v. State*, 52 Ga. App. 105, 182 S.E. 414 (1935); *Worley v. State*, 60 Ga. App. 557, 4 S.E.2d 417 (1939); *Ivey v. State*, 91 Ga. App. 455, 85 S.E.2d 829 (1955); *Hill v. State*, 236 Ga. 831, 224 S.E.2d 281 (1976); *Smith v. State*, 238 Ga. 640, 235 S.E.2d 17 (1977).

Testimony of an accomplice must be corroborated by independent evidence tending to connect the accused with the crime or leading to an inference that the accused is guilty and must do more than merely cast a grave suspicion of guilt on the accused. *Powell v. State*, 166 Ga. App. 393, 304 S.E.2d 515 (1983).

Slight evidence from an extraneous source identifying the accused as a participator in the criminal act is sufficient corroboration of the accomplice to support a verdict. *Hargett v. State*, 55 Ga. App. 192, 189 S.E. 675 (1937); *King v. State*, 77 Ga. App. 720, 49 S.E.2d 790 (1948); *Blakely v. State*, 78 Ga. App. 282, 50 S.E.2d 762 (1948); *McPherson v. State*, 96 Ga. App. 839, 101 S.E.2d 750 (1958); *Wilkins v. State*, 96 Ga. App. 841, 101 S.E.2d 912 (1958); *Waldrop v. State*, 221 Ga. 319, 144 S.E.2d 372 (1965); *Lindsey v. State*, 227 Ga. 48, 178 S.E.2d 848 (1970); *Pitts v. State*, 128 Ga. App. 434, 197 S.E.2d 495 (1973); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976); *Jones v. State*, 139 Ga. App. 643, 229 S.E.2d 121 (1976); *Green v. State*, 139 Ga. App. 652, 229 S.E.2d 129 (1976); *Hill v. State*, 237 Ga. 794, 229

S.E.2d 737 (1976); *Smith v. State*, 238 Ga. 640, 235 S.E.2d 17 (1977); *Felix v. State*, 143 Ga. App. 376, 238 S.E.2d 734 (1977); *Cummings v. State*, 240 Ga. 104, 239 S.E.2d 529 (1977); *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979); *Neal v. State*, 152 Ga. App. 270, 262 S.E.2d 561 (1979); *Smith v. State*, 245 Ga. 205, 264 S.E.2d 15 (1980); *Davis v. State*, 154 Ga. App. 803, 269 S.E.2d 874 (1980); *Smith v. State*, 154 Ga. App. 741, 270 S.E.2d 5 (1980); *Black v. State*, 155 Ga. App. 798, 272 S.E.2d 762 (1980); *Cole v. State*, 156 Ga. App. 288, 274 S.E.2d 685 (1980); *Inman v. State*, 182 Ga. App. 209, 355 S.E.2d 119 (1987); *Thurston v. State*, 186 Ga. App. 881, 368 S.E.2d 822 (1988); *Martin v. State*, 209 Ga. App. 720, 434 S.E.2d 534 (1993); *Dalton v. State*, 237 Ga. App. 217, 513 S.E.2d 745 (1999).

Only slight evidence of participation in the offense from an extraneous source will provide the necessary corroboration under O.C.G.A. § 24-4-8, which may consist entirely of circumstantial evidence. *Chergi v. State*, 234 Ga. App. 548, 507 S.E.2d 795 (1998).

Confession of defendant was corroborated. — Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. *Cantrell v. State*, 299 Ga. App. 746, 683 S.E.2d 676 (2009).

Connection with crime more than suspicion of guilt. — Corroborating evidence must, independently of the accomplice's testimony and of itself, connect the defendant on trial with the commission of the offense and tend to show defendant's guilt; a grave suspicion of the defendant's guilt is not sufficient. *King v. State*, 77 Ga. App. 720, 49 S.E.2d 790 (1948); *Price v. State*, 208 Ga. 695, 69 S.E.2d 253 (1952); *Wilkins v. State*, 96 Ga. App. 841, 101 S.E.2d 912 (1958); *Allen v. State*, 215 Ga. 455, 111 S.E.2d 70 (1959); *Seay v. State*, 108 Ga. App. 724, 134 S.E.2d 422 (1963); *Pritchard v. State*, 224 Ga.

Sufficiency of Corroborating Evidence (Cont'd)

776, 164 S.E.2d 808 (1968); *Caldwell v. State*, 227 Ga. 703, 182 S.E.2d 789 (1971); *Vaughn v. State*, 139 Ga. App. 565, 228 S.E.2d 741 (1976); *Felix v. State*, 143 Ga. App. 376, 238 S.E.2d 734 (1977); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979); *Stinson v. State*, 151 Ga. App. 533, 260 S.E.2d 407 (1979); *Black v. State*, 155 Ga. App. 798, 272 S.E.2d 762 (1980).

Need not warrant conviction but must do more than create suspicion. — Corroborating evidence need not be so strong as to support a verdict of guilty, but it must be sufficient to connect the accused with the perpetration of the offense and lead to the inference of the accused's guilt, and more than sufficient to merely raise a suspicion against the accused. *Sheppard v. State*, 44 Ga. App. 481, 162 S.E. 413 (1931); *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Need not warrant conviction or be exhaustively corroborated. — Corroboration need not of itself be sufficient to warrant a verdict or be corroborated in every material particular. *Hargett v. State*, 55 Ga. App. 192, 189 S.E. 675 (1937); *Mitchell v. State*, 202 Ga. 247, 42 S.E.2d 767 (1947); *Blakely v. State*, 78 Ga. App. 282, 50 S.E.2d 762 (1948); *Mears v. State*, 98 Ga. App. 576, 106 S.E.2d 854 (1958); *Waldrop v. State*, 221 Ga. 319, 144 S.E.2d 372 (1965); *Pitts v. State*, 128 Ga. App. 434, 197 S.E.2d 495 (1973); *Atcheson v. State*, 136 Ga. App. 152, 220 S.E.2d 483 (1975); *Turner v. State*, 235 Ga. 826, 221 S.E.2d 590 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976); *Jones v. State*, 139 Ga. App. 643, 229 S.E.2d 121 (1976); *Cole v. State*, 156 Ga. App. 288, 274 S.E.2d 685 (1980).

Evidence corroborating the accomplice's testimony does not have to be sufficient in and of itself to support a verdict of guilty; circumstantial evidence tying the defendant to the crime and justifying an inference of guilt is satisfactory. *Cofer v. State*, 166 Ga. App. 436, 304 S.E.2d 537 (1983).

Slight evidence not warranting conviction and not supporting every material fact. —

Law does not require that the corroborating evidence shall in and of itself alone be sufficient to warrant a verdict of guilty, or that the testimony of the accomplice shall be corroborated in every material particular. On the contrary, slight evidence that the crime was committed by both defendants, and identifying the defendants with the crime, will corroborate the testimony of the accomplice and warrant a conviction. *Evans v. State*, 78 Ga. 351 (1886); *Boswell v. State*, 92 Ga. 581, 17 S.E. 805 (1893); *Pritchett v. State*, 92 Ga. 33, 18 S.E. 350 (1893); *Chapman v. State*, 112 Ga. 56, 37 S.E. 102 (1900); *Dixon v. State*, 116 Ga. 186, 42 S.E. 357 (1902); *Nance v. State*, 126 Ga. 95, 54 S.E. 932 (1906); *Davis v. State*, 25 Ga. App. 532, 103 S.E. 819, cert. denied, 25 Ga. App. 840 (1920); *Newman v. State*, 63 Ga. App. 417, 11 S.E.2d 248 (1940); *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968); *Caldwell v. State*, 227 Ga. 703, 182 S.E.2d 789 (1971); *Mulligan v. State*, 245 Ga. 266, 264 S.E.2d 204 (1980); *Bennett v. State*, 156 Ga. App. 617, 275 S.E.2d 701 (1980); *Powell v. State*, 166 Ga. App. 393, 304 S.E.2d 515 (1983); *Whitton v. State*, 178 Ga. App. 862, 344 S.E.2d 703 (1986); *Howard v. State*, 181 Ga. App. 187, 351 S.E.2d 550 (1986); *Durham v. State*, 181 Ga. App. 155, 351 S.E.2d 683 (1986); *Slaughter v. State*, 227 Ga. App. 739, 490 S.E.2d 399 (1997).

Direct or circumstantial evidence. — Sufficient corroboration may consist of either direct or circumstantial evidence which connects the defendant with the crime, tends to show the defendant's participation therein, and would justify an inference of the guilt of the accused independently of the testimony of the accomplice. *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Circumstantial evidence. — Circumstantial evidence, when taken with the accomplice testimony, showing guilt beyond a reasonable doubt is sufficient corroboration. *Whitfield v. State*, 159 Ga. App. 398, 283 S.E.2d 627 (1981).

Although corroboration may be by circumstantial evidence, the evidence must do more than merely cast a grave suspicion of guilt on the accused. *Claybrooks v. State*, 189 Ga. App. 431, 375 S.E.2d 880, cert. denied, 189 Ga. App. 911, 375 S.E.2d 880 (1988).

Circumstantial evidence presented at trial sufficient to corroborate testimony of ac-

complice. — See *Howard v. State*, 187 Ga. App. 74, 369 S.E.2d 271 (1988); *Martinez v. State*, 222 Ga. App. 497, 474 S.E.2d 708 (1996).

Testimony of other witnesses linking the defendant to the crime was sufficient to corroborate the testimony of the accomplice and was sufficient for a rational trier of fact to find defendant guilty of the crimes charged beyond a reasonable doubt. *Sanchez v. State*, 203 Ga. App. 61, 416 S.E.2d 139 (1992).

Evidence was sufficient to corroborate accomplice testimony in a prosecution for burglary of a store since the corroborating evidence included a burglary call to the police, a store security video which showed events testified to by the accomplice, and an incriminating statement made by the defendant. *Williams v. State*, 234 Ga. App. 191, 506 S.E.2d 237 (1998).

Corroboration circumstantial and consistent with innocence. — When corroboration of the alleged accomplice's testimony is entirely circumstantial and is of itself as consistent with innocence as with guilt, such evidence is insufficient to sustain a verdict. *Reed v. State*, 127 Ga. App. 458, 194 S.E.2d 121 (1972).

Source of corroboration. — Corroboration of an accomplice must come from a source or sources other than his or her own testimony, were it otherwise the rule as to corroboration would obviously be nugatory and worthless. *Taylor v. State*, 110 Ga. 150, 35 S.E. 161 (1900); *Butler v. State*, 17 Ga. App. 522, 87 S.E. 712 (1916).

There was adequate corroboration. — See *Cain v. State*, 212 Ga. App. 531, 442 S.E.2d 279 (1994); *Bush v. State*, 267 Ga. 877, 485 S.E.2d 466 (1997); *Givens v. State*, 227 Ga. App. 861, 490 S.E.2d 530 (1997); *In re J.L.*, 229 Ga. App. 447, 494 S.E.2d 274 (1997); *Pye v. State*, 269 Ga. 779, 505 S.E.2d 4 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999); *Sparks v. State*, 234 Ga. App. 11, 505 S.E.2d 555 (1998); *Dalton v. State*, 237 Ga. App. 217, 513 S.E.2d 745 (1999); *Purvis v. State*, 239 Ga. App. 900, 522 S.E.2d 499 (1999); *Terrell v. State*, 271 Ga. 783, 523 S.E.2d 294 (1999); *Crumpton v. State*, 244 Ga. App. 57, 534 S.E.2d 809 (2000); *Blair v. State*, 246 Ga. App. 533, 541 S.E.2d 120 (2000); *Jackson v. State*, 246 Ga. App. 731, 541 S.E.2d 701 (2000); *Callaway v.*

State, 247 Ga. App. 310, 542 S.E.2d 596 (2000); *Rogers v. State*, 247 Ga. App. 219, 543 S.E.2d 81 (2000); *Eidson v. State*, 247 Ga. App. 26, 543 S.E.2d 100 (2000); *Miller v. State*, 273 Ga. 831, 546 S.E.2d 524 (2001); *Parker v. State*, 249 Ga. App. 530, 549 S.E.2d 154 (2001).

Sufficient corroborating evidence existed to support accomplice's testimony that defendant kicked in the door of the victim's residence and committed other crimes inside that residence against the victim, as another person, other than defendant and the other two men who committed the crimes, gave a statement to police regarding defendant's presence at the scene of the crime and that statement was introduced at trial through the police officer who witnessed the statement. *Moore v. State*, 261 Ga. App. 752, 583 S.E.2d 588 (2003).

Although the uncorroborated testimony of a co-defendant was insufficient to convict defendant under O.C.G.A. § 24-4-8, there was other evidence, including defendant's statements to police that defendant urged the co-defendant to kill the victim, to show that defendant aided and abetted and counseled another to commit the crimes under O.C.G.A. § 16-2-20(b)(3) and (4). *Lucky v. State*, 286 Ga. 478, 689 S.E.2d 825 (2010).

Because of the corroborating testimony from the defendant's two accomplices, the accomplice testimony was admissible to support the defendant's conviction for aggravated assault, O.C.G.A. § 16-5-21(a)(3), and aggravated battery, O.C.G.A. § 16-5-24(a). *Scott v. State*, 302 Ga. App. 111, 690 S.E.2d 242 (2010).

Adequate corroboration for RICO conviction. — Testimony by defendant's cousin that the cousin saw defendant deliver packages to defendant's mother on several occasions corroborated defendant's mother's testimony that defendant supplied cocaine for sale by family members and was sufficient to sustain defendant's conviction under the Georgia Racketeer Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-1 et seq. *McGee v. State*, 255 Ga. App. 708, 566 S.E.2d 431 (2002), cert. denied, 537 U.S. 1058, 123 S. Ct. 633, 154 L. Ed. 2d 539 (2002).

Adequate corroboration for marijuana conviction. — Sufficient corroboration existed to support a conviction for possession of marijuana with intent to distribute based

Sufficiency of Corroborating Evidence (Cont'd)

on the testimony of an accomplice after the police saw that defendant was in a house that had marijuana in many rooms, the marijuana was divided into different colored baggies, implying different ownership, and defendant's flight from the scene showed defendant's consciousness of guilt. *Ellison v. State*, 265 Ga. App. 446, 594 S.E.2d 675 (2004).

In a trial for attempted trafficking in marijuana, a codefendant's statements were sufficiently corroborated under O.C.G.A. § 24-4-8 by the testimony of a case agent that a loaded pistol was found at the defendant's feet and that a bag containing the currency used in the drug transaction was found within arm's reach of the defendant. *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

Adequate corroboration for burglary conviction. — Evidence was sufficient to support defendant's conviction for burglary after an accomplice's testimony that defendant was an active participant in the burglary was corroborated by: (1) a police officer's testimony that defendant was in a vehicle with two accomplices shortly after the burglary; (2) another officer's testimony that handguns were found in a pillowcase retrieved from the vehicle; and (3) the pawn shop owner's testimony that the guns found in the vehicle were the guns stolen from the owner's shop. *Reynolds v. State*, 267 Ga. App. 148, 598 S.E.2d 868 (2004).

Testimony of defendant's accomplice was sufficiently corroborated by defendant's possession of tools used in the crime, the fact that defendant was found near the scene of a bank burglary covered in grease that could have come from a bank machine, the fact that defendant was sweaty, as if defendant had been working, and the fact that pine straw similar to the pine straw in front of the burglarized bank was found in defendant's car. *McNair v. State*, 267 Ga. App. 872, 600 S.E.2d 830 (2004).

Adequate corroboration for aggravated assault conviction. — Sufficient evidence supported aggravated assault conviction because both the victim and another witness testified that defendant stabbed the victim, and a nurse testified that the victim's injury

was serious. *Hampton v. State*, 272 Ga. App. 273, 612 S.E.2d 96 (2005).

Sufficient evidence supported the defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21(a)(2) after the defendant's companions used metal knuckles, a metal pipe, and a gun to beat the victim; the defendant was a party to the offense under O.C.G.A. § 16-2-20(a), as the victim, whose testimony was sufficient to establish a fact under O.C.G.A. § 24-4-8, testified that, during the incident, the defendant summoned the companions to help beat the victim, and the defendant and the companions repeatedly warned the victim not to testify in court in the defendant's criminal case. *Souder v. State*, 281 Ga. App. 339, 636 S.E.2d 68 (2006), cert. denied, 2007 Ga. LEXIS 97 (Ga. 2007).

Adequate corroboration for malice murder conviction. — Sufficient non-accomplice evidence was presented to corroborate the testimony by accomplices of both defendants in trial on charges of malice murder and other related offenses, specifically, that: (1) the first defendant admitted to the victim's killing, via a note from that defendant to a non-accomplice witness, in order to prevent the victim from testifying; and (2) independent evidence was presented regarding the second defendant's participation in the crimes to corroborate the testimony of the accomplice. *Williams v. State*, 280 Ga. 584, 630 S.E.2d 370 (2006).

Adequate corroboration for methamphetamine conviction. — Sufficient evidence existed to support defendant's conviction for criminal attempt to manufacture methamphetamine, and defendant's challenge to the sufficiency of the evidence based upon the uncorroborated testimony of defendant's accomplice alone failed as the incriminating testimony by the accomplice was adequately corroborated by independent evidence, including defendant's possession of essential items for manufacturing methamphetamine; defendant's statement to a passenger in the back of the patrol car that a store likely had ratted about the matchbook purchases; and the large quantity of matchbooks found discarded along the route defendant had just traveled. *Kohlmeier v. State*, 289 Ga. App. 709, 658 S.E.2d 261 (2008).

Because the accomplice testimony pre-

sented against a juvenile was sufficiently corroborated by two other witness, the juvenile's prior similar acts, and the juvenile's flight from the scene, the appeals court rejected the juvenile's sufficiency challenge. *In the Interest of S.K.*, 289 Ga. App. 672, 658 S.E.2d 220 (2008).

Adequate corroboration for armed robbery and hijacking motor vehicle conviction.

— Trial court properly convicted defendant of armed robbery and hijacking of a motor vehicle because: (1) there was sufficient evidence to establish defendant committed the crimes based on the testimony of the victim, who identified defendant as the individual who approached the victim's vehicle, pointed a gun, and demanded the vehicle; (2) two officers testified as to observing defendant driving the stolen vehicle the same night; and (3) the victim's cell phone was found on defendant's person when the defendant was arrested. *Culver v. State*, 290 Ga. App. 321, 659 S.E.2d 390 (2008).

Adequate corroboration for robbery, burglary, and related crimes conviction. — With regard to a defendant's convictions for robbery, burglary, and other related crimes, the testimony of a codefendant that implicated defendant was sufficiently corroborated by other testimony and evidence at trial. *Burton v. State*, 293 Ga. App. 822, 668 S.E.2d 306 (2008).

Adequate corroboration for armed robbery conviction. — Evidence was sufficient to support a defendant's armed robbery conviction since an accomplice, who was wearing a mask and holding a gun when the accomplice entered the victim's bedroom, testified that the defendant had given the accomplice the mask and the gun and that the accomplice had shouted downstairs to the defendant during the robbery; the testimony was corroborated under O.C.G.A. § 24-4-8 by the victim's recognition of the defendant's voice from the shouted conversation during the robbery and by the defendant's resistance and flight when police arrived. *Williams v. State*, 287 Ga. App. 361, 651 S.E.2d 768 (2007).

Evidence was sufficient to convict a defendant of armed robbery since the testimony of a 14-year-old accomplice was corroborated by testimony from a clerk in the store that was robbed by the defendant and others, and the state presented physical evi-

dence—clothing worn by the robbers—that linked the defendant to the robbery. *Sellers v. State*, 294 Ga. App. 536, 669 S.E.2d 544 (2008).

In an armed robbery prosecution, as the victim identified the defendant as the driver of a car and the codefendant as the passenger who robbed the victim at gunpoint, and the pistol used in the robbery was found in the car's locked glove compartment, to which only the defendant had the key, the evidence was sufficient to establish that the defendant aided and abetted the codefendant in the robbery under O.C.G.A. § 16-2-20 and sufficiently corroborated the codefendant's accomplice testimony under O.C.G.A. § 24-4-8. *Bailey v. State*, 295 Ga. App. 480, 672 S.E.2d 450 (2009).

Adequate corroboration for weapons possession conviction. — Evidence was sufficient to convict a defendant of possession of a weapon during the commission of a crime as the testimony of the defendant's accomplice that the defendant raped the victim at gunpoint was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist, and the fact that the defendant's DNA was found on the victim's clothing. *Williams v. State*, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

Adequate corroboration for rape conviction. — Evidence was sufficient to convict a defendant of rape as the testimony of the defendant's accomplice that the defendant raped the victim was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist and the fact that the defendant's DNA was found on the victim's clothing. *Williams v. State*, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

Adequate corroboration for sodomy conviction. — Trial court properly denied a defendant's motion for new trial on the ground that there was insufficient evidence to prove aggravated sodomy since the only evidence of the victim performing oral sodomy upon the defendant came from the uncorroborated testimony of the victim's parent, who was an accomplice to the sexual abuse and because there was insufficient evidence of force. To the contrary, the victim's testimony as to the sexual abuse committed by the defendant sufficiently corroborated the testimony of the victim's parent, and the testimony of the victim that the

Sufficiency of Corroborating Evidence (Cont'd)

defendant kept multiple guns around the outbuilding where the trio lived and that the defendant had repeatedly threatened to shoot the victim if the victim did not engage in the sexual acts was sufficient to prove the element of force. *Driggers v. State*, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

Adequate corroboration for cocaine conviction. — While a defendant claimed that the evidence was insufficient to exclude the possibility that the cocaine belonged solely to the defendant's passenger, the testimony of the passenger that the passenger dropped the drugs out of the truck after the defendant threw the drugs in the passenger's lap was adequately corroborated under O.C.G.A. § 24-4-8 by the facts that the defendant had more than \$2,000 in the defendant's pocket and that the defendant was the owner and driver of the truck from which the drugs were thrown; the defendant was, thus, properly convicted of trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) and possession of cocaine as a lesser included offense of possession with intent to distribute. *Wingfield v. State*, 297 Ga. App. 476, 677 S.E.2d 704 (2009).

Adequate corroboration for robbery conviction. — Evidence that the defendant committed a robbery was not based solely on the uncorroborated testimony of the defendant's accomplice. A store employee corroborated the accomplice's testimony, and items similar to those taken during the robbery, as well as items taken during a later robbery, were recovered from the defendant's car, which was occupied by the defendant and the accomplice. *Savage v. State*, 298 Ga. App. 350, 679 S.E.2d 734 (2009).

Accomplice cannot corroborate the accomplices own testimony by something the accomplice told another witness. The corroborating circumstances must be independent of the testimony of the accomplice. *Payne v. State*, 135 Ga. App. 245, 217 S.E.2d 476 (1975).

Corroboration required for each offense. — Although slight evidence of corroboration connecting the defendant with the crime is sufficient, when the defendant is charged with the commission of several offenses, there must be corroborating evi-

dence for each offense charged. *Davis v. State*, 154 Ga. App. 803, 269 S.E.2d 874 (1980), cert. dismissed, 247 Ga. 8, 273 S.E.2d 409 (1981).

Testimony corroborated in murder trial.

— Testimony of the principal witness, an accomplice in the murder of which the accused was tried, was corroborated and the conviction was authorized by the evidence. *George v. State*, 167 Ga. 532, 146 S.E. 120 (1928).

When appellant was convicted of burglary, armed robbery, and felony murder, and appellant admitted that the appellant went to the victim's house with an accomplice, but insisted that the accomplice killed the victim, and contends that the only evidence that the appellant committed the murder is the uncorroborated testimony of the appellant's accomplice, the court found that the evidence was sufficient to satisfy the requirements of O.C.G.A. § 24-4-8, since appellant's own statement is sufficient evidence of the appellant's participation in the crime to corroborate the testimony of the accomplice. *Wisembaker v. State*, 259 Ga. 416, 383 S.E.2d 132 (1989).

Evidence of tenancy and drug paraphernalia. — Evidence that the defendant lived in an apartment and quantities of methamphetamine were located there, along with the implements of trafficking, a triple-beam scale, cutting materials, and baggies for packaging was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the offense of possession of methamphetamine with intent to distribute. *Lowe v. State*, 208 Ga. App. 49, 430 S.E.2d 169 (1993).

Testimony corroborated for drug possession. — When defendant's flight itinerary was identical to drug courier's and defendant made voluntary statements that defendant would have cooperated with officials had the officials talked to defendant first instead of talking to "that girl first," the conviction was authorized by the evidence. *Warren v. State*, 207 Ga. App. 53, 427 S.E.2d 45 (1993).

There was sufficient corroboration when the testimony of the detective regarding what the detective heard about setting up the deal, the detective's observation of the drug transaction, and the detective's later

finding the marked bill was at least slight evidence from which the jury could conclude that evidence, independent of the accomplice's testimony, connected defendant to the crime and led to the inference that defendant was guilty. *Black v. State*, 242 Ga. App. 271, 529 S.E.2d 410 (2000).

Evidence was sufficient to convict defendant of possession of cocaine since defendant's two accomplices testified as to their purchase of cocaine and their being stopped by the police while enroute to a motel to smoke the cocaine and since the police found cocaine in the back seat of the car defendant was driving to the motel. *Heard v. State*, 257 Ga. App. 505, 571 S.E.2d 524 (2002).

Testimony corroborated in sudden snatching robbery. — Independent testimony of two separate victims sufficiently established evidence that defendant participated in accomplice's crimes, and thus was sufficient corroboration of accomplice's testimony. *Daniel v. State*, 207 Ga. App. 720, 429 S.E.2d 130 (1993).

Testimony of victim sufficient to corroborate accomplice's testimony. — Jury charge that defendant may not have been convicted on the uncorroborated testimony of an accomplice to the charged home invasion was unwarranted since, *inter alia*, the victims' testimony corroborated the accomplice's testimony regarding defendant's involvement. *Skaggs-Ferrell v. State*, 266 Ga. App. 248, 596 S.E.2d 743 (2004).

Testimony of defendant sufficient to corroborate accomplice's testimony. — In a prosecution for malice murder, even though defendant and defendant's accomplice each accused the other of being the actual perpetrator, defendant's own testimony — placing oneself at the scene and as a participant in disposing of some of the evidence, including the murder weapon — provided ample corroboration for the accomplice's testimony to support a conviction of defendant either as a party to the crime or as an actual perpetrator in the murder. *Parkerson v. State*, 265 Ga. 438, 457 S.E.2d 667 (1995).

Defendant's testimony sufficiently corroborated that of a codefendant to support the defendant's conviction of armed robbery since the defendant testified that the defendant was present during the planning of an armed robbery and that the defendant sup-

plied the gun used during the robbery. *Short v. State*, 234 Ga. App. 633, 507 S.E.2d 514 (1998).

Defendant's statement concerning willing accompaniment of friends despite knowing those friends were involved in criminal activity and defendant's knowledge about items that were taken during such activity was sufficient evidence corroborating an accomplice's testimony inculcating the defendant. *Moore v. State*, 245 Ga. App. 641, 537 S.E.2d 764 (2000).

When defendant robbed the victims at gunpoint with two accomplices, the testimony of one accomplice that defendant was involved in the robbery was sufficient to corroborate testimony to the same effect from defendant's other accomplice and sustain defendant's convictions for armed robbery and aggravated assault, under O.C.G.A. §§ 16-5-21(a)(1), (2) and 16-8-41(a). *Gallimore v. State*, 264 Ga. App. 629, 591 S.E.2d 485 (2003).

Testimony of state's witness sufficient to corroborate testimony of accomplice. — See *Herndon v. State*, 187 Ga. App. 77, 369 S.E.2d 264 (1988).

Recent possession of stolen property, not satisfactorily explained, is sufficient basis for the corroboration of an accomplice's testimony. *Inman v. State*, 182 Ga. App. 209, 355 S.E.2d 119 (1987).

Guns and ski mask sufficient corroboration. — Testimony of the codefendant, corroborated by circumstantial evidence was sufficient to support a conviction of armed robbery, since the codefendant testified that defendant actively participated in the robbery and guns and a ski mask identified as those used in the commission of the crime were found in the defendant's trailer. *Eschena v. State*, 203 Ga. App. 621, 417 S.E.2d 214, cert. denied, 203 Ga. App. 908, 417 S.E.2d 336 (1992).

Identification by robbery victim. — Evidence was sufficient to sustain the defendant's conviction for armed robbery and to corroborate the accomplice's testimony, when one of the robbery victims identified the defendant as one of the robbers. *Telfair v. State*, 234 Ga. App. 444, 507 S.E.2d 195 (1998).

Testimony corroborated in prosecution for armed robbery. — An accomplice's specific, extensive testimony linking the defen-

Sufficiency of Corroborating Evidence (Cont'd)

dant to an armed robbery was sufficiently corroborated by substantial evidence of the defendant's immediate, unexplained possession of stolen checks, forged identification cards, and the vehicle used during the robbery. *Smith v. State*, 234 Ga. App. 586, 506 S.E.2d 406 (1998).

In a prosecution for armed robbery and possession of a firearm by a convicted felon, the defendant's presence at a convenience store identified by defendant's accomplice, at the specific time identified by the accomplice, in the type of vehicle identified by the accomplice, with the array of loaded weaponry — including a 9mm weapon — identified by the accomplice, was sufficient to corroborate the accomplice's testimony regarding the defendant's participation as a party to the crime. *House v. State*, 237 Ga. App. 504, 515 S.E.2d 652 (1999).

Evidence was sufficient for a rational trier of fact to find that the defendant participated in an armed robbery because an accomplice's testimony, which implicated the defendant as a party to the crimes, was sufficiently corroborated by the testimony and evidence at trial when the testimony of a second accomplice regarding the circumstances surrounding the planned robbery, the defendant's participation in the planning of the robbery, and the party's actions before and after the robbery sufficiently corroborated the first accomplice's testimony; the first accomplice's testimony was further corroborated by the victims' descriptions of the events surrounding the robbery, and the police chief testified at trial that police found two sets of shoe prints at the scene of the robbery, but only one set where the second accomplice waited with the car, which also corroborated the accomplice's testimony about what happened after the robbery. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

In a malice murder action, an accomplice's testimony that defendant was the shooter was corroborated by the evidence of defendant's animosity towards the victim, the fact that defendant had previously pulled a handgun on the victim, and the fact that defendant had celebrated the victim's murder. Moreover, defendant's confession

to another that defendant shot the victim corroborated the accomplice's testimony. *Hewitt v. State*, 277 Ga. 327, 588 S.E.2d 722 (2003).

Violation of statute not grounds for habeas corpus relief. — Corroboration of the testimony of an accomplice is a statutory requirement, not a constitutional right. Since violation of a state law no longer constitutes a basis for habeas corpus relief, there is no constitutional nor habeas corpus ground for relief since the contention is the absence of corroboration of the testimony of an accomplice. *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986) (concurring opinions).

Corroborated by other testimony and physical evidence. — Although there was one witness who implicated defendant in the commission of aggravated assault and recanted the witness's statements at trial, the evidence was sufficient to convict defendant since the witness's statements to police implicating defendant in the fatal assault were corroborated by other testimony and the physical evidence. *Kinney v. State*, 271 Ga. 877, 525 S.E.2d 91 (2000).

There was sufficient evidence under O.C.G.A. § 24-4-8 to convict defendant of firearms offenses and drug possession, after the codefendant testified that defendant owned five of the guns and the drugs that were found in the stopped vehicle in which defendant was a passenger, and the police officer who stopped defendant's vehicle corroborated the codefendant's testimony by stating that the officer found a gun under defendant's seat in the car. *Spratling v. State*, 255 Ga. App. 500, 565 S.E.2d 839 (2002).

Accomplice's testimony corroborated. — Although a conviction cannot be based upon the uncorroborated testimony of an accomplice, slight evidence of defendant's identity and participation from an extraneous source is all that is required to corroborate the accomplice's testimony, and thus, support the verdict. *Leonard v. State*, 241 Ga. App. 899, 528 S.E.2d 540 (2000).

Accomplice's testimony not sufficiently corroborated. — Juvenile adjudications were reversed since the testimony of an accomplice witness was not sufficiently corroborated to support the guilty findings; the victim's prior report to a school concerning two of the three defendants did not connect

defendants to the crime, and was insufficient corroboration. In the Interest of M.B., 267 Ga. App. 721, 601 S.E.2d 370 (2004).

Lay opinion testimony of deputy admitted. — Trial court did not err in denying the defendant's motion for directed verdict because the evidence was sufficient to find the defendant guilty of distribution of cocaine beyond a reasonable doubt; a deputy's lay opinion testimony was sufficient to identify the defendant as the perpetrator of the crime. *Strickland v. State*, 302 Ga. App. 44, 690 S.E.2d 638 (2010).

Evidence Constituting Corroboration

Testimony of one accomplice may be corroborated by the testimony of another accomplice. *Chance v. State*, 33 Ga. App. 137, 125 S.E. 730 (1924); *Pope v. State*, 171 Ga. 655, 156 S.E. 599 (1930), answer conformed to, 42 Ga. App. 680, 157 S.E. 211 (1931); *Austin v. State*, 47 Ga. App. 217, 169 S.E. 729 (1933); *Wise v. State*, 52 Ga. App. 98, 182 S.E. 535 (1935); *Wise v. State*, 53 Ga. App. 363, 186 S.E. 142 (1936); *Walker v. State*, 57 Ga. App. 868, 197 S.E. 67 (1938); *Rozier v. State*, 68 Ga. App. 797, 24 S.E.2d 137 (1943); *Greeson v. State*, 90 Ga. App. 57, 81 S.E.2d 839 (1954); *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968); *Nix v. State*, 133 Ga. App. 417, 211 S.E.2d 26 (1974); *Vaughn v. State*, 139 Ga. App. 565, 228 S.E.2d 741 (1976); *Baker v. State*, 238 Ga. 389, 233 S.E.2d 347, cert. denied, 431 U.S. 970, 97 S. Ct. 2931, 53 L. Ed. 2d 1066 (1977); *Eubanks v. State*, 240 Ga. 544, 242 S.E.2d 41 (1978); *Smith v. State*, 154 Ga. App. 741, 270 S.E.2d 5 (1980); *Whitfield v. State*, 159 Ga. App. 398, 283 S.E.2d 627 (1981); *Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998).

Rule barring conviction based on uncorroborated testimony of a single accomplice was inapplicable to a robbery case since the evidence against each of three juvenile defendants was derived from more than one witness and was supported by corroborating evidence after the victim identified one juvenile defendant and one of the two coconspirators, but the victim could not identify the others, and an officer testified regarding statements given to the officer by one of the coconspirators and another of the juvenile defendants which implicated all three juvenile defendants in the crime; although all

three juvenile defendants argued that the corroborating evidence was not credible, the trial court was the sole arbiter of credibility. In the Interest of C.L.B., 267 Ga. App. 456, 600 S.E.2d 407 (2004).

Pursuant to O.C.G.A. § 24-4-8, defendant juvenile's statements to the police corroborated an accomplice's testimony that the juvenile struck a woman unconscious, caused her serious bodily injury, used force to steal her pocketbook, and dragged her down onto her front yard; accordingly, the evidence was sufficient to adjudicate the juvenile delinquent under O.C.G.A. §§ 16-5-21(a)(2), 16-5-40(a), and 16-8-40(a)(1). In re D. T., 294 Ga. App. 486, 669 S.E.2d 471 (2008).

Felony conviction based on testimony of accomplice. — In order to sustain a felony conviction based upon the testimony of an accomplice, there must be corroborating facts and circumstances, which, in themselves and independently of the testimony of the accomplice, directly connect the defendant with the crime or lead to the inference that the defendant is guilty, and are more than sufficient to merely cast on the defendant a grave suspicion of guilt. The necessary corroboration may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that defendant participated in the crime. *Bradford v. State*, 262 Ga. 512, 421 S.E.2d 523 (1992); *Klinect v. State*, 269 Ga. 570, 501 S.E.2d 810 (1998).

Defendant's possession of the gun identified by the victim as used in the crime was sufficient to corroborate the accomplice's testimony as to the sequence of events and acts perpetrated by defendant and the accomplice with regard to the crimes of armed robbery, rape, and aggravated sodomy with the accomplice agreeing to testify against the defendant in return for a lighter sentence. *Palmer v. State*, 286 Ga. App. 751, 650 S.E.2d 255 (2007), cert. denied, 2007 Ga. LEXIS 678 (Ga. 2007).

Uncorroborated testimony of accomplices is sufficient to authorize a felony conviction; thus, convictions of defendant for hijacking a motor vehicle, aggravated assault, and armed robbery that were based upon the testimony of defendant's two accomplices to the crimes were affirmed. *Boles v. State*, 257

Evidence Constituting Corroboration (Cont'd)

Ga. App. 240, 570 S.E.2d 677 (2002).

Conduct on the part of the defendant may act to corroborate the testimony of an accomplice. *Holton v. State*, 61 Ga. App. 654, 7 S.E.2d 202 (1940); *Nix v. State*, 133 Ga. App. 417, 211 S.E.2d 26 (1974); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Defendant's attempts to conceal defendant's participation in an offense can corroborate defendant's accomplice's testimony regarding defendant's participation. *Smith v. State*, 245 Ga. 168, 263 S.E.2d 910 (1980); *Drake v. State*, 245 Ga. 798, 267 S.E.2d 237 (1980).

Evidence of conduct as corroboration may be circumstantial or direct. — Conduct of a defendant before, during the time of, and after the commission of a crime can corroborate the testimony of an accomplice and can be shown by circumstantial as well as by direct evidence. *Smith v. State*, 238 Ga. 640, 235 S.E.2d 17 (1977); *Stanford v. State*, 157 Ga. App. 633, 278 S.E.2d 175 (1981).

Jury may consider the conduct of the defendant before, during, and after the commission of the crime to determine the defendant's intent and defendant's participation in the crime to determine whether defendant's conduct is sufficient corroboration of the accomplice's testimony to sustain the conviction. *Whitfield v. State*, 159 Ga. App. 398, 283 S.E.2d 627 (1981).

The necessary corroboration required by O.C.G.A. § 24-4-8 may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that defendant participated in the crime. *Berry v. State*, 248 Ga. 430, 283 S.E.2d 888 (1981).

While a conviction based upon uncorroborated testimony of an alleged accomplice is insufficient, corroboration itself is peculiarly a matter for the jury, and may be shown by direct or circumstantial evidence tending to show defendant's participation. *Howell v. State*, 163 Ga. App. 445, 295 S.E.2d 329 (1982).

Corroborating evidence connecting a defendant to a crime may consist entirely of

circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that the defendant participated in the crime; whether the corroborating evidence was sufficient in a given context was a matter for the jury, and even slight evidence of corroboration connecting an accused to a crime was legally sufficient. *Anderson v. State*, 261 Ga. App. 456, 582 S.E.2d 575 (2003).

Confession is sufficient to corroborate the testimony of an accomplice. *Lancaster v. State*, 54 Ga. App. 243, 187 S.E. 617 (1936); *Wade v. State*, 195 Ga. 870, 25 S.E.2d 712 (1943); *Nix v. State*, 133 Ga. App. 417, 211 S.E.2d 26 (1974); *Vaughn v. State*, 139 Ga. App. 565, 228 S.E.2d 741 (1976); *Spencer v. State*, 192 Ga. App. 822, 386 S.E.2d 705 (1989).

Testimony of the codefendant that the murder defendant was the triggerman in the armed robbery was corroborated by the defendant's confession in which defendant admitted participation in the robbery. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Defendant's own testimony regarding defendant's presence at the scene of the crime provided corroboration for defendant's brother's testimony linking the defendant with the crime. *Mosier v. State*, 223 Ga. App. 75, 476 S.E.2d 842 (1996).

Proof of corpus delicti as corroboration. — Proof of the corpus delicti independently of the evidence of the accomplice is corroborative of the guilt of the accomplice, but does not at all corroborate the accomplice's testimony as to the guilt of another. *Childers v. State*, 52 Ga. 106 (1874); *McCalla v. State*, 66 Ga. 346 (1881); *Altman v. State*, 5 Ga. App. 833, 63 S.E. 928 (1909); *Smith v. State*, 7 Ga. App. 781, 68 S.E. 335 (1910); *Sanders v. State*, 46 Ga. App. 175, 167 S.E. 207 (1932); *Newman v. State*, 63 Ga. App. 417, 11 S.E.2d 248 (1940).

Statement describing burglary corroborated by officer's observations and guilty plea. — Defendant's videotaped statement describing a burglary, which statement conflicted with defendant's subsequent testimony denying knowledge of or participation in the burglary, could be corroborated by: (1) the officer's independent observations

of the items taken which corresponded with defendant's description; and (2) the district attorney's testimony as to defendant's plea of guilty to the burglary. *Dixon v. State*, 172 Ga. App. 803, 324 S.E.2d 780 (1984).

Recent unexplained possession of stolen property is sufficient basis for the corroboration of an accomplice's testimony and for a conviction of burglary. *Green v. State*, 139 Ga. App. 652, 229 S.E.2d 129 (1976); *Cole v. State*, 156 Ga. App. 288, 274 S.E.2d 685 (1980).

Unexplained recent possession of goods taken in an armed robbery and burglary has some corroborative value. *Brady v. State*, 169 Ga. App. 316, 312 S.E.2d 632 (1983).

Pregnancy of the unmarried prosecutor, unless it be shown that such pregnancy resulted from the act of the defendant, does not constitute corroboration of the testimony of the prosecutor. *Wilkins v. State*, 96 Ga. App. 841, 101 S.E.2d 912 (1958).

When testimony of defendant's wife-accomplice was corroborated by testimony of wife's sister who observed defendant beating the same victim on an earlier occasion, such evidence was sufficient to sustain defendant's conviction for cruelty to children. *Jackson v. State*, 178 Ga. App. 378, 343 S.E.2d 122 (1986).

Polygraph test results are sufficient corroboration of an accomplice's testimony. *Smith v. State*, 245 Ga. 205, 264 S.E.2d 15 (1980).

Defendant's prior inconsistent statements, which constituted substantive evidence, were sufficient to corroborate the accomplice's testimony. *Arnold v. State*, 243 Ga. App. 118, 532 S.E.2d 458 (2000).

Evidence from extraneous source. — First defendant and second defendant were incorrect in asserting that their convictions arising out of the robbery and murder of a drug dealer were supported by insufficient evidence as their convictions were not based solely on the uncorroborated testimony of accomplices; rather, those convictions also rested on extraneous source evidence identifying the defendants as participants in the crime, including the testimony and identification of the defendant's by a person present at the drug dealer's apartment when the crimes were committed as well as substantial forensic evidence linking the defendants to the crimes. *Howard v. State*, 279 Ga.

166, 611 S.E.2d 3 (2005).

Slight physical evidence sufficient to corroborate. — Evidence of a large bag of marijuana, digital scales, and plastic baggies in a bedroom belonging to defendant slightly corroborated defendant's brother's girlfriend's testimony that defendant possessed the marijuana and gave it to the girlfriend to sell, and a tax return and receipt belonging to defendant corroborated the girlfriend's contention that this room belonged to defendant. Slight corroboration was sufficient under O.C.G.A. § 24-4-8. *Williams v. State*, 299 Ga. App. 798, 683 S.E.2d 860 (2009).

Perjury

Perjury is never presumed. *Georgia Power Co. v. Owen*, 207 Ga. 178, 60 S.E.2d 436 (1950).

In general. — To convict of perjury, there must be two witnesses, or one witness and proof by corroborating circumstances. *McLaren v. State*, 4 Ga. App. 643, 62 S.E. 138 (1908); *Davis v. State*, 7 Ga. App. 680, 67 S.E. 839 (1910). See *Flemister v. State*, 81 Ga. 768, 7 S.E. 642 (1888); *Rodenberry v. State*, 37 Ga. App. 359, 140 S.E. 386 (1927); *Potts v. State*, 78 Ga. App. 799, 52 S.E.2d 575 (1949).

Evidence was insufficient to support a finding that the juvenile committed perjury and, thus, was not sufficient to support the juvenile's adjudication as a delinquent since the state's perjury case against the juvenile rested solely on the testimony of a codefendant, and was not supported by the required two witnesses, or one witness and corroborating circumstances. In the Interest of C.H., 262 Ga. App. 630, 585 S.E.2d 921 (2003).

Sufficiency of corroboration. — Nature and sufficiency of the corroboration necessary to prove the perjury must in each case be determined by the jury, but the equilibrium between the oath of the alleged perjurer and the oath of the contradicting witness should be destroyed by material and independent circumstances strongly corroborative of the positive testimony of the witness. *Bell v. State*, 5 Ga. App. 701, 63 S.E. 860 (1909).

Evidence was sufficient to support defendant's conviction for armed robbery since: (1) defendant affirmatively lied by denying that defendant knew one accomplice in defendant's initial statement to the police; (2)

Perjury (Cont'd)

defendant was driving the getaway car when it was stopped by the police; and (3) defendant was in possession of the handgun used in the armed robbery and the money stolen in the armed robbery. The sufficiency of the corroboration of the accomplice's testimony that defendant participated in the planning of the robbery as required under O.C.G.A. § 24-4-8 was a matter for the jury to determine. *Clemons v. State*, 265 Ga. App. 825, 595 S.E.2d 530 (2004).

Proof based on circumstantial evidence.

— This statute does not apply to a case where the proof of perjury is necessarily based upon circumstantial evidence. *Mallard v. State*, 19 Ga. App. 99, 90 S.E. 1044 (1916) (see O.C.G.A. § 24-4-8).

Charging part of statute when inapplicable. — Court did not err in giving in charge this statute as to the number of witnesses necessary to convict of perjury and certain other offenses, although a part of the statute was not applicable to the case where the inapplicable part was explained. *Pence v. State*, 36 Ga. App. 270, 136 S.E. 820 (1927) (see O.C.G.A. § 24-4-8).

Jury

When state does not rely solely upon evidence of accomplice to connect the accused with an offense, it is not incumbent upon the court, without request, to instruct the jury on corroboration. *Smith v. State*, 154 Ga. App. 741, 270 S.E.2d 5 (1980).

Charge unnecessary when two witnesses testify. — When two witnesses swear to the same state of facts, the fact that the witnesses are accomplices or are not accomplices, or that one is an accomplice and other not an accomplice, does not require a charge by the court, in the trial of a defendant alleged to be a party to a joint crime, that "where the only witness is an accomplice" the accomplice's testimony must be corroborated. *Wilson v. State*, 51 Ga. App. 570, 181 S.E. 134 (1935); *Farley v. State*, 210 Ga. App. 580, 436 S.E.2d 770 (1993); *Reeves v. State*, 244 Ga. App. 15, 534 S.E.2d 179 (2000).

Failure to charge connection with crime.

— In charging upon the subject of corroboration of an accomplice, the court having instructed that the extent of corroborative testimony was a question for the jury, it was

not error, in the absence of a proper request, to fail to charge further that the evidence in corroboration should connect the accused with the commission of the crime. *Jones v. State*, 200 Ga. 793, 38 S.E.2d 429 (1946); *Hill v. State*, 237 Ga. 794, 229 S.E.2d 737 (1976).

When charge on corroboration not required. — Trial court did not err in failing to charge the jury that an accomplice's testimony alone, without corroboration, was insufficient to support a conviction because trial counsel did not request this charge and because the state did not rely wholly on the accomplice's testimony. *Wooten v. State*, 240 Ga. App. 725, 524 S.E.2d 776 (1999).

Because the state relied on evidence other than the accomplice's testimony, the trial court was not required to submit the issue of the sufficiency of the corroborating evidence to the jury and was therefore not required to charge the jury on corroboration. *Jenkins v. Byrd*, 103 F. Supp. 2d 1350 (S.D. Ga. 2000).

Charge not harmful. — Charge in regard to the provision of this statute, relating to corroboration of testimony of an accomplice in a felony case was not harmful to the defendants. *Cole v. State*, 156 Ga. App. 288, 274 S.E.2d 685 (1980) (see O.C.G.A. § 24-4-8).

Jury instruction proper. — Trial court did not err in charging the jury as follows while deleting the bracketed word "generally": "The testimony of a witness is [generally] sufficient to establish a fact if the jury believes the witness." *Thomas v. State*, 249 Ga. App. 556, 548 S.E.2d 71 (2001).

Whether witness was an accomplice is a question for the jury. *Venable v. State*, 56 Ga. App. 366, 192 S.E. 646 (1937); *Aimar v. State*, 116 Ga. App. 204, 156 S.E.2d 367 (1967); *Maddox v. State*, 131 Ga. App. 86, 205 S.E.2d 31 (1974); *Payne v. State*, 135 Ga. App. 245, 217 S.E.2d 476 (1975); *Durham v. State*, 243 Ga. 408, 254 S.E.2d 359 (1979).

O.C.G.A. § 24-4-8 requires that accomplice testimony be corroborated in felony cases when the only witness is the accomplice, but only slight evidence from an extraneous source as to a defendant's identity and participation is needed to corroborate an accomplice's testimony, and, such evidence may be entirely circumstantial. *Smith v. State*, 257 Ga. App. 595, 571 S.E.2d 817 (2002).

Submitting question as to whether witness was accomplice. — It is not error to submit to the jury the question of whether a witness for the state was or was not an accomplice even if the witness had confessed to being an accomplice and had been jointly indicted with the defendant on trial. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981).

Jury determines whether participation voluntary. — When a witness testifies that the witness was forced to accompany the defendants out of fear of one or both of the defendant's, it is for the jury to determine whether the witness is an accomplice. *Milton v. State*, 248 Ga. 192, 282 S.E.2d 90 (1981); *Jones v. State*, 268 Ga. 12, 483 S.E.2d 871 (1997).

Instruction to jury on status as accomplice is expression of opinion of guilt. — To be accomplices of each other, both the defendant and the state's witness must have been involved in the criminal enterprise. One cannot be the "accomplice" of an innocent man. It therefore constitutes an expression of opinion by the court as to the guilt of the accused to instruct the jury that a witness who testified as to the defendant's guilt and admitted the witness's participation in the crime would be an accomplice of the accused. *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981).

Instruction on slight evidence. — Judge should not charge the jury as matter of law that slight evidence is sufficient to corroborate the testimony of an accomplice; but as a matter of fact slight evidence is sufficient, if it is satisfactory to the minds of the jury. *Smith v. State*, 189 Ga. 169, 5 S.E.2d 762 (1939).

Trial court's pattern charge that "slight evidence" connecting the defendant to the crime may have been sufficient to support the testimony of an accomplice stated the law accurately. *Richardson v. State*, 277 Ga. App. 429, 626 S.E.2d 518 (2006).

Sufficiency of corroboration of accomplice's testimony is a question for the jury. *Powers v. State*, 44 Ga. 209 (1871); *Ransone v. Christian*, 56 Ga. 351 (1876); *Bell v. State*, 73 Ga. 572 (1884); *Evans v. State*, 78 Ga. 351 (1886); *Sikes v. State*, 105 Ga. 592, 31 S.E. 567 (1898); *Parham v. State*, 3 Ga. App. 468, 60 S.E. 123 (1908); *Gilbert v. State*, 27 Ga. App. 604, 109 S.E. 697 (1921); *Sheppard v. State*, 44 Ga. App. 481, 162 S.E. 413 (1931);

Hargett v. State, 55 Ga. App. 192, 189 S.E. 675 (1937); *Garner v. State*, 72 Ga. App. 819, 35 S.E.2d 317 (1945); *Waldrop v. State*, 221 Ga. 319, 144 S.E.2d 372 (1965); *Sutton v. State*, 223 Ga. 313, 154 S.E.2d 578 (1967); *Lindsey v. State*, 227 Ga. 48, 178 S.E.2d 848 (1970); *Pitts v. State*, 128 Ga. App. 434, 197 S.E.2d 495 (1973); *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428 U.S. 910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976); *Jones v. State*, 139 Ga. App. 643, 229 S.E.2d 121 (1976); *Green v. State*, 139 Ga. App. 652, 229 S.E.2d 129 (1976); *Davis v. State*, 154 Ga. App. 803, 269 S.E.2d 874 (1980); *Smith v. State*, 154 Ga. App. 741, 270 S.E.2d 5 (1980); *Cody v. State*, 195 Ga. App. 318, 393 S.E.2d 692 (1990).

Jury must infer guilt. — Sufficiency of circumstances proved to corroborate the accomplice is entirely a matter for the jury, provided the circumstances proved, independently of the testimony of the accomplice, lead to the inference that the defendant is guilty, and in some way connect the defendant with the guilty act. *Potts v. State*, 86 Ga. App. 779, 72 S.E.2d 553 (1952); *Mears v. State*, 98 Ga. App. 576, 106 S.E.2d 854 (1958).

Slight evidence to support jury's determination. — Extent of corroboration is a question to be determined by the jury; it may be strong, or it may be slight, but in each case it must be of such character as to satisfy the minds of the jury as to the connection of the accused with the criminal enterprise. *Sheppard v. State*, 44 Ga. App. 481, 162 S.E. 413 (1931); *Walker v. State*, 57 Ga. App. 868, 197 S.E. 67 (1938); *Smith v. State*, 189 Ga. 169, 5 S.E.2d 762 (1939); *Newman v. State*, 63 Ga. App. 417, 11 S.E.2d 248 (1940); *Mitchell v. State*, 202 Ga. 247, 42 S.E.2d 767 (1947); *Blakely v. State*, 78 Ga. App. 282, 50 S.E.2d 762 (1948); *Croker v. State*, 101 Ga. App. 742, 115 S.E.2d 413 (1960); *Park v. State*, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968); *Quaid v. State*, 132 Ga. App. 478, 208 S.E.2d 336 (1974); *Townsend v. State*, 141 Ga. App. 743, 234 S.E.2d 368 (1977); *Smith v. State*, 238 Ga. 640, 235 S.E.2d 17 (1977); *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978);

Jury (Cont'd)

Haynes v. State, 149 Ga. App. 179, 253 S.E.2d 851 (1979); Butler v. State, 150 Ga. App. 751, 258 S.E.2d 691 (1979); Williams v. State, 153 Ga. App. 421, 265 S.E.2d 341 (1980); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685 (1980); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984).

Jury to decide sufficiency of corroborating evidence. — Sufficiency of corroborating evidence is peculiarly a matter for the jury to determine. If the verdict is founded on slight evidence of corroboration connecting a defendant with the crime, the verdict is legally sufficient. *Bradford v. State*, 262 Ga. 512, 421 S.E.2d 523 (1992); *Klinect v. State*,

269 Ga. 570, 501 S.E.2d 810 (1998); *Pinkins v. State*, 243 Ga. App. 737, 534 S.E.2d 192 (2000).

Failure to charge statute. — When a person accused of perjury is on trial, the judge should instruct the jury that, before the jury would be authorized to convict the accused, the charge must be established by the testimony of two witnesses or by one witness and corroborating circumstances. However, the failure so to charge could not be harmful to the cause of the defendant, since the defendant introduced no evidence, and two or more witnesses for the plaintiff testified positively to each of the material allegations in the indictment. *Oxford v. State*, 40 Ga. App. 511, 150 S.E. 466 (1929).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1407.

ALR. — Rule as to corroborative evidence in prosecutions for subornation of perjury, 56 ALR 407.

Character and sufficiency of evidence required to corroborate testimony of plaintiff in divorce suit, 65 ALR 169.

Testimony of defendant in favor of codefendant on setoff or counterclaim interposed by latter alone against decedent's estate, under statute disqualifying or requiring corroboration of adverse or interested party, 67 ALR 1548.

Bribe giver as accomplice of bribe taker and vice versa within rule requiring corroboration of testimony of accomplice, 73 ALR 389.

Corroboration of accomplice by evidence of defendant's actual or contemplated flight, or concealment of himself, 87 ALR 767.

Corroboration by circumstantial evidence of testimony of single witness in prosecution for perjury, 111 ALR 825.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury, 156 ALR 499.

Question as to who are accomplices, within rule requiring corroboration of their testimony, as one of law or fact, 19 ALR2d 1352.

Corroboration required under statute

prohibiting judgment against representative of deceased person on uncorroborated testimony of his adversary, 21 ALR2d 1013.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration or cautionary instruction, 53 ALR2d 817.

Necessity and sufficiency of corroboration of plaintiff's testimony concerning ground for annulment of marriage, 71 ALR2d 620.

Prosecutrix in incest case as accomplice or victim, 74 ALR2d 705.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 ALR2d 852.

Corroboration of accomplice witness by objective evidence authenticated by same accomplice, 96 ALR2d 1185.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 858.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 ALR3d 560.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 ALR4th 368.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Right of defendant in prosecution for

perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury — state cases, 41 ALR5th 1.

24-4-9. Inferences from evidence or lack thereof.

In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved. (Civil Code 1895, § 5157; Civil Code 1910, § 5743; Code 1933, § 38-123.)

History of Code section. — This Code section is derived from the decisions in *Beall v. State*, 68 Ga. 820 (1882); *Castleberry v. City of Atlanta*, 74 Ga. 164 (1885); *Brown v. Matthews*, 79 Ga. 1, 4 S.E. 13 (1887); and *White v. Hammond*, 79 Ga. 182, 4 S.E. 102 (1887).

Law reviews. — For article, "The Doctrine of *Res Ipsa Loquitur* in Georgia," see 9 Ga. B.J. 31 (1946).

For note, "*Res Ipsa Loquitur* and its Application in Georgia," see 14 Mercer L. Rev. 427 (1963).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RES IPSA LOQUITUR

General Consideration

Constitutionality. — Presumption that allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant is not inherently unconstitutional, but is to be tested by a "rational connection" test asking if the ultimate fact to be presumed is more likely than not to flow from the proved fact. *Whisenhunt v. State*, 152 Ga. App. 829, 264 S.E.2d 271 (1979), cert. denied, 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed. 2d 112 (1980).

Admissibility. — When facts are such that the jury may or may not make an inference pertinent to the issue, the facts are such that the jury ought to be permitted to hear the facts. *Brand v. State*, 154 Ga. App. 781, 270 S.E.2d 206 (1980).

When facts are such that the jury, if permitted to hear the facts, may or may not make an inference pertinent to the issue, according to the view which the jury may take of the facts, in connection with the other facts in evidence, the facts are such that the jury ought to be permitted to hear

those facts. *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Inference of guilt. — When there is some evidence from which the guilt of one accused of a crime can be legitimately inferred, it is entirely within the province of the jury to draw that inference. *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Effect of positive and uncontradicted evidence. — Finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists. *Backus v. Ray Jones, Inc.*, 150 Ga. App. 753, 258 S.E.2d 693 (1979).

Directed verdict properly denied. — In a medical malpractice action, the issue of reliance by a patient on a hospital to provide needed services and personnel was subject to proof by circumstantial evidence; thus, denial of a directed verdict in favor of the hospital was not error. *Doctors Hosp. v. Bonner*, 195 Ga. App. 152, 392 S.E.2d 897 (1990).

Flight is always a circumstance which may be shown and which the jury is authorized to

General Consideration (Cont'd)

take into account in determining guilt or innocence of an accused. *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Jury was authorized to believe that defendant's attempts to flee when confronted by firefighters constituted circumstantial evidence of guilt. *Williams v. State*, 273 Ga. App. 213, 614 S.E.2d 834 (2005).

Evidence of a refusal to submit to a blood-alcohol test is circumstantial evidence.

— There was ample evidence to support the defendant's DUI conviction, after the arresting officer testified that the officer smelled alcohol as the officer approached the defendant's van, that the defendant's eyes were red, glassy, and "hazed over," that the defendant's speech was slower than normal, and that the defendant performed poorly on sobriety field tests, and the defendant's failure to submit to breath tests was circumstantial evidence of defendant's intoxication. *Lucas v. State*, 234 Ga. App. 534, 507 S.E.2d 253 (1998).

Doctrine of presumption of continuity. — Whether the doctrine of presumption of continuity — a state of things once existing is presumed to continue until a change occurs — holds true in a particular case is a question for jury determination. *Mattison v. Travelers Indem. Co.*, 157 Ga. App. 372, 277 S.E.2d 746 (1981).

Permissive inference almost identical to presumption of fact. — No reversible error occurred when a trial court charged the jury in language of permissive inference rather than presumption of fact. A thin line exists at best between a permissible inference of fact and a rebuttable presumption of fact. *Pouncey v. Adams*, 206 Ga. App. 126, 424 S.E.2d 376 (1992).

Summary judgment determines only whether material fact exists. — On summary judgment, a trial court determines only whether a material issue of fact exists, and such determination does not include "the discovery of the truth of such fact" or permit frustration of a plaintiff's constitutional right to a trial by jury "by inferring with the existence of other facts" from predicate evidence. *Bruno's Food Stores, Inc. v. Taylor*, 228 Ga. App. 439, 491 S.E.2d 881 (1997).

Cited in *Smith v. City of Rome*, 16 Ga. App. 96, 84 S.E. 734 (1915); *Yellow Cab Co.*

v. Nelson, 35 Ga. App. 694, 134 S.E. 822 (1926); *Beaver v. Magid*, 56 Ga. App. 272, 192 S.E. 497 (1937); *Hayes v. Grantham*, 58 Ga. App. 859, 200 S.E. 517 (1938); *H.J. Heinz Co. v. Fortson*, 62 Ga. App. 130, 8 S.E.2d 443 (1940); *Bryant v. Bryant*, 192 Ga. 114, 14 S.E.2d 725 (1941); *Cole v. Pepsi-Cola Bottling Co.*, 65 Ga. App. 204, 15 S.E.2d 543 (1941); *Barbre v. Scott*, 75 Ga. App. 542, 43 S.E.2d 760 (1947); *Whited v. Atlantic Coca-Cola Bottling Co.*, 88 Ga. App. 241, 76 S.E.2d 408 (1953); *Lovejoy v. Tidwell*, 212 Ga. 750, 95 S.E.2d 784 (1956); *Overstreet v. Rhodes*, 213 Ga. 181, 97 S.E.2d 561 (1957); *Reeves v. Madray*, 101 Ga. App. 300, 113 S.E.2d 651 (1960); *Jordan v. Fowler*, 104 Ga. App. 824, 123 S.E.2d 334 (1961); *Clements v. State*, 106 Ga. App. 729, 128 S.E.2d 376 (1962); *Edwards v. Employers Mut. Liab. Ins. Co.*, 219 Ga. 121, 132 S.E.2d 39 (1963); *Massey v. National Homeowners Sales Serv. Corp.*, 225 Ga. 93, 165 S.E.2d 854 (1969); *Johnson v. City of Port Wentworth*, 119 Ga. App. 357, 166 S.E.2d 830 (1969); *Ginn v. Morgan*, 225 Ga. 192, 167 S.E.2d 393 (1969); *Orkin Exterminating Co. v. Stevens*, 130 Ga. App. 363, 203 S.E.2d 587 (1973); *Peachstone Dev., Ltd. v. Austin*, 133 Ga. App. 684, 212 S.E.2d 18 (1975); *General Accident, Fire & Life Ins. Co. v. Sturgis*, 136 Ga. App. 260, 221 S.E.2d 51 (1975); *Hospital Auth. v. Smith*, 142 Ga. App. 284, 235 S.E.2d 562 (1977); *Guye v. Home Indem. Co.*, 241 Ga. 213, 244 S.E.2d 864 (1978); *Broadnax v. City of Atlanta*, 149 Ga. App. 611, 255 S.E.2d 86 (1979); *Windjammer Assocs. v. Hodge*, 246 Ga. 85, 269 S.E.2d 1 (1980); *Brown v. State*, 177 Ga. App. 284, 339 S.E.2d 332 (1985); *Patterson v. State*, 181 Ga. App. 68, 351 S.E.2d 503 (1986); *Heath v. State*, 186 Ga. App. 655, 368 S.E.2d 346 (1988); *Freeman v. Bentley*, 205 Ga. App. 409, 422 S.E.2d 435 (1992); *Lucas v. State*, 234 Ga. App. 534, 507 S.E.2d 253 (1998); *Elrod v. State*, 238 Ga. App. 80, 517 S.E.2d 805 (1999).

Res Ipsa Loquitur

Doctrine of res ipsa loquitur is embraced in this statute and the doctrine's application authorized by statute. *Macon Coca-Cola Bottling Co. v. Chancey*, 216 Ga. 61, 114 S.E.2d 517 (1960); *Hospital Auth. v. Eason*, 222 Ga. 536, 150 S.E.2d 812 (1966) (see O.C.G.A. § 24-4-9).

Elements of doctrine. — In a tort action for personal injuries, the doctrine of *res ipsa loquitur* applies when the following elements are present: (1) the injury must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) the injury must not have been due to any voluntary action or contribution on the part of the plaintiff; and (4) the injury must have occurred absent an intervening cause which could have produced the injury. *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734 (5th Cir. 1980).

Application of doctrine. — When an event is unusual and extraordinary in nature, and there is nothing to indicate an external cause, but the peculiar character of the accident is sufficient within itself to indicate that the event must have been brought about by negligence on the part of someone, and when the most reasonable and probable inference which can be rationally drawn from the happening of such an event is that it would not and could not have taken place, had not the person charged with furnishing or maintaining the instrumentality causing the accident been guilty of the particular acts or omissions set forth by the plaintiff as constituting the actual cause, then the jury is authorized to apply the rule of evidence known as the doctrine of *res ipsa loquitur* in determining whether or not the accident must have been thus occasioned. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S.E. 443 (1903); *Sinkovitz v. Peters Land Co.*, 5 Ga. App. 788, 64 S.E. 93 (1909); *Bonita Theatre v. Bridges*, 31 Ga. App. 798, 122 S.E. 255 (1924); *Atlanta Coca-Cola Bottling Co. v. Shipp*, 41 Ga. App. 705, 154 S.E. 385 (1930); *Macon Coca-Cola Bottling Co. v. Crane*, 55 Ga. App. 573, 190 S.E. 879 (1937); *Macon Coca-Cola Bottling Co. v. Chancey*, 216 Ga. 61, 114 S.E.2d 517 (1960); *Hall v. Chastain*, 246 Ga. 782, 273 S.E.2d 12 (1980).

Trial court committed reversible error, entitling the plaintiffs in a personal injury suit to a new trial after a verdict in favor of the defense was returned, by refusing to charge the jury on the doctrine of *res ipsa loquitur*; here, the plaintiffs established the three elements necessary for the doctrine to apply, namely: that a 15-ton machine rolling off a trailer without explanation and crush-

ing a car was an extraordinary event; that the defendant driver admitted that trailers do not ordinarily roll over and that the defendant driver was in exclusive control of the truck and trailer; and that the defendant driver testified twice that the plaintiffs did nothing to cause the accident. *Doyle v. RST Constr. Specialty, Inc.*, 286 Ga. App. 53, 648 S.E.2d 664 (2007), cert. denied, 2007 Ga. LEXIS 860 (Ga. 2007).

Doctrine applied with caution. — Doctrine of *res ipsa loquitur*, when applicable, should be applied with caution, and should be drawn by the jury only in extreme cases. *Sinkovitz v. Peters Land Co.*, 5 Ga. App. 788, 64 S.E. 93 (1909); *Miller v. Gerber Prods. Co.*, 207 Ga. 385, 62 S.E.2d 174 (1950).

Rule of evidence. — Doctrine of *res ipsa loquitur* is simply a rule of circumstantial evidence which permits an inference to be drawn from proved facts. *Cochrell v. Langley Mfg. Co.*, 5 Ga. App. 317, 63 S.E. 244 (1908); *Armour & Co. v. Gulley*, 61 Ga. App. 414, 6 S.E.2d 165 (1939); *White v. Executive Comm. of Baptist Convention*, 65 Ga. App. 840, 16 S.E.2d 605 (1941); *Clayton Coca-Cola Bottling Co. v. Coleman*, 68 Ga. App. 302, 22 S.E.2d 768 (1942); *Dalton Coca-Cola Bottling Co. v. Watkins*, 70 Ga. App. 790, 29 S.E.2d 281 (1944); *Miller v. Gerber Prods. Co.*, 207 Ga. 385, 62 S.E.2d 174 (1950).

Presumption of negligence not raised. — Application of the rule of *res ipsa loquitur* does not raise a presumption of negligence, unless it is to the extent of getting a case to a jury only, but authorizes a jury in the jury's discretion to infer negligence. *Wimpy v. Rogers*, 58 Ga. App. 67, 197 S.E. 656 (1938).

Mere inference. — *Res ipsa loquitur* creates a mere inference of fact and not a presumption of truth. *DeVane v. Smith*, 154 Ga. App. 442, 268 S.E.2d 711 (1980).

Inference is slight. — Maxim *res ipsa loquitur* is applied with caution in every case and when applied, the inference is only *prima facie*, is generally slight, and is easily overcome. *White v. Executive Comm. of Baptist Convention*, 65 Ga. App. 840, 16 S.E.2d 605 (1941).

Exclusion of other hypotheses. — In the application of the *res ipsa loquitur* doctrine, if in the opinion of the jury the most reasonable and most probable inference which can be drawn from the nature and character of

Res Ipsa Loquitur (Cont'd)

an extraordinary event is that it would not and could not have happened had not the defendant been guilty of the particular conduct charged, then there has been an exclusion in their minds of every other reasonable hypothesis, not by evidence, but by virtue of the peculiar nature and character of the event speaking for itself. *Macon Coca-Cola Bottling Co. v. Chancey*, 216 Ga. 561, 114 S.E.2d 517 (1960).

Negligence of defendant. — Before the doctrine can be applied, the act must speak not only of negligence but of negligence on the part of the defendant. *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S.E. 1087 (1912).

Probability of defendant's negligence. — In order to invoke a theory of *res ipsa loquitur*, the plaintiff must prove "control" by evidence sufficient to permit a finding that there is a greater probability that the injury was the result of defendant's negligence than some other cause. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976).

No evidence of external cause. — Doctrine of *res ipsa loquitur* is applicable only in the absence of evidence as to an external cause of injury. *Stanfield v. Gardner*, 56 Ga. App. 634, 193 S.E. 375 (1937); *Floyd v. Swift & Co.*, 59 Ga. App. 154, 200 S.E. 531 (1938).

Conclusions must be clear. — When "the thing itself speaks" or "the obvious is self-evident," the obvious must be clearly seen, and what is spoken must be plain. If two images appear, or the statement spoken is ambiguous, before a legal verdict can be predicated thereon, the conclusions claimed must more clearly appear or be understood than any other or inconsistent theory. *Armour & Co. v. Gulley*, 61 Ga. App. 414, 6 S.E.2d 165 (1939); *White v. Executive Comm. of Baptist Convention*, 65 Ga. App. 840, 16 S.E.2d 605 (1941); *Miller v. Gerber Prods. Co.*, 207 Ga. 385, 62 S.E.2d 174 (1950).

Inference of fact. — When something unusual happens with respect to a defendant's property, over which defendant has control, and by such extraordinary occurrence a plaintiff is injured, an inference may in some case arise from an unexplained occurrence which has worked an injury to

another that the defendant who had in charge the instrumentality which was the direct cause of the injury was guilty of negligence, which inference of negligence may or may not be drawn by the jury but, like the facts of negligence or no negligence, the inference which the jury may be authorized to draw is peculiarly an inference of fact, and it is not an inference of law. And, if from the facts an inference of negligence arises, it may be rebutted by the defendant, like any other inference arising from the proof submitted. *Georgia Power Co. v. Stonecypher*, 47 Ga. App. 386, 170 S.E. 530 (1933).

Inference authorized but not required. — While negligence is never presumed from the mere fact of injury, the manner of the occurrence of the injury complained of, or the attendant circumstances, may sometimes well warrant an inference of negligence, such inference being one which the jury is authorized to draw, and not an inference which the jury is compelled to draw. *Gainesville Coca-Cola Bottling Co. v. Stewart*, 51 Ga. App. 102, 179 S.E. 734 (1935); *Macon Coca-Cola Bottling Co. v. Chancey*, 216 Ga. 61, 114 S.E.2d 517 (1960).

Inference based on proven facts. — Before the jury could arrive at the ultimate fact by inference of the existence of other facts, the facts inferred must be reasonably and logically consequent upon proven facts; the jury cannot assume the ultimate fact merely from other facts which are based upon an inference rather than upon proof. *Miller v. Gerber Prods. Co.*, 207 Ga. 385, 62 S.E.2d 174 (1950); *Hospital Auth. v. Eason*, 222 Ga. 536, 150 S.E.2d 812 (1966).

Inference based on circumstantial evidence. — When the inference of negligence is dependent upon circumstantial evidence, and direct unambiguous testimony shows that the defendant was without negligence, a verdict for the plaintiff is unauthorized. *Miller v. Gerber Prods. Co.*, 207 Ga. 385, 62 S.E.2d 174 (1950).

Inference based on inference. — Proof of plaintiff's case resting upon inferences made from inferences is insufficient when the inference is too remote. *Spruell v. Georgia Automatic Gas Appliance Co.*, 84 Ga. App. 657, 67 S.E.2d 178 (1951).

Intervening cause. — When there is some intervention or intermediary cause which produces or could produce the injury com-

plained of, the doctrine of *res ipsa loquitur* is not applicable. *Floyd v. Swift & Co.*, 59 Ga. App. 154, 200 S.E. 531 (1938); *Miller v. Gerber Prods. Co.*, 207 Ga. 385, 62 S.E.2d 174 (1950); *Rupek v. Pig'n Whistle, Inc.*, 94 Ga. App. 404, 94 S.E.2d 747 (1956).

Fact of injury. — Mere fact of injury does not call for the application of the doctrine of *res ipsa loquitur*. *Stansfield v. Gardner*, 56 Ga. App. 634, 193 S.E. 375 (1937).

Question for jury. — Maxim *res ipsa loquitur* is of limited application, and the process by which it is to be determined whether the physical facts and circumstances accompanying an injury are such that the act may be said itself to speak the negligence of the defendant is to be worked out by the jury, and not by the court. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S.E. 443 (1903); *Sinkovitz v. Peters Land Co.*, 5 Ga. App. 788, 64 S.E. 93 (1909); *Bonita Theatre v. Bridges*, 31 Ga. App. 798, 122 S.E. 255 (1924); *Dawson v. American Heritage Life Ins. Co.*, 121 Ga. App. 266, 173 S.E.2d 424 (1970).

Conclusions beyond evidence. — In construing and applying testimony, reasonable inferences and deductions may be made, and conclusions may be reached that lie quite beyond the mere letter of the evidence. *Armour & Co. v. Guley*, 61 Ga. App. 414, 6 S.E.2d 165 (1939).

Shifting of burden. — If the extraordinary character of the occurrence is sufficient to raise an inference of the negligence alleged, a *prima facie* case is established, and the burden of disproving negligence is cast upon the defendant, to disprove negligence upon the defendant's part. *Sinkovitz v. Peters Land Co.*, 5 Ga. App. 788, 64 S.E. 93 (1909); *Macon Coca-Cola Bottling Co. v. Crane*, 55 Ga. App. 573, 190 S.E. 879 (1937).

Burden of proof not shifted. — Doctrine of *res ipsa loquitur* is merely a rule of evidence permitting the jury to draw the inference of negligence and does not have the effect of shifting the burden of proof. *DeVane v. Smith*, 154 Ga. App. 442, 268 S.E.2d 711 (1980).

Rebuttal by defendant. — An inference of negligence may be rebutted by the defendant like any other presumption arising from proofs submitted. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S.E. 443 (1903).

Motion for nonsuit should not be granted when there is any evidence tending to sustain the plaintiff's action, or when the jury can fairly infer from the evidence a state of facts favorable to the plaintiff. *Mason v. Hall*, 72 Ga. App. 867, 35 S.E.2d 478 (1945).

Specific applications. — Doctrine of *res ipsa loquitur* has been applied in the following cases: *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S.E. 443 (1903) (unexplained falling of brick arch); *Rivers v. State*, 118 Ga. 42, 44 S.E. 859 (1903) (purpose for leasing house); *McDonnell v. Central of Ga. Ry.*, 118 Ga. 86, 44 S.E. 840 (1903) (explosion of boilers); *Seaboard Air-Line Ry. v. Bishop*, 132 Ga. 71, 63 S.E. 1103 (1909) (projecting nail); *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S.E. 1087 (1912) (explosion of bottle); *McPherson v. Capuano & Co.*, 31 Ga. App. 82, 121 S.E. 580 (1923) (illness following eating in restaurant); *Eckerd-Walton, Inc. v. Adams*, 126 Ga. App. 210, 190 S.E.2d 490 (1972) (driving car through wall of building); *Parrish v. State*, 182 Ga. App. 247, 355 S.E.2d 682 (1987) (destruction of marijuana plants).

Proof insufficient. — Mere proof that a hospital bed was on fire, from undetermined origin, was not sufficient to invoke *res ipsa loquitur*. *Hospital Auth. v. Eason*, 222 Ga. 536, 150 S.E.2d 812 (1966).

RESEARCH REFERENCES

ALR. — Liability for injuries by breaking or bursting of container in which goods are sold, 4 ALR 1094.

Applicability of *res ipsa loquitur* to fall of person, 5 ALR 282.

Presumption of negligence from throwing passenger from seat, 5 ALR 1034.

Res ipsa loquitur as applied to automobile accidents, 5 ALR 1240; 12 ALR 668; 64 ALR 255; 93 ALR 1101; 79 ALR2d 6.

Application of *res ipsa loquitur* doctrine to injury to passenger from defective or dangerous condition of floor of car, 7 ALR 1675.

Applicability of "*res ipsa loquitur*" to explosion of gases or chemicals, 8 ALR 500; 39 ALR 1006; 59 ALR 593.

Res ipsa loquitur as affected by circumstances tending to negative negligence by defendant, 22 ALR 1471.

Applicability of *res ipsa loquitur* in case of boiler explosion, 23 ALR 484.

Res ipsa loquitur as applicable to injury to passenger in a collision where one of the vehicles is not within carrier's control, 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Res ipsa loquitur distinguished from characterization of a known condition as negligence, and the establishment of negligence by circumstantial evidence, 59 ALR 468; 78 ALR 731; 141 ALR 1016.

Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 ALR 486; 92 ALR 653.

Res ipsa loquitur as applicable in action against municipality for injuries from dangerous condition in parks, streets, or highways, 74 ALR 1226.

Pleading particular cause of injury as waiver of right to rely on *res ipsa loquitur*, 79 ALR 48; 160 ALR 1450; 2 ALR3d 1335.

Debtor's intent to defraud or delay creditors within contemplation of attachment statute as inferable as matter of law from fact that he has removed or is about to remove property from the state without making adequate provision for his creditors, 92 ALR 966.

Right or duty of court to instruct jury as to presumptions, 103 ALR 126.

Presumption of ownership of automobile by one in whose name it is registered or whose license plates it bears, 103 ALR 138.

Presumption against suicide as evidence, 103 ALR 185; 158 ALR 747.

Presumption of negligence from foreign substance in food, 105 ALR 1039.

Res ipsa loquitur, or presumption, or inference of negligence on part of carrier where passenger is injured by object coming from outside, through or against, car window, 129 ALR 1340.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 140 ALR 191; 142 ALR 1490.

Presumption that public officers have properly performed their duty, as evidence, 141 ALR 1037.

Res ipsa loquitur as applicable in action against landlord for injury to person or property due to condition of premises, 145 ALR 870.

Res ipsa loquitur as applicable to injury to

person in street by fall of object in course of construction or repair of building, 146 ALR 523.

Res ipsa loquitur as applied to a collision between a moving automobile and a standing automobile or other vehicle, 151 ALR 876.

May presumption rest upon admission by opponent's pleading without proof of constituent fact, 153 ALR 1106.

Physicians and surgeons: presumption or inference of negligence in malpractice cases; *res ipsa loquitur*, 162 ALR 1265; 82 ALR2d 1262.

"*Res ipsa loquitur*" as a presumption or a mere permissible inference, 167 ALR 658.

Res ipsa loquitur doctrine as affected by injured person's control over or connection with instrumentality, 169 ALR 953.

Presumption of negligence from foreign substance in food, 171 ALR 1209.

Right of plaintiff in *res ipsa loquitur* case to an instruction respecting inference by jury, 173 ALR 880.

Application of *res ipsa loquitur* rule in case of injury or damages from heating unit, electrical appliance, etc., installed by defendant, 3 ALR2d 1448.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 ALR2d 196.

Res ipsa loquitur in aviation accidents, 6 ALR2d 528.

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 ALR2d 677.

Applicability of *res ipsa loquitur* to injuries or death sustained by collapse, failure, or falling of scaffold, 22 ALR2d 1176.

Applicability of *res ipsa loquitur* doctrine to fall of object or substance from ceiling of place of public resort, 24 ALR2d 643.

Error as to instructions on burden of proof under doctrine of *res ipsa loquitur* as prejudicial, 29 ALR2d 1390.

Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 ALR2d 988.

Evidence of specific negligence as affecting reliance on *res ipsa loquitur*, 33 ALR2d 791.

Liability for injuries occasioned by falling of awning or the like, 34 ALR2d 486.

Res ipsa loquitur in Federal Employers' Liability Act cases, 35 ALR2d 475.

Applicability of *res ipsa loquitur* or doctrine of exclusive control to injury or damage caused by fall of object from train, 41 ALR2d 932.

Res ipsa loquitur doctrine with respect to firearms accident, 46 ALR2d 1216.

Presumption or *prima facie* case of negligence based on presence of foreign substance in bottled or canned beverage, 52 ALR2d 117.

Applicability of *res ipsa loquitur* doctrine in nonautomatic elevator accident cases, 56 ALR2d 1059.

Liability of proprietor of store, office, or similar business premises for injury from fall on floor made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall or steps made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 131.

Liability of proprietor of store, office, or similar business premises for injury from fall down open stairway, or into trap door or similar floor-level opening, 66 ALR2d 331.

Liability of proprietor of store, office, or similar business premises for fall due to improper lighting of steps or stairway, 66 ALR2d 443.

Liability to patron of scenic railway, roller coaster, or miniature railway, 66 ALR2d 689.

Applicability of *res ipsa loquitur* doctrine where objects being transported fall from motor vehicle, 66 ALR2d 1255.

Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 ALR2d 1072.

Applicability of *res ipsa loquitur* where injury or damage results from contact with open door or tailgate of motor vehicle, 71 ALR2d 375.

Sufficiency of evidence, in absence of survivors or of eyewitnesses competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 ALR2d 580.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR2d 460.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 ALR2d 594.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR2d 696.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 ALR2d 738.

Applicability of *res ipsa loquitur* doctrine where motor vehicle leaves road, 79 ALR2d 6.

Applicability of *res ipsa loquitur* doctrine where motor vehicle stops on highway, 79 ALR2d 153.

Applicability of *res ipsa loquitur* doctrine where motor vehicle turns over on highway, 79 ALR2d 211.

Physicians and surgeons: *res ipsa loquitur*, or presumption or inference of negligence, in malpractice cases, 82 ALR2d 1262.

Liability of physician for injury to esophagus or other internal organs occurring in course of gastroscopic examination, 88 ALR2d 297.

Liability of owner or operator of theater or other place of amusement to patron injured by condition of or defect in lavatory, restroom, or toilet facilities, 88 ALR2d 1090.

Res ipsa loquitur as ground for direction of verdict in favor of plaintiff, 97 ALR2d 522.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 ALR3d 642.

Modern trends as to pleading a particular cause of injury or act of negligence as waiving or barring the right to rely on *res ipsa loquitur*, 2 ALR3d 1335.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Relation back of presumption of continuance of condition of property, 7 ALR3d 1302.

Res ipsa loquitur in actions against owner or occupant of premises for personal injury, death, or property damage caused by fire, 8 ALR3d 974.

Hospital's liability for negligence in connection with preparation, storage, or dispensing of drug or medicine, 9 ALR3d 579.

Res ipsa loquitur in action against hospital for injury to patient, 9 ALR3d 1315; 49 ALR4th 63.

Liability for accident occurring in motor transportation of house or similar structure on public streets or highways, 9 ALR3d 1436.

Liability of water distributor for damage caused by water escaping from main, 20 ALR3d 1294.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 ALR3d 1363.

Applicability of *res ipsa loquitur* where plaintiff must prove active or gross negligence, willful misconduct, recklessness, or the like, 23 ALR3d 1083.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 ALR3d 1450.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

Aviation: helicopter accidents, 35 ALR3d 707.

Malpractice: attending physician's liability for injury caused by equipment furnished by hospital, 35 ALR3d 1068.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Liability for injury to guest in airplane, 40 ALR3d 1117.

Liability of owner or proprietor for injury or death caused by collision with glass door, panel, or wall, 41 ALR3d 176.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage, 41 ALR3d 782.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 ALR3d 1320.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 48 ALR3d 1027.

Products liability: proof of defect under doctrine of strict liability in tort, 51 ALR3d 8.

Products liability: necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury, 51 ALR3d 1344.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Presumption of negligence and application of *res ipsa loquitur* doctrine in action for injury or damage caused by accidental starting up of parked car, 55 ALR3d 1260.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Liability of innkeeper to guest for injury due to fire, 60 ALR3d 1217.

Liability of owner or operator for injury caused by door of automatic passenger elevator, 63 ALR3d 893.

Liability for injury caused by fall of person into shaft, or by abrupt drop, sudden movement, or stopping between floors, of automatic passenger elevator, 64 ALR3d 950.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 ALR3d 1005.

Liability of owner or operator for injury caused by failure of automatic elevator to level at floor, 64 ALR3d 1020.

Res ipsa loquitur as applied to accident resulting from wheel or part thereof becoming detached from motor vehicle, 79 ALR3d 346.

Products liability: liability for injury or death allegedly caused by defective tires, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

Liability of power company for injury or death resulting from contact of radio or television antenna with electrical line, 82 ALR3d 113.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water, 91 ALR3d 186.

Application of *res ipsa loquitur* doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Applicability of *res ipsa loquitur* doctrine in action for injury to patron of beauty salon, 93 ALR3d 897.

Products liability: toys and games, 95 ALR3d 390.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Liability for injury on, or in connection with, escalator, 1 ALR4th 144.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 ALR4th 411.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: farm machinery, 4 ALR4th 13.

Products liability: elevators, 7 ALR4th 852.

Products liability: stud guns, staple guns, or parts thereof, 8 ALR4th 70.

Products liability: transformer and other electrical equipment, 10 ALR4th 854.

Products liability: cranes and other lifting apparatuses, 13 ALR4th 476.

Products liability: cement and concrete, 15 ALR4th 1186.

Products liability: tire rims and wheels, 16 ALR4th 137.

Products liability: firefighting equipment, 19 ALR4th 326.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 ALR4th 509.

Res ipsa loquitur as to cause of or liability for real-property fires, 21 ALR4th 929.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

Products liability: stud guns, staple guns, or parts thereof, 33 ALR4th 1189.

Applicability of res ipsa loquitur in case of multiple, nonmedical defendants — modern status, 59 ALR4th 201.

Products liability: building and construction lumber, 61 ALR4th 121.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 ALR4th 346.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Applicability of res ipsa loquitur in case of multiple medical defendants — modern status, 67 ALR4th 544.

Products liability: industrial refrigerator equipment, 72 ALR4th 90.

Products liability: scaffolds and scaffolding equipment, 74 ALR4th 904.

Products liability: tractors, 75 ALR4th 312.

Products liability: bicycles and accessories, 76 ALR4th 117.

Products liability: exercise and related equipment, 76 ALR4th 145.

Products liability: trampolines and similar devices, 76 ALR4th 171.

Products liability: competitive sports equipment, 76 ALR4th 201.

Products liability: skiing equipment, 76 ALR4th 256.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial — modern criminal cases, 76 ALR4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor — modern cases, 77 ALR4th 463.

Products liability: general recreational equipment, 77 ALR4th 1121.

Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney — modern cases, 78 ALR4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident — modern cases, 78 ALR4th 616.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 ALR4th 127.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 ALR4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend — modern cases, 79 ALR4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse — modern cases, 80 ALR4th 337.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party — modern cases, 80 ALR4th 405.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution — modern cases, 80 ALR4th 547.

Products liability: lubricating products and systems, 80 ALR4th 972.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 ALR4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 ALR4th 939.

Admissibility of DNA identification evidence, 84 ALR4th 313.

Products liability: Mechanical amusement rides and devices, 3 ALR5th 851.

Malpractice in diagnosis and treatment of male urinary tract and related organs, 48 ALR5th 575.

Products liability: ladders, 81 ALR5th 245.

ARTICLE 2

PRESUMPTIONS AND ESTOPPEL

RESEARCH REFERENCES

ALR. — Presumption of payment from lapse of time, 1 ALR 779.

Presumption of innocence as evidence, 34 ALR 938; 94 ALR 1042; 152 ALR 626.

"Res ipsa loquitur" as a presumption or a mere permissible inference, 53 ALR 1494; 167 ALR 658.

Effect of words "value received" or similar words in written instrument, other than negotiable instrument or sealed instrument, to create presumption or make prima facie case of consideration, 116 ALR 545.

24-4-20. Presumptions of law and of fact distinguished.

Presumptions are either of law or of fact. Presumptions of law are conclusions and inferences which the law draws from given facts. Presumptions of fact are exclusively questions for the jury, to be decided by the ordinary test of human experience. (Orig. Code 1863, § 3675; Code 1868, § 3699; Code 1873, § 3752; Code 1882, § 3752; Civil Code 1895, § 5149; Penal Code 1895, § 988; Civil Code 1910, § 5735; Penal Code 1910, § 1014; Code 1933, § 38-113.)

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's evidence laws, see 31 Mercer L. Rev. 107 (1979).

For comment discussing the right to

present evidence for the purposes of rebutting presumption, in light of *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION SPECIFIC PRESUMPTIONS

General Consideration

Constitutionality. — Presumption that allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant is not inherently unconstitutional, but is to be

tested by a "rational connection" test asking if the ultimate fact to be presumed is more likely than not to flow from the proved fact. *Whisenhunt v. State*, 152 Ga. App. 829, 264 S.E.2d 271 (1979), cert. denied, 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed. 2d 112 (1980).

For a statutory presumption to pass constitutional muster, it must be shown with

“substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” *Benham v. Edwards*, 501 F. Supp. 1050 (N.D. Ga. 1980), *aff’d* in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)).

Discussion of relationship of presumptions to due process. — See *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

Presumption is an inference as to the existence of a fact not actually known arising from its necessary or usual connection with others which are known. *Ivey v. State*, 23 Ga. 576 (1857).

Presumptions of fact are different from presumptions of law. *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), *aff’d* in part and *rev’d* in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971).

Presumptions of law and fact distinguished. — Presumptions of fact are founded on actual probability, but it is impossible to sustain the doctrine of presumptions of law on the theory that they rest on a probability of fact. *Morris v. State*, 47 Ga. App. 792, 171 S.E. 555 (1933).

Presumption of fact is same as inference. *Carpenter v. State*, 140 Ga. App. 368, 231 S.E.2d 97 (1976).

Permissive inference almost identical to presumption of fact. — No reversible error occurred when a trial court charged the jury in language of permissive inference rather than presumption of fact. A thin line exists at best between a permissible inference of fact and a rebuttable presumption of fact. *Pouncey v. Adams*, 206 Ga. App. 126, 424 S.E.2d 376 (1992).

Inference drawn by common sense. — Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact, inferences which common sense draws from circumstances usually occurring in such cases. *Morris v. State*, 47 Ga. App. 792, 171 S.E. 555 (1933).

Derivation of presumptions of law. — Presumptions of law are inferences or positions established for the most part, by the

common law, but occasionally by statute, which are obligatory alike on judges and juries. *Morris v. State*, 47 Ga. App. 792, 171 S.E. 555 (1933).

Function of presumption of law. — Presumptions of law are rules which, in certain cases, either forbid or dispense with any further inquiry. *Morris v. State*, 47 Ga. App. 792, 171 S.E. 555 (1933).

If presumption is mandatory, it is irrelevant whether other evidence is in the record in addition to basic facts from which presumption is drawn. *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

When ultimate fact is element of crime charged, it may not rest on mandatory presumption. This is true in a case where presumption is the only proof of ultimate fact, and it is true in a case where there is additional proof of ultimate fact apart from presumption. *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

Reliance on permissive presumption in criminal case. — If the prosecution relies on permissive presumption as evidence of defendant’s guilt, but offers other evidence of defendant’s guilt, it may rely on all of evidence in the record to meet the standard of proof beyond a reasonable doubt. There need be only substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

When permissive presumption is sole and sufficient basis for finding of guilt, it is not enough that presumption meets “more-likely-than-not” test. The presumed fact must follow from proved fact beyond a reasonable doubt in such cases. *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

Court or jury drawing inference. — When there is a legal presumption, the law does the reasoning, and draws the inference; when presumptions of fact are involved, the jury is left to do the reasoning, and to make an inference or not as the jury believe the premises warrant. *Mitchell v. Mayor of Rome*, 49 Ga. 19, 15 Am. R. 669 (1873); *Jenkins v. Jenkins*, 83 Ga. 283, 9 S.E. 541, 20 Am. St. R. 316 (1889).

Unrebutted presumption prevails. — While a legal presumption is only *prima facie* true and may be rebutted, if it is not rebutted the law draws the conclusion. Good

General Consideration (Cont'd)

v. Tuggle, 52 Ga. App. 510, 183 S.E. 850 (1936); Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259 (1970), aff'd in part and rev'd in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971); Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

Testimony outweighs presumption. — Bare presumptions of law give way to testimony, which may shift the burden of proof or of proceeding to the opposite party, who is not then entitled to prevail upon the presumption alone. *Jarvis v. State*, 71 Ga. App. 617, 31 S.E.2d 673 (1944).

Presumption yields to direct evidence. — Prima facie presumption that negotiable paper is issued for a valuable consideration yields to direct, uncontradicted, and unimpeached evidence that there was in fact no consideration. *Goldstein v. Drexler*, 102 Ga. App. 90, 115 S.E.2d 744 (1960).

Presumption of fact for jury. — Presumptions of fact are exclusively questions for the jury. *Kinnebrew v. State*, 80 Ga. 232, 5 S.E. 56 (1887); *Templeton v. Kennesaw Life & Accident Ins. Co.*, 216 Ga. 770, 119 S.E.2d 549 (1961); *Belch v. Gulf Life Ins. Co.*, 219 Ga. 823, 136 S.E.2d 351 (1964).

Choice among inferences. — When a given state of facts bears several different interpretations, it is the function of the jury to say which one of the facts should be adopted, but when only one reasonable inference can be drawn therefrom, the question resolves itself into one of law, and may be determined by the court. *Callaway v. Barmore*, 32 Ga. App. 665, 124 S.E. 382 (1924).

Rebuttal for jury. — Whether a presumption has been successfully rebutted with testimony is ordinarily a question for the jury. *Jarvis v. State*, 71 Ga. App. 617, 31 S.E.2d 673 (1944).

Jury determination of rebutted presumption. — *Pest Masters, Inc. v. Callaway*, 133 Ga. App. 123, 210 S.E.2d 243 (1974) is overruled to the extent it holds that "the facts arising from presumption, although rebutted by uncontradicted evidence, must be determined by a jury." *Allen Kane's Major Dodge, Inc. v. Barnes*, 243 Ga. 776, 257 S.E.2d 186,

aff'd, 151 Ga. App. 835, 262 S.E.2d 643 (1979).

Presumptions in civil cases have an effect at two stages during a jury trial: when a party moves for a directed verdict; and when the trial court instructs the jury. Under Georgia law, a rebuttable presumption of law generally does not vanish when the opposing party introduces evidence contrary to the presumption, and it does not matter how much counter evidence the opponent has presented to rebut the presumed fact, the presumption remains alive through jury instructions and can only disappear if the jury decides to discount it. *Beach v. Lipham*, 276 Ga. 302, 578 S.E.2d 402 (2003).

Rebuttal of valid marriage presumption. — Presumption as to the validity of a marriage can only be negated by disproving every reasonable possibility. *State Hwy. Bd. v. Lewis*, 46 Ga. App. 162, 167 S.E. 219 (1932).

Verdict not disturbed. — When there is proof of facts or circumstances to support the presumption, and the evidence as a whole is conflicting, a verdict in favor of either party will not be disturbed upon general grounds. *Jarvis v. State*, 71 Ga. App. 617, 31 S.E.2d 673 (1944).

Cited in *Barbre v. Scott*, 75 Ga. App. 524, 43 S.E.2d 760 (1947); *Columbus Wine Co. v. Sheffield*, 83 Ga. App. 593, 64 S.E.2d 356 (1951); *Griffith v. State*, 124 Ga. App. 505, 184 S.E.2d 477 (1971); *Binford v. Bush*, 125 Ga. App. 704, 188 S.E.2d 883 (1972); *Peachstone Dev., Ltd. v. Austin*, 133 Ga. App. 684, 212 S.E.2d 18 (1975); *Byrd v. Hopper*, 234 Ga. 248, 215 S.E.2d 251 (1975); *Guye v. Home Indem. Co.*, 241 Ga. 213, 244 S.E.2d 864 (1978); *State v. Williams*, 246 Ga. 788, 272 S.E.2d 725 (1980); *Ritter v. Prudential Ins. Co. of Am.*, 538 F. Supp. 398 (N.D. Ga. 1982); *Lovell v. Anderson*, 272 Ga. 675, 533 S.E.2d 64 (2000).

Specific Presumptions

No presumption of marriage. — There is no presumption of law or fact that a given person is married or single. *Neil v. State*, 117 Ga. 14, 43 S.E. 435 (1903).

Doctrine of presumption of continuity. — Whether the doctrine of presumption of continuity — a state of things once existing is presumed to continue until a change occurs — holds true in a particular case is a question for jury determination. *Mattison v. Trav-*

elers Indem. Co., 157 Ga. App. 372, 277 S.E.2d 746 (1981).

Continuation of marriage. — Marriage once shown to exist, nothing more appearing, is presumed to continue in existence until rebutted by proof of the marriage's dissolution. *Walker v. Hall*, 123 Ga. App. 457, 181 S.E.2d 508 (1971).

Dissolution of first marriage. — When a second marriage by a person is established, and it is shown that he or she had previously married another person, who was living at the time of the second marriage, the presumption is that the first marriage had been dissolved by a decree of divorce, and the burden is upon the person attacking the validity of the second marriage to show that a divorce had not been granted. *State Hwy. Bd. v. Lewis*, 46 Ga. App. 162, 167 S.E. 219 (1932).

Presumption of death. — When a person moves from this state to a point in another state, and, upon inquiry at such point in the other state, ascertains that the person has been gone and is unaccounted for and unheard of for the past seven years or longer, the presumption of the continuance of life ceases, and a legal presumption as to the person's death at the end of the seven years arises. *Goode v. Tuggle*, 52 Ga. App. 510, 183 S.E. 850 (1936).

Presumption against suicide. — While proof of death alone, no other facts appearing, is sufficient to raise a presumption against suicide, it is necessary that not only death be shown, but also that death be caused by violent and external means in order to raise a presumption of accidental death. *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), *aff'd in part and rev'd in part on other grounds*, 227 Ga. 258, 181 S.E.2d 283, *vacated on other grounds*, 123 Ga. App. 423, 181 S.E.2d 541 (1971).

Qualification of officer. — When it appears from the minutes of the court that a named person was selected as bailiff, a presumption arises that the person was duly sworn and qualified to act in that capacity. *Zeigler v. State*, 2 Ga. App. 632, 58 S.E. 1066 (1907). See also *Bird v. State*, 53 Ga. 602 (1875).

Duties of officers. — All officers are presumed to have properly discharged their sworn official duties. *Kirk v. State*, 73 Ga. 620

(1884); *Nixon v. Lehman*, 137 Ga. 516, 73 S.E. 747 (1912); *Alston v. Mobley*, 42 Ga. App. 98, 155 S.E. 81 (1930); *Jarrett v. City of Boston*, 209 Ga. 530, 74 S.E.2d 549 (1953).

Officer within authority. — It will be presumed that an officer has not exceeded the officer's authority, unless some showing to the contrary is made. *Jones v. McCrary*, 123 Ga. 282, 51 S.E. 349 (1905); *Jarrett v. City of Boston*, 209 Ga. 530, 74 S.E.2d 549 (1953).

Genuineness of deed. — Deed attested by three witnesses, one of whom is an officer authorized by law to attest deeds, and recorded is admissible in evidence without further proof of the deed's execution, and all presumptions are in favor of its genuineness. *Guthrie v. Gaskins*, 171 Ga. 303, 155 S.E. 185 (1930).

Honesty. — Law presumes all men honest in their dealings. *Eaves v. Fears*, 131 Ga. 820, 64 S.E. 269 (1909).

Physical and mental soundness. — There is a general presumption that the ordinary human facilities are possessed by every individual and in the absence of proof the law presumes soundness both as to mental and bodily functions. *Holcombe v. State*, 5 Ga. App. 47, 62 S.E. 647 (1908).

Legality of warrant. — Nothing to the contrary appearing, the presumption is that the warrant was regularly and legally issued. *Hilburn v. State*, 121 Ga. 344, 49 S.E. 318 (1904).

Indictment not presumed lawful. — Indictment will not be presumed regularly returned into court when no return was entered on minutes at term indictment was found. *Bowen v. State*, 81 Ga. 482, 8 S.E. 736 (1889).

Interlineations proper. — Interlineations appearing in an accusation will be presumed to have been made at the proper time and by the proper authority. *Crawford v. State*, 4 Ga. App. 789, 62 S.E. 501 (1908).

Influence of juror. — When a juror overhears remarks prejudicial to the accused, the juror is presumed to be influenced thereby. *Downer v. State*, 10 Ga. App. 827, 74 S.E. 301 (1912).

Stolen goods. — Unsatisfactorily explained possession of stolen goods raises a presumption of guilt against their possessor. This presumption, however, is one of fact, and not of law. *Holliday v. State*, 23 Ga. App. 400, 98 S.E. 386 (1919); *Morris v. State*, 47

Specific Presumptions (Cont'd)

Ga. App. 792, 171 S.E. 555 (1933); *Stevenson v. State*, 143 Ga. App. 813, 240 S.E.2d 123 (1977).

Recent unexplained possession of stolen goods is a circumstance sufficient to authorize a jury to find that the accused is guilty as charged (assuming other elements of the crime are proved) but it does not create a presumption of law against the accused, and it is not of itself necessarily proof of the accused's guilt. *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

While it is the rule that recent unexplained possession of stolen property permits the jury to infer that the accused committed the theft, it should be emphasized that recent unexplained possession creates only a permissible inference of guilt of a "presumption of fact" in terms of O.C.G.A. § 24-4-20 which the jury may or may not draw. *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

To convict accused under O.C.G.A. § 24-4-20, the state must prove that: (1) goods in accused's possession were recently stolen; and (2) someone committed the crime. *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

Theft. — Nearer the possession to the time of theft, the stronger will be the inference of guilt; and question of result of lapse of time is for jury. *Williamson v. State*, 248

Ga. 47, 281 S.E.2d 512 (1981).

Confinement to chain gang lawful. — When a person is confined to the chain gang, the presumption is that the person is lawfully confined there. *Williford v. State*, 121 Ga. 173, 48 S.E. 962 (1904).

Medical negligence and due care pattern jury instructions. — Although the presumption of due care pattern jury instructions was a correct statement of the law, in discussing the presumption that health care professionals exercise due care, the pattern jury instruction needs to explain more clearly the presumption's relationship to the plaintiff's burden of proof and the defendant's standard of care. The jury needs to be instructed that: (1) the law presumes that physicians or other medical professionals perform medical services in an ordinarily skillful manner; (2) the person claiming an injury may overcome this legal presumption by introducing evidence that the physician did not treat the patient in an ordinarily skillful manner; (3) expert medical testimony is required to overcome the presumption; and (4) the plaintiff's burden in proving the physician's lack of due care and skill is by the preponderance of the evidence. These suggested changes are intended to uphold the tradition of having physicians judged by their peers while ensuring that jurors are instructed that the due-care presumption does not change the plaintiff's burden of proof in medical negligence cases. *Beach v. Lipham*, 276 Ga. 302, 578 S.E.2d 402 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 7, 198.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 103.

C.J.S. — 31A C.J.S., Evidence, §§ 173 et seq.

ALR. — Presumption from derailment as requiring submission of carrier's negligence to jury in action by passenger, notwithstanding uncontradicted evidence negating negligence, 23 ALR 1214.

Presumption and burden of proof as to carrier's responsibility for goods received in good condition and delivered to consignee in bad condition, 53 ALR 996; 106 ALR 1156.

Presumption and burden of proof as to loss from failure of pledgee to sell or collect choses in action pledged, 53 ALR 1075.

Province of court and jury respectively as to construction of written contract where extrinsic evidence as to intention has been introduced, 65 ALR 648.

Governing law as regards presumption and burden of proof, 78 ALR 883; 168 ALR 191.

Voluntariness of confession admitted by court as question for jury, 85 ALR 870; 170 ALR 567.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 86 ALR 179; 162 ALR 495.

Rebuttal of presumption of receipt of letter properly mailed and addressed, 91 ALR 161.

Presumption and burden of proof of settlement in action by one town or poor district against another for support of pauper, 99 ALR 457.

Presumption of ownership of automobile by one in whose name it is registered or whose license plates it bears, 103 ALR 138.

Presumption against suicide as evidence, 103 ALR 185; 158 ALR 747.

Construction, application, and effect of provision of statute or policy which raises a presumption of total and permanent disability of insured after continuation of disability for a specified period, 110 ALR 631.

Presumption of death as evidence, 115 ALR 404.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 ALR 1078.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Presumption that description by reference to highway carries fee to center thereof, as affected by presence of water system or other apparatus under highway, 147 ALR 667.

Statute which places burden of proof as to contributory negligence on defendant or creates a presumption against contributory negligence as applicable to actions by one person for consequential damages resulting from injury to another, 147 ALR 726.

May presumption rest upon admission by opponent's pleading without proof of constituent fact, 153 ALR 1106.

Presumption and burden of proof as re-

gards continuance or revocation of will produced for probate, 165 ALR 1188.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 ALR2d 196.

Inference of malice or intent to kill where killing is by blow without weapon, 22 ALR2d 854.

Validity of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 ALR2d 1176.

Judicial notice of intoxicating quality, and the like, of a liquor or particular liquid, from its name, 49 ALR2d 764.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury, 56 ALR2d 372.

Presumption against suicide as overcome as a matter of law by physical facts related to death in action on accident or life insurance policy, 85 ALR2d 722.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Relation back of presumption of continuance of condition of property, 7 ALR3d 1302.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Presumption of payment as applicable to bank deposit, 69 ALR3d 1311.

Amnesiac as entitled to presumption of due care, 88 ALR3d 622.

24-4-21. Rebuttable presumptions of law.

Certain presumptions of law, such as the presumption of innocence, in some cases the presumption of guilt, the presumption of continuance of life for seven years, the presumption of a mental state once proved to exist, and all similar presumptions, may be rebutted by proof. (Orig. Code 1863, § 3677; Code 1868, § 3701; Code 1873, § 3754; Code 1882, § 3754; Civil Code 1895, § 5154; Penal Code 1895, § 990; Civil Code 1910, § 5740; Penal Code 1910, § 1016; Code 1933, § 38-118.)

Cross references. — For further provisions regarding presumption of death of missing person, see § 53-9-1 et seq.

Law reviews. — For note, "Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective," see 15 Ga. L. Rev. 1065 (1981).

For comment regarding denial of due process through statute involving adminis-

tration of estate of absentee minor, in light of *Payne v. Home Sav. Bank*, 193 Ga. 406, 18 S.E.2d 770 (1942), see 5 Ga. B.J. 62 (1943). For comment discussing the right to present evidence for the purposes of rebutting presumption, in light of *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PRESUMPTIONS REGARDING DEATH

INSANITY

MARRIAGE

OFFICERS

General Consideration

Constitutionality. — For a statutory presumption to pass constitutional muster, it must be shown with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Benham v. Edwards*, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)).

O.C.G.A. § 24-4-21 is not violative of the due process and equal protection guarantees of U.S. Const., amend. 14. *Evans v. State*, 159 Ga. App. 776, 285 S.E.2d 235 (1981).

Presumption of negligence against a railroad company, when property is injured by the running of its trains, is a disputable presumption, and may be rebutted like other such presumptions. *Savannah, Florida & Western Ry. v. Gray*, 77 Ga. 440, 3 S.E. 158 (1886).

Presumption of valuable consideration yields to direct evidence. — Prima facie presumption that negotiable paper is issued for a valuable consideration yields to direct, uncontradicted and unimpeached evidence that there was in fact no consideration. In such a case, the plaintiff could not recover on the presumption alone, but would have to carry the whole case by virtue of a pre-

ponderance of the evidence. *Goldstein v. Drexler*, 102 Ga. App. 90, 115 S.E.2d 744 (1960).

Instruction on presumption of intended consequences. — No unconstitutional shift of the burden of persuasion occurs when court's instruction on presumption of intended consequences is given with an instruction that a person is not presumed to act with criminal intent and that the presumption of intended consequence may be rebutted. *Williams v. State*, 157 Ga. App. 494, 277 S.E.2d 781 (1981).

When uncontradicted and unimpeached evidence is produced as to the real facts, any inference to the contrary disappears, and does not create a conflict in the evidence so as to require its submission to a jury. *International Computer Group, Inc. v. Data Gen. Corp.*, 159 Ga. App. 169, 283 S.E.2d 12 (1981).

Performance of official and social duties. — Unless and until there be facts or circumstances to indicate to the contrary, it will be presumed that every person obeys the mandates of law and performs all of the person's official and social duties. *Strother Ford, Inc. v. First Nat'l Bank*, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

Jury determination of rebutted presumption. — Presumptions in civil cases have an effect at two stages during a jury trial; when a party moves for a directed verdict; and when the trial court instructs the jury. Under Georgia law, a rebuttable presumption of law generally does not vanish when the opposing

party introduces evidence contrary to the presumption, and it does not matter how much counter evidence the opponent has presented to rebut the presumed fact; the presumption remains alive through jury instructions and can only disappear if the jury decides to discount the presumption. *Beach v. Lipham*, 276 Ga. 302, 578 S.E.2d 402 (2003).

Most rational hypothesis. — Presumption of law is merely a circumstantial inference selected by the law as the most rational hypothesis from given facts, and may or may not be rebutted according to the quality of evidence introduced. *Jefferson Std. Life Ins. Co. v. Bentley*, 55 Ga. App. 272, 190 S.E. 50 (1937); *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), *aff'd in part and rev'd in part on other grounds*, 227 Ga. 258, 181 S.E.2d 283, *vacated on other grounds*, 123 Ga. App. 423, 181 S.E.2d 541 (1971).

Presumption yields to proved facts. — Presumption of law yields to direct, positive, and uncontradicted evidence, i.e., it gives way to proved facts. *Jefferson Std. Life Ins. Co. v. Bentley*, 55 Ga. App. 272, 190 S.E. 50 (1937); *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), *aff'd in part and rev'd in part on other grounds*, 227 Ga. 258, 181 S.E.2d 283, *vacated on other grounds*, 123 Ga. App. 423, 181 S.E.2d 541 (1971).

Presumption of continuity. — Under the doctrine known as the presumption of continuity, a status, when proved to exist, will be presumed to have continued to exist. *Strother Ford, Inc. v. First Nat'l Bank*, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

Presumption of demand for possession yields to direct evidence. — While the defendant may not deny in the defendant's counter-affidavit that a demand for possession had been made upon the defendant by the plaintiff prior to the issuance of the dispossessory warrant, and defendant's failure to do so raises a presumption of law that such a demand was made, still such presumption must give way to the direct and positive testimony of the defendant on the trial that no demand was made upon the defendant for possession by anyone prior to the issuance of the dispossessory warrant. Bare presumptions of law give way to testimony, which may shift the burden of proof

or of proceeding to the opposite party, and one is then not entitled to prevail upon the presumption alone. *Ginn v. Johnson*, 74 Ga. App. 35, 38 S.E.2d 753 (1946).

Medical negligence and due care pattern jury instructions. — Although the presumption of due care pattern jury instructions was a correct statement of the law in discussing the presumption that health care professionals exercise due care, the pattern jury instruction needs to explain more clearly the presumption's relationship to the plaintiff's burden of proof and the defendant's standard of care. The jury needs to be instructed that: (1) the law presumes that physicians or other medical professionals perform medical services in an ordinarily skillful manner; (2) the person claiming an injury may overcome this legal presumption by introducing evidence that the physician did not treat the patient in an ordinarily skillful manner; (3) expert medical testimony is required to overcome the presumption; and (4) the plaintiff's burden in proving the physician's lack of due care and skill is by the preponderance of the evidence. These suggested changes are intended to uphold the tradition of having physicians judged by their peers while ensuring that jurors are instructed that the due-care presumption does not change the plaintiff's burden of proof in medical negligence cases. *Beach v. Lipham*, 276 Ga. 302, 578 S.E.2d 402 (2003).

Innocence. — Every person charged with crime is presumed innocent until proven guilty by competent evidence. *Thigpen v. State*, 11 Ga. App. 846, 76 S.E. 596 (1912).

Continuity of domicile. — Until evidence is introduced to the contrary, it is presumed that a person has not changed the person's residence or domicile. *Strother Ford, Inc. v. First Nat'l Bank*, 132 Ga. App. 268, 208 S.E.2d 25 (1974).

Cited in *Strickland v. Strickland*, 201 Ga. 293, 39 S.E.2d 483 (1946); *Brown v. State*, 208 Ga. 304, 66 S.E.2d 745 (1951); *Hobbs v. State*, 98 Ga. App. 816, 107 S.E.2d 253 (1959); *Forrester v. Livingston*, 216 Ga. 798, 120 S.E.2d 174 (1961); *Cardin v. Harmon*, 217 Ga. 737, 124 S.E.2d 638 (1962); *Ward v. Ward*, 226 Ga. 212, 173 S.E.2d 703 (1970); *Brackett v. State*, 227 Ga. 493, 181 S.E.2d 380 (1971); *Saylor v. Terminal Transp. Co.*, 132 Ga. App. 760, 209 S.E.2d 133 (1974); *Johnson v. State*, 235 Ga. 486, 220 S.E.2d 448

General Consideration (Cont'd)

(1975); *Parker v. State*, 137 Ga. App. 6, 223 S.E.2d 6 (1975); *Brown v. State*, 250 Ga. 66, 295 S.E.2d 727 (1982); *Benham v. Edwards*, 678 F.2d 511 (5th Cir. 1982); *Milam v. State*, 255 Ga. 560, 341 S.E.2d 216 (1986); *Crapse v. State*, 180 Ga. App. 321, 349 S.E.2d 190 (1986); *Williams v. State*, 185 Ga. App. 559, 365 S.E.2d 141 (1988); *Stephens v. State*, 201 Ga. App. 744, 412 S.E.2d 571 (1991); *Crawford v. State*, 202 Ga. App. 653, 415 S.E.2d 300 (1992); *Ford v. Saint Francis Hosp.*, 227 Ga. App. 823, 490 S.E.2d 415 (1997).

Presumptions Regarding Death

Life. — One of the presumptions of law in this state is “continuance of life for seven years.” *Poole v. State*, 22 Ga. App. 248, 95 S.E. 935 (1918); *Gantt v. American Nat'l Ins. Co.*, 173 Ga. 323, 160 S.E. 345 (1931).

Presumption of life not statutory. — There is no express statutory provision in this state making absence from the state for seven years the ground of the presumption of death. The only provision in the Code with reference of such presumption is this statute. There being no statutory provision, therefore, making mere absence from the state the ground of the presumption, the common-law rule must be applied, which is as ruled in *Hansen v. Owens*, 132 Ga. 648, 64 S.E. 800 (1909). *Rudolph v. Brown*, 150 Ga. 147, 103 S.E. 251 (1920) (see O.C.G.A. § 24-4-21).

Presumption of continuation of life ends.

— Presumption of the duration of life, with respect to people of whom no account can be given, ends at the expiration of seven years from the time when the people were last known to be living. *Doe v. Roe*, 1 Ga. 538 (1846); *Doe v. Roe & Benson*, 26 Ga. 582 (1858); *Executors of Adams v. Administrator of Jones*, 39 Ga. 479 (1869). See also *Poole v. State*, 22 Ga. App. 248, 95 S.E. 935 (1918); *Gantt v. American Nat'l Ins. Co.*, 41 Ga. App. 627, 154 S.E. 213 (1930), rev'd on other grounds, 173 Ga. 323, 160 S.E. 345 (1931); *Pilgrim Health & Life Ins. Co. v. Shows*, 60 Ga. App. 872, 5 S.E.2d 585 (1939).

Death occurring after seven years. — In the absence of facts or circumstances tending to establish the date of death, death is presumed to have occurred at the expiration

of the seven years. *Gantt v. American Nat'l Ins. Co.*, 173 Ga. 323, 160 S.E. 345 (1931); *Gantt v. American Nat'l Ins. Co.*, 53 Ga. App. 425, 186 S.E. 458 (1936); *Pfenning v. Life Ins. Co. of Va.*, 60 Ga. App. 706, 4 S.E.2d 682 (1939); *Payne v. Home Sav. Bank*, 193 Ga. 406, 18 S.E.2d 770 (1942); *Georgia Cas. & Sur. Co. v. Bloodworth*, 120 Ga. App. 313, 170 S.E.2d 433 (1969).

Time of death must be proved. — Presumption of law relates only to the fact of death; the time of death, whenever it is material, must be a subject of distinct proof. *Gantt v. American Nat'l Ins. Co.*, 41 Ga. App. 627, 154 S.E. 213 (1930), rev'd on other grounds, 173 Ga. 323, 160 S.E. 345 (1931).

Presumption of death established by probate court. — Order of probate court under O.C.G.A. § 53-9-2 establishing presumption of death of insured constituted a rebuttable presumption of law in later case involving action on life insurance policy. *Ritter v. Prudential Ins. Co. of Am.*, 538 F. Supp. 398 (N.D. Ga. 1982).

Presumption of death of one moving to another state. — In order to raise a presumption of the death of a person who moves from this state to a named point in another state, inquiry must be made at the last known domicile of the absentee at which the absentee resided in the other state; and it must be shown, by those who would be most likely to hear from the absentee, that the absentee was absent and unheard of in the last place of residence for seven years. *Rudolph v. Brown*, 150 Ga. 147, 103 S.E. 251 (1920); *National Life & Accident Ins. Co. v. Hankerson*, 49 Ga. App. 350, 175 S.E. 590 (1934); *Pilgrim Health & Life Ins. Co. v. Shows*, 60 Ga. App. 872, 5 S.E.2d 585 (1939).

Evidence of absence of person from one's original place of residence will not raise the presumption of death, when it appears that the person has moved to another place and there located. *National Life & Accident Ins. Co. v. Hankerson*, 49 Ga. App. 350, 175 S.E. 590 (1934).

Issue of life or death for jury. — When the presumption from absence is relied upon to show death, the issue as to life or death would be for the jury when the evidence tending to rebut the legal presumption is merely circumstantial, or when, notwithstanding direct or circumstantial rebuttal evidence, the bare legal presump-

tion of death is itself supported by direct or circumstantial proof. But the mere legal presumption is completely overcome by positive, uncontradicted evidence that the person is in fact alive, and even by competent proof of the person's existence within the seven-year period. *National Life & Accident Ins. Co. v. Hankerson*, 49 Ga. App. 350, 175 S.E. 590 (1934).

No presumption of survival. — When a family was absent for over seven years there would be no presumption that a husband survived his wife and daughter, or that he had no other children whom he survived. *Cock v. Lipsey*, 148 Ga. 322, 96 S.E. 628 (1918).

Insanity

Presumption of insanity not unconstitutionally irrebuttable. — Construction of presumptions in O.C.G.A. § 24-4-21 did not create a de facto irrebuttable (and, therefore, unconstitutional) presumption of insanity because the fact-finders duty not to disregard expert testimony applies to cases presuming sanity or insanity, and the court's standard of review and the findings and conclusions required for that review, ensure that the presumption of insanity cannot be applied irrebuttably. *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993).

Presumption of continuing insanity applies prospectively to future acts of the defendant, not retroactively to past behavior. *Vanderpool v. State*, 244 Ga. App. 804, 536 S.E.2d 821 (2000), cert denied, 532 U.S. 996, 121 S. Ct. 1658, 149 L. Ed. 2d 640 (2001).

To be constitutionally committed, the insanity-acquittee is entitled, as matter of equal protection, to a judicial determination which attains a greater degree of certainty than that generated by a scientifically unsupported presumption of insanity. *Benham v. Edwards*, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)).

Presumption of continuation of a mental state comports with due process, because it is rational to assume that, once a mental state is proven to exist, that mental state

continues to do so in the absence of evidence to the contrary. *Clark v. State*, 245 Ga. 629, 266 S.E.2d 466 (1980).

Continuation of mental condition. — Mental condition, once proved to exist, is presumed to continue. *Carter v. State*, 225 Ga. 310, 168 S.E.2d 158 (1969); *Boyd v. State*, 207 Ga. 567, 63 S.E.2d 394 (1951), overruled on other grounds, 234 Ga. 608, 216 S.E.2d 855 (1975).

Continuation of insanity. — There is a presumption of continuation of insanity, once insanity is proved to exist. *Dicken v. Johnson*, 7 Ga. 484 (1849); *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423 (1852); *Stanfield v. Hursey*, 36 Ga. App. 394, 136 S.E. 826 (1927).

Defendant failed to carry the defendant's burden of showing by a preponderance of the evidence that the defendant was sane after the defendant was found not guilty by reason of insanity on two stalking charges and was ordered into a civil commitment to a mental health facility; the verdict of not guilty by reason of insanity established both that the defendant committed the criminal offense and that the defendant did so because of a mental illness, and once the defendant was ruled insane, a presumption existed under O.C.G.A. § 24-4-21 that the insanity existed thereafter, and the defendant put on very little evidence to the contrary. *Bonney v. State*, 295 Ga. App. 706, 673 S.E.2d 102 (2009).

Insanity of insanity-acquittee. — When there has been a previous adjudication finding a defendant not guilty by reason of defendant's insanity, a presumption of such insanity exists at the commencement of a hearing to secure defendant's release. *Pennewell v. State*, 148 Ga. App. 611, 251 S.E.2d 832 (1979); *Clark v. State*, 245 Ga. 629, 266 S.E.2d 466 (1980).

Presumption of continued insanity for release applications. — In deciding applications for release, the court may rely on the presumption of continued insanity and is not bound by the opinions of either lay or expert witnesses. *Gross v. State*, 210 Ga. App. 125, 435 S.E.2d 496 (1993).

Effect of release. — An administrative release cancels the continuing presumption of insanity, although the prior adjudication is evidence tending to show mental condition and can be considered by the fact-finder

Insanity (Cont'd)

to rebut the presumption of sanity. *Gilbert v. State*, 235 Ga. 501, 220 S.E.2d 262 (1975).

Denial of release held proper. — Rational trier of fact could have found that appellant failed to prove by a preponderance of evidence that the appellant was no longer insane and should be released from civil commitment since experts testified that appellant became violently “psychotic” when the appellant engaged in substance abuse and that, although appellant might not exhibit violently “psychotic” behavior so long as the appellant underwent the regimen of “forced abstinence” in a hospital setting, there was nothing to show that, once released from that setting and regimen, the appellant would not again engage in substance abuse and commit yet another violent “psychotic” act. *Nagel v. State*, 264 Ga. 150, 442 S.E.2d 446 (1994).

Sanity after release from mental institution. — Presumption of sanity prevails even after a commitment to a mental institution if the accused has been released from that institution. *Durham v. State*, 239 Ga. 697, 238 S.E.2d 334 (1977).

Rebuttal not automatic. — Presentation of evidence to the contrary does not automatically dissipate the presumption of sanity which exists by law. *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993).

Court may presume insanity despite witnesses' opinions. — Superior court, in deciding applications for release of a person committed upon a plea of insanity, may rely on the presumption of continued insanity and is not bound by the opinions of either lay or expert witnesses. The court also may take judicial notice of the evidence at trial pursuant to O.C.G.A. § 17-7-131(e). *Butler v. State*, 258 Ga. 344, 369 S.E.2d 252 (1988).

Verdict of not guilty by reason of insanity reflects two crucial factual determinations. First, such verdict indicates a determination beyond reasonable doubt by a finder of fact that defendant committed the crime in question. Secondly, this verdict indicates finding that it has been demonstrated by a prepon-

derance of the evidence that the defendant, at the time the criminal act was committed, met the criteria for civil commitment. Under O.C.G.A. § 24-4-21, this mental state is presumed to continue so that the burden of proof in a release proceeding under O.C.G.A. § 17-7-131 rests on the insanity acquittee. *Whitfield v. State*, 158 Ga. App. 660, 281 S.E.2d 643 (1981).

Marriage

Continuation of marriage. — Marriage once shown to exist, nothing more appearing, is presumed to continue in existence until rebutted by proof of the marriage's dissolution. *Walker v. Hall*, 123 Ga. App. 457, 181 S.E.2d 508 (1971).

Prior marriage dissolved by death. — Presumption that a first marriage was dissolved by death prevails whether the time elapsing between the date the former spouse was last heard of and the second marriage was ten months or ten years. *Longstreet v. Longstreet*, 205 Ga. 255, 53 S.E.2d 480 (1949).

Ownership by husband. — Husband is recognized by law as the head of his family and where he and wife reside together, the legal presumption is that the house and all the household effects, belong to the husband as the head of the family; this presumption of course is rebuttable. *Kreutz v. State*, 53 Ga. App. 219, 185 S.E. 371 (1936).

Conflicting presumptions. — When the presumption of the validity of a marriage conflicts with the presumption of the continued life of a former spouse of one of the parties, if neither is aided by proof of facts or circumstances corroborating it, the presumption of the validity of the second marriage will prevail over the presumption of the continuance of life of the former spouse. *Longstreet v. Longstreet*, 205 Ga. 255, 53 S.E.2d 480 (1949); *Baker v. Musa*, 170 Ga. App. 77, 316 S.E.2d 178 (1984).

Officers

Officer's duties. — All officers are presumed to have properly discharged their sworn official duties. *Kirk v. State*, 73 Ga. 620 (1884); *Brantley v. Thompson*, 216 Ga. 164, 115 S.E.2d 533 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 212.

Am. Jur. Pleading and Practice Forms. — 8A Am. Jur. Pleading and Practice Forms, Death, § 168.

ALR. — Validity of by-law of mutual benefit association preventing recovery upon presumption of death from seven years' absence, 17 ALR 418; 21 ALR 1346; 36 ALR 982; 40 ALR 1274.

Circumstances justifying inference of death of insured before the lapse of seven years from his disappearance, 34 ALR 1389; 61 ALR 1327.

Ownership of automobile as prima facie evidence of responsibility for negligence of person operating it, 42 ALR 898; 74 ALR 951; 96 ALR 634.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 ALR 1139; 86 ALR 179; 162 ALR 495.

Statutory or contractual limitation where presumption of death of the insured from seven years' absence is relied upon, 61 ALR 686; 119 ALR 1308.

Presumption of death from seven years' absence as affected by domestic troubles, 64 ALR 1288.

Conclusiveness of uncontradicted testimony of interested witness where opposed to presumption, 72 ALR 94.

Presumption of death of insured in relation to time of death as affecting failure to pay premiums during seven-year period, 75 ALR 630.

Presumption of innocence as evidence, 94 ALR 1042; 152 ALR 626.

When finding or adjudication as to one's mental condition by official or body not clearly judicial is conclusive evidence or has effect of a judgment as regards legal mental status, 108 ALR 47.

Insanity as affecting presumption against suicide, 112 ALR 1278.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Direct evidence as to what took place at time of accident as displacing presumption arising from instinct of self-preservation that one was acting with concern for own safety, 116 ALR 340.

Effect of words "value received" or similar words in written instrument, other than negotiable instrument or sealed instrument, to create presumption or make prima facie case of consideration, 116 ALR 545.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 ALR 1078.

Administration of estate of one the fact of whose death rests upon presumption or circumstantial evidence, 140 ALR 1403.

Validity of marriage celebrated while spouse by former marriage of one of the parties was living and undivorced, in reliance upon presumption from lapse of time of death of such spouse, 144 ALR 747.

Presumption against suicide as evidence, 158 ALR 747.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 ALR 1188.

Form and sufficiency of proof of death in case of insured's disappearance, 26 ALR2d 1073.

Judicial notice of intoxicating quality, and the like, of a liquor or particular liquid, from its name, 49 ALR2d 764.

Validity, construction, and effect of statutes or regulations making possession of fish or game, or of specified hunting or fishing equipment, prima facie evidence of violation, 81 ALR2d 1093.

Necessity and sufficiency of showing of search and inquiry by one relying on presumption of death from seven years' absence, 99 ALR2d 307.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Relation back of presumption of continuance of condition of property, 7 ALR3d 1302.

Application of *res ipsa loquitur* doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Medical malpractice: presumption or in-

ference from failure of hospital or doctor to produce relevant medical records, 69 ALR4th 906.

24-4-22. Presumption from failure to produce evidence.

If a party has evidence in his power and within his reach by which he may repel a claim or charge against him but omits to produce it, or if he has more certain and satisfactory evidence in his power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against him is well founded; but this presumption may be rebutted. (Civil Code 1895, § 5163; Penal Code 1895, § 989; Civil Code 1910, § 5749; Penal Code 1910, § 1015; Code 1933, § 38-119.)

History of Code section. — This Code section is derived from the decisions in *Mitchell v. State*, 71 Ga. 128 (1883); *First Nat'l Bank v. Atlanta Rubber Co.*, 77 Ga. 781 (1886); *Savannah, Florida & Western Ry. v. Gray*, 77 Ga. 440, 3 S.E. 158 (1887); and *Stevenson v. State*, 83 Ga. 575, 10 S.E. 234 (1889).

Law reviews. — For article, "Spoliation of Evidence," see 8 Ga. St. B.J. 12 (2003).

For comment on *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), see 1 Ga. St. B.J. 550 (1965). For comment discussing the right to present evidence for the purposes of rebutting presumption, in light of *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION ILLUSTRATIONS

General Consideration

In general. — When a party has evidence within the party's power or control by which the party may rebut a claim against the party and fails to produce that evidence, a presumption arises that the evidence would be unfavorable or harmful to the party failing to produce the evidence. *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972).

Rebuttable presumption in O.C.G.A. § 24-4-22 applies when both parties fail to produce evidence as conclusive and satisfactory as appears to be within their respective control. *Eddie Parker Interests, Inc. v. Booth*, 160 Ga. App. 15, 285 S.E.2d 753 (1981).

Constitutionality. — Statute violates the fundamental principle of criminal law that the guilt of the accused must be shown by competent evidence before a conviction can be legally had. *Sokolic v. State*, 228 Ga. 788,

187 S.E.2d 822 (1972) (see O.C.G.A. § 24-4-22).

O.C.G.A. § 24-4-22 is violative of a defendant's right to be convicted by evidence establishing guilt beyond a reasonable doubt. *Radford v. State*, 251 Ga. 50, 302 S.E.2d 555 (1983).

Test for constitutionality. — For a statutory presumption to pass constitutional muster, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Benham v. Edwards*, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)).

O.C.G.A. § 24-4-22 not applicable in crim-

inal case. — See *Harper v. State*, 129 Ga. 770, 59 S.E. 792 (1907); *Davis v. State*, 4 Ga. App. 441, 61 S.E. 843 (1908); *Mills v. State*, 133 Ga. 155, 65 S.E. 368 (1909); *Wilson v. State*, 8 Ga. App. 816, 70 S.E. 193 (1911); *Worley v. State*, 136 Ga. 231, 71 S.E. 153 (1911); *Williamson v. State*, 9 Ga. App. 442, 71 S.E. 509 (1911); *Whitley v. State*, 14 Ga. App. 577, 81 S.E. 797 (1914); *Waller v. State*, 164 Ga. 128, 138 S.E. 67 (1927); *Summerville v. State*, 65 Ga. App. 11, 14 S.E.2d 574 (1941); *Bond v. State*, 68 Ga. App. 15, 21 S.E.2d 866 (1942); *Clay v. State*, 122 Ga. App. 677, 178 S.E.2d 331 (1970); *Sokolic v. State*, 228 Ga. 788, 187 S.E.2d 822 (1972); *Lyle v. State*, 131 Ga. App. 8, 205 S.E.2d 126 (1974); *Peters v. State*, 131 Ga. App. 513, 206 S.E.2d 623 (1974); *Perryman v. State*, 139 Ga. App. 655, 229 S.E.2d 131 (1976); *Joseph v. State*, 149 Ga. App. 296, 254 S.E.2d 383 (1979); *Brown v. State*, 150 Ga. App. 831, 258 S.E.2d 641 (1979); *Tiller v. State*, 159 Ga. App. 557, 284 S.E.2d 63 (1981); *Radford v. State*, 251 Ga. 50, 302 S.E.2d 555 (1983); *Drummond v. State*, 173 Ga. App. 337, 326 S.E.2d 787 (1985); *Jacobs v. State*, 201 Ga. App. 57, 410 S.E.2d 320 (1991); *Clayton v. State*, 203 Ga. App. 843, 418 S.E.2d 610, cert. denied, 203 Ga. App. 905, 418 S.E.2d 610 (1992); *Williams v. State*, 239 Ga. App. 30, 521 S.E.2d 27 (1999).

Charge on spoliation of evidence based upon O.C.G.A. § 24-4-22 is not appropriate in a criminal case; thus, the trial court did not err in not giving such a charge. *Doyal v. State*, 287 Ga. App. 667, 653 S.E.2d 52 (2007).

O.C.G.A. § 24-4-22 not applicable in criminal case. — Trial counsel was not ineffective for failing to request a jury charge under O.C.G.A. § 24-4-22 addressing the State's failure to preserve a child molestation victim's pajamas, because the trial court stated it would not have given the charge if requested, and § 24-4-22 was not appropriate in a criminal case. *Cline v. State*, 300 Ga. App. 615, 685 S.E.2d 501 (2009).

Jury may not be charged on failure to produce evidence in criminal case but may draw conclusion therefrom. — While the jury may not be instructed to infer that if the defendant had evidence by which defendant might repel or rebut the charge against the defendant and failed to introduce the evidence the presumption arises that the defen-

dant is guilty, the jury may be apprised of the facts from which it arrives at the same conclusion. *Pritchard v. State*, 160 Ga. App. 105, 286 S.E.2d 338 (1981).

Intention of legislature was to penalize either party by a presumption of fact against either party for withholding evidence within their power to produce, and relying on evidence of a weaker nature. *Fields v. Yellow Cab Co.*, 80 Ga. App. 569, 56 S.E.2d 845 (1949).

Limited application. — It may be conceded that this principle cannot be safely given as a charge except in a very limited class of cases, but it cannot be said to be improper in all cases. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934).

Application in divorce case as to financial worth. — In divorce case when one of the issues in the case is the financial worth of the defendant, when the plaintiff introduced documentary evidence showing that the defendant received about \$24,000 in cash from a certain business venture and the defendant did not offer any written evidence to substantiate defendant's contention that only a small portion of the sum received was profit, there is no error in charging on the presumption arising from failure to produce evidence, or the strongest evidence. *West v. West*, 199 Ga. 378, 34 S.E.2d 545 (1945).

Presumption of fact. — Presumption against a party withholding or suppressing evidence within the party's control or reach is not one of law, but of fact and it can be rebutted. *Savannah, Florida & Western Ry. v. Gray*, 77 Ga. 440, 3 S.E. 158 (1886); *Brothers v. Horne*, 140 Ga. 617, 79 S.E. 468 (1913); *Cocroft v. Cocroft*, 158 Ga. 714, 124 S.E. 346 (1924); *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934); *Burns v. Colonial Stores, Inc.*, 90 Ga. App. 492, 83 S.E.2d 259 (1954); *Independent Life & Accident Ins. Co. v. Craton*, 102 Ga. App. 78, 115 S.E.2d 636 (1960); *Gulf Life Ins. Co. v. Belch*, 108 Ga. App. 480, 133 S.E.2d 622 (1963), rev'd on other grounds, 219 Ga. 823, 136 S.E.2d 351 (1964); *Glynn Plymouth, Inc. v. Davis*, 120 Ga. App. 475, 170 S.E.2d 848 (1969), aff'd, 226 Ga. 221, 173 S.E.2d 691 (1970).

Burden of proof irrelevant. — Statute applies irrespective of the burden of proof. *Shiver & Barnett v. Firemens Ins. Co.*, 60 Ga.

General Consideration (Cont'd)

App. 57, 2 S.E.2d 760 (1939) (see O.C.G.A. § 24-4-22).

No evidence held back. — When it does not appear that the party holds back evidence within the party's power to produce the non-production of more full and definite evidence than the party presents raises no presumption against the party and it is error to charge this statute. *Schnell v. Toomer*, 56 Ga. 168 (1876); *Western & A.R.R. v. Morrison*, 102 Ga. 319, 29 S.E. 104, 66 Am. St. R. 173, 40 L.R.A. 84 (1897); *Central of Ga. Ry. v. Bernstein*, 113 Ga. 175, 38 S.E. 394 (1901); *Shields v. Georgia Ry. & Elec. Co.*, 1 Ga. App. 97, 57 S.E. 980 (1907); *Alabama Great Southern Ry. v. Hamby*, 56 Ga. App. 215, 192 S.E. 467 (1937); *Howard v. Obie*, 190 Ga. 394, 9 S.E.2d 666 (1940); *Brosnan v. Long*, 75 Ga. App. 837, 44 S.E.2d 809 (1947); *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972) (see O.C.G.A. § 24-4-22).

Proving assertions without calling other witness. — No presumption will ever arise prejudicial to the party failing to produce the witness, provided the jury is satisfied from the evidence before the jury that the party who had such witness accessible has nevertheless proved the party's claim or established the party's defense. *Weinkle & Sons v. Brunswick & W.R.R.*, 107 Ga. 367, 33 S.E. 471 (1899), overruled on other grounds, 238 Ga. 559, 234 S.E.2d 24 (1977); *Howard v. Obie*, 190 Ga. 394, 9 S.E.2d 666 (1940).

Proving a negative. — When the means of proving a negative are not within the power of one of the parties, but all the proof on the subject is within the control of the other, who, if the negative is not true, can disprove it at once, the truth of the negative averment can be presumed from the fact that the party who has within the party's power proof (if such exists) that the negative is not true still withholds or does not produce such proof. *Hyer v. Holmes & Co.*, 12 Ga. App. 837, 79 S.E. 58 (1913); *Mayo v. Owen*, 208 Ga. 483, 67 S.E.2d 709 (1951).

All witnesses need not testify. — It never was the intention of the provisions of this statute to require that all witnesses to a scene of a collision, the nature of which is in question, should be summoned and used as

witnesses. *Fields v. Yellow Cab Co.*, 80 Ga. App. 569, 56 S.E.2d 845 (1949) (see O.C.G.A. § 24-4-22).

O.C.G.A. § 24-4-22 does not require a party actually to produce all possible witnesses, but merely provides that an adverse presumption may arise from a failure to so produce. *Jacobs v. State*, 201 Ga. App. 57, 410 S.E.2d 320 (1991).

If all witnesses not produced. — Party is not required to produce all witnesses; a party may rest one's case upon one witness, though another be accessible, but that party subjects oneself to presumption arising from failure to so produce. *Shiver & Barnett v. Firemens Ins. Co.*, 60 Ga. App. 57, 2 S.E.2d 760 (1939); *Trammell v. Williams*, 97 Ga. App. 31, 101 S.E.2d 887 (1958).

Calling one of two witnesses. — Fact that a party called only one of two witnesses who had an equal opportunity to know the facts which it was sought to establish did not authorize an inference that the other witness would have testified differently, or warrant an instruction of this statute to the jury. *Bank of Emanuel v. Smith*, 32 Ga. App. 606, 124 S.E. 114 (1924) (see O.C.G.A. § 24-4-22).

Evidence under power and control of party. — Charging this statute was error since there was nothing to show that the absent witness was in any way under the power and control of the defendant, or that as a witness, if the witness were accessible at all, the witness was not as much so to the plaintiff as to the defendant. *Anderson v. Southern Ry.*, 107 Ga. 500, 33 S.E. 644 (1899); *Brothers v. Horne*, 140 Ga. 617, 79 S.E. 468 (1913); *Cocroft v. Cocroft*, 158 Ga. 714, 124 S.E. 346 (1924); *Trammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315 (1935); *Atlanta Baggage & Cab Co. v. Atlanta Taxicabs, Inc.*, 104 Ga. App. 89, 121 S.E.2d 175 (1961) (see O.C.G.A. § 24-4-22).

Witness accessible to both parties. — When witness was present at the trial, equally accessible to both parties, it was error for the judge to give in charge this statute. *Bank of Emanuel v. Smith*, 32 Ga. App. 606, 124 S.E. 114 (1924) (see O.C.G.A. § 24-4-22).

Examining physician is equally available as a witness to both parties; no presumption could arise against either party for failure to produce the physician as a witness. *Bradford v. Parrish*, 111 Ga. App. 167, 141 S.E.2d 125 (1965).

Failure of both parties to produce evidence. — When both parties fail to produce as conclusive and satisfactory evidence as appears to be within their respective control, the charge of this statute is appropriate. *Davidson v. Consolidated Quarries Corp.*, 99 Ga. App. 359, 108 S.E.2d 495 (1959) (see O.C.G.A. § 24-4-22).

Failure of defendant to appear in court and the failure to offer evidence raise a presumption against the defendant that the charges against the defendant are true. *Mitchell v. Hayden, Stone, Inc.*, 225 Ga. 711, 171 S.E.2d 280 (1969).

Failure of party to testify. — Provisions of this statute are not applicable to the failure of a party defendant to testify at the party's trial. *Ramirez v. Mansour*, 104 Ga. App. 651, 122 S.E.2d 594 (1961); *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972) (see O.C.G.A. § 24-4-22).

Failure to testify at former trial. — It is admissible to show that the defendant, since deceased, who was present at a former trial and competent as a witness, failed to testify concerning the transaction in issue, of which the defendant had peculiar knowledge; the bona fides of which was attacked by the plaintiffs. *Wood v. Wilson*, 145 Ga. 256, 88 S.E. 980 (1916).

Documentary evidence. — Statute applies equally to documentary evidence. *Oliver v. Fair Jewelers, Inc.*, 104 Ga. App. 392, 121 S.E.2d 787 (1961) (see O.C.G.A. § 24-4-22).

Medical exam under court order. — Statutory presumption arising from failure to produce evidence is not applicable in a personal injury action when there can be no additional medical evidence available until after an examination is had under court order. *Bradford v. Parrish*, 111 Ga. App. 167, 141 S.E.2d 125 (1965).

Refusal to submit to physical examination. — Evidence that the plaintiff in a case of personal injury, refused to allow a physical examination is admissible. *City of Cedartown v. Brooks*, 2 Ga. App. 583, 59 S.E. 836 (1907).

Failure to produce testimony is badge of fraud, since the bona fides of the transaction is in issue, and witnesses who ought to be able to explain the transaction are in reach. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934); *State Banking Co. v. Miller*, 185 Ga. 653, 196 S.E. 47 (1938).

Spoliation of evidence raises a presumption against the spoliator. *Glynn Plymouth, Inc. v. Davis*, 120 Ga. App. 475, 170 S.E.2d 848 (1969), *aff'd*, 226 Ga. 221, 173 S.E.2d 691 (1970).

Destruction of evidence. — When a party has destroyed evidence which may be material to ensuing litigation, the trial judge may be authorized to dismiss the case or prevent the party's expert witness from testifying in any respect about the evidence. *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539, 469 S.E.2d 783 (1996).

Argument to jury. — Failure to produce witnesses who are accessible to a party will authorize counsel of the opposite party to argue before the jury that, if they are in doubt as to the truth of the transaction, they would be authorized to infer that, if the absent witnesses had testified, the testimony would have been prejudicial to the party who might most easily have produced them. *City of Atlanta v. Feeney*, 42 Ga. App. 135, 155 S.E. 370 (1930); *Howard v. Obie*, 190 Ga. 394, 9 S.E.2d 666 (1940).

Comment on defendant's failure to produce evidence is not a comment on the defendant's failure to testify as prohibited by this statute. *Wood v. State*, 234 Ga. 758, 218 S.E.2d 47 (1975) (see O.C.G.A. § 24-4-22).

Comment on failure to present certain witnesses. — Defense counsel in a criminal case is not barred from commenting, when appropriate, on the failure of the opposing side to present certain witnesses; while no legal presumption may arise from such failure, it is proper for counsel to draw an inference of fact from such failure and comment on such failure to the jury when there is competent evidence before the jury that the missing witness has knowledge of material and relevant facts. *Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

Evidentiary value. — Fact that the accused has failed to produce evidence has some evidentiary value and counsel can comment on it to the jury. *Hunt v. State*, 81 Ga. 140, 7 S.E. 142 (1888); *Morgan v. State*, 124 Ga. 442, 52 S.E. 748 (1905); *Saffold v. State*, 11 Ga. App. 329, 75 S.E. 338 (1912).

Question for jury. — It was not error for court to charge that if either party in this case had in the party's power or control any evidence that would have illustrated any issue in the case and such party failed to

General Consideration (Cont'd)

produce that evidence, the jury might infer it would have been against the party so failing to produce it, in the event the jury saw fit to do so; the charge left it for the jury to determine whether or not there existed a state of facts from which the presumption would arise and did not have the effect of invading the province of the jury. *Beardsley v. Suburban Coach Co.*, 83 Ga. App. 381, 63 S.E.2d 911 (1951).

Charge demanding inference. — When a stated set of circumstances will demand a particular inference, it is not error for the court to instruct the jury to that effect, provided the question of whether the circumstances do in fact exist is left open for determination by the jury. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934); *Shiver & Barnett v. Firemens Ins. Co.*, 60 Ga. App. 57, 2 S.E.2d 760 (1939).

Harmless error. — When this statute was not applicable to the facts of a case, the court did not err in failing to give the statute in a charge to the jury. Especially is this true when there was no written request so to the charge. *Shields v. Georgia Ry. & Elec. Co.*, 1 Ga. App. 172, 57 S.E. 980 (1907) (see O.C.G.A. § 24-4-22).

Although the statute is charged in a case where it is not applicable, in absence of harm or injury to one side, the charge would not require a reversal. *Goldstein v. Ipswich Hosiery Co.*, 104 Ga. App. 500, 122 S.E.2d 339 (1961) (see O.C.G.A. § 24-4-22).

Defendant admitted liability and did not produce the accident report and pictures of the truck involved; since the withheld evidence went to liability and not damages, any error in giving a "withheld evidence" charge to the jury was harmless. *AT Sys. Southeast, Inc. v. Carnes*, 272 Ga. App. 671, 613 S.E.2d 150 (2005).

Exclusion of explanation harmless error. — Party should be permitted to explain the absence of witnesses which the evidence shows have knowledge of facts material to the case, so as to avoid the application of this statute, but the exclusion of testimony of explanation, if error, is harmless error, since the evidence of such witness or witnesses would be merely cumulative of the testimony of the complaining party, and which testimony the verdict of the jury shows the jury

accepted. *Gray v. General Fin. Corp.*, 108 Ga. App. 586, 134 S.E.2d 58 (1963) (see O.C.G.A. § 24-4-22).

Cited in *Western & A.R.R. v. Morrison*, 102 Ga. 319, 29 S.E. 104, 66 Am. St. R. 173, 4 L.R.A. 84 (1897); *Adkins v. Flagg*, 147 Ga. 136, 93 S.E. 92 (1917); *Georgia Ry. & Power Co. v. Shaw*, 40 Ga. App. 341, 149 S.E. 657 (1929); *Pitts v. Temple Banking Co.*, 169 Ga. 226, 150 S.E. 89 (1929); *Barfield v. State*, 41 Ga. App. 476, 153 S.E. 433 (1930); *Atlantic C.L.R.R. v. Spearman*, 42 Ga. App. 536, 156 S.E. 824 (1931); *Colonial Stages S., Inc. v. Joel*, 50 Ga. App. 209, 177 S.E. 525 (1934); *Hayes v. Grantham*, 58 Ga. App. 859, 200 S.E. 517 (1938); *Laney v. Barr*, 61 Ga. App. 145, 6 S.E.2d 99 (1939); *Minter v. Kent*, 62 Ga. App. 265, 8 S.E.2d 109 (1940); *Golden v. State*, 63 Ga. App. 764, 12 S.E.2d 107 (1940); *McCallie v. McCallie*, 192 Ga. 699, 16 S.E.2d 562 (1941); *Lasseter v. Green*, 202 Ga. 148, 42 S.E.2d 480 (1947); *Lane v. Varner*, 89 Ga. App. 47, 78 S.E.2d 528 (1953); *Pittsburgh-Erie Saw Corp. v. Southern Saw Serv., Inc.*, 136 F. Supp. 96 (N.D. Ga. 1955); *Atlantic Coast Line R.R. v. Sapp*, 248 F.2d 889 (5th Cir. 1957); *Styles v. Dennard*, 97 Ga. App. 635, 104 S.E.2d 258 (1958); *Malcom v. Sudderth*, 98 Ga. App. 674, 106 S.E.2d 367 (1958); *Johnson v. Johnson*, 218 Ga. 28, 126 S.E.2d 229 (1962); *Phillips v. Reece*, 106 Ga. App. 779, 128 S.E.2d 370 (1962); *Wallace v. Willis*, 111 Ga. App. 576, 142 S.E.2d 383 (1965); *Singuefield v. General Oglethorpe Hotel Co.*, 113 Ga. App. 326, 148 S.E.2d 92 (1966); *GMAC v. Bearden*, 114 Ga. App. 392, 151 S.E.2d 517 (1966); *James v. State*, 223 Ga. 677, 157 S.E.2d 471 (1967); *Johnson v. Rooks*, 116 Ga. App. 394, 157 S.E.2d 527 (1967); *Richmond County Hosp. Auth. v. Haynes*, 121 Ga. App. 537, 174 S.E.2d 364 (1970); *Seaboard C.L.R.R. v. Harris*, 124 Ga. App. 126, 182 S.E.2d 915 (1971); *City of Barnesville v. Powell*, 124 Ga. App. 132, 183 S.E.2d 55 (1971); *Old Republic Life Ins. Co. v. Banks*, 125 Ga. App. 265, 187 S.E.2d 333 (1972); *Zurich Ins. Co. v. Robinson*, 127 Ga. App. 113, 192 S.E.2d 533 (1972); *Central Ga. Elec. Membership Corp. v. Drake*, 128 Ga. App. 560, 197 S.E.2d 389 (1973); *Isom v. Schettino*, 129 Ga. App. 73, 199 S.E.2d 89 (1973); *M & M Mars v. Jones*, 129 Ga. App. 389, 199 S.E.2d 617 (1973); *Brown Transp. Co. v. Parker*, 129 Ga. App. 737, 201 S.E.2d 17 (1973); *Willingham v. State*, 131 Ga. App.

851, 207 S.E.2d 249 (1974); Consolidated Eng'g Co. v. U.I.R. Contractors, 136 Ga. App. 923, 222 S.E.2d 692 (1975); Speagle v. Nationwide Mut. Fire Ins. Co., 138 Ga. App. 384, 226 S.E.2d 459 (1976); Jernigan v. Carmichael, 145 Ga. App. 560, 244 S.E.2d 92 (1978); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800 (1978); Delk v. Sellers, 149 Ga. App. 439, 254 S.E.2d 446 (1979); Dehler v. Setliff, 153 Ga. App. 796, 266 S.E.2d 516 (1980); Wall v. Citizens & S. Bank, 247 Ga. 216, 274 S.E.2d 486 (1981); Blackman v. State, 158 Ga. App. 463, 280 S.E.2d 872 (1981); Plaza Pontiac, Inc. v. Shaw, 158 Ga. App. 799, 282 S.E.2d 383 (1981); Hines v. Good Housekeeping Shop, 161 Ga. App. 318, 291 S.E.2d 238 (1982); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533 (1982); Reliance Ins. Co. v. Bridges, 168 Ga. App. 874, 311 S.E.2d 193 (1983); Jahncke Serv., Inc. v. DOT, 172 Ga. App. 215, 322 S.E.2d 505 (1984); Hankinson v. Rackley, 177 Ga. App. 734, 341 S.E.2d 231 (1986); Meacham v. Barber, 183 Ga. App. 533, 359 S.E.2d 424 (1987); Glass v. Carnes, 260 Ga. 627, 398 S.E.2d 7 (1990); Central of Ga. R.R. v. Lightsey, 198 Ga. App. 59, 400 S.E.2d 652 (1990); Bakery Servs., Inc. v. Thornton Chevrolet, Inc., 224 Ga. App. 31, 479 S.E.2d 363 (1996); Harris v. State, 269 Ga. 731, 505 S.E.2d 467 (1998); Cavin v. Brown, 246 Ga. App. 40, 538 S.E.2d 802 (2000); Ford v. Caffrey, 293 Ga. App. 269, 666 S.E.2d 623 (2008); Angus v. State, 301 Ga. App. 92, 687 S.E.2d 142 (2009).

Illustrations

When husband of plaintiff was in court, summoned there by the plaintiff, and it appeared that he knew a great deal about the infirmities of his wife before the crash which was the subject of the suit, and about her condition after such collision, there was sufficient evidence to authorize a charge setting forth the principles of law set forth in this statute. Price v. Whitley Constr. Co., 91 Ga. App. 257, 85 S.E.2d 528 (1954) (see O.C.G.A. § 24-4-22).

Since appellant father had knowledge of his own financial situation and of the needs of his son, who was living with him at that time, his failure to produce evidence of such to refute or amplify the appellee's showing, raised a rebuttable presumption that the appellee's showing was accurate. Ritchea v.

Ritchea, 242 Ga. 524, 250 S.E.2d 435 (1978).

When eyewitness to homicide, and to the vital incidents and circumstances leading up thereto, was present in court, and the plaintiff nevertheless relied entirely upon evidence of a weaker and inferior nature, consisting of secondary evidence in the form of testimony as to the declarations made by the defendant, and which were not altogether certain or clear as to their proper import, the court was altogether justified in giving in charge the principle of law set forth by this statute. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1929) (see O.C.G.A. § 24-4-22).

Written offer. — When plaintiff failed to introduce in evidence written offer in plaintiff's possession to buy defendant's property, but instead relied on oral testimony to prove such offer, the court erred in refusing defendant's instruction on drawing adverse inference on party's omission to produce evidence within the defendant's reach to repel charge against the defendant. Steinmetz v. Draper-Owens Co., 71 Ga. App. 814, 32 S.E.2d 417 (1944).

Destruction of driver's log book raised a presumption against truck company-employer that driver was compelled to drive with insufficient rest. J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 427 S.E.2d 499 (1992).

Witnesses listed on indictment. — When the state called as witnesses seven of the 11 persons whose names appeared on the indictment, and there was nothing in the record which disclosed that the other four witnessed the homicide or that those witnesses were present at the trial or even accessible to the state, no presumption unfavorable to the state would arise from a failure to introduce those individuals as witnesses. Lucear v. State, 221 Ga. 572, 146 S.E.2d 316 (1965).

Inability to question defense witnesses precludes judgment. — In a negligence action, the court erred in granting summary judgment before the plaintiff was able to question two key defense witnesses who avoided plaintiff's discovery attempts, but who filed affidavits in support of the defendant's motion. This judgment deprived the plaintiff of an opportunity to develop proof which may have well given rise to triable issues of fact, and also overlooked the rule

Illustrations (Cont'd)

that, when a party fails to produce evidence, the charge or claim against the party is presumed to be well founded. *Shipley v. Handicaps Mobility Sys.*, 222 Ga. App. 101, 473 S.E.2d 533 (1996).

In petition for custody, former husband's evidence charging the wife with misconduct and illicit relations with a named individual did not require the wife to procure from such individual a statement that the charge was not true. *Waller v. Waller*, 202 Ga. 535, 43 S.E.2d 535 (1947).

In a products liability action, because defendant manufacturer failed to produce evidence as required under the notice to produce, it was not improper to allow the jury to make an adverse inference from the defendant's apparent initial attempt to hide evidence or avoid discovery. *Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 461 S.E.2d 877 (1995), *aff'd*, 276 Ga. 226, 476 S.E.2d 565 (1996).

In a medical malpractice action, the court did not err in refusing to instruct the jury with regard to spoliation of evidence by the defendant physician since it was undisputed that the physician's chart was missing vital signs data for the 15-minute period during which the physician was attempting to provide the plaintiff's decedent with oxygen and that a monitor recorded this information, but the plaintiff did not point to any evidence which suggested what might have been proven with the missing data and, when questioned at trial, the plaintiff's medical expert acknowledged that when the expert reviewed the case and developed an opinion, the expert did not have any problem with the defendant's charting. *Johnson v. Riverdale Anesthesia Assocs., P.C.*, 249 Ga. App. 152, 547 S.E.2d 347 (2001), *aff'd*, 275 Ga. 240, 563 S.E.2d 431, 2002 Ga. LEXIS 383 (2002).

In a Dram Shop Act suit, given proof of spoliation under O.C.G.A. § 24-2-22, the trial court erred in granting summary judgment to an injured party's guardian as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of the tavern's intoxicated patron's would soon be driving; hence, a rebuttable presumption arose

against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. *Baxley v. Hakiel Indus.*, 282 Ga. 312, 647 S.E.2d 29 (2007).

Workers' compensation. — When an employer in a workers' compensation action offers no evidence, and testimony of the employee further shows that the employer's doctors examined the employee and were fully conversant with the employee's physical condition, the presumption arises that if the employer had produced the doctors as witnesses, the doctors' testimony would have corroborated that of the employee. *GMC v. Craig*, 91 Ga. App. 239, 85 S.E.2d 441 (1954).

When the defendant offered no testimony in defendant's own behalf in a worker's compensation case and failed to produce defendant's employment records although the plaintiff had issued a subpoena in an effort to obtain those records, a presumption adverse to the defendant is authorized. *Hearing v. Johnson*, 105 Ga. App. 408, 124 S.E.2d 655 (1962).

Material witness in slip and fall case. — In a slip and fall case, after the defendant submitted an affidavit stating the store policy on sweeping, but did not submit affidavits from the employees who actually carried out the purported inspections and sweeping on the date in question, O.C.G.A. § 24-4-22 allows an inference to be drawn that the employees' testimony would show that the employees did have actual or constructive knowledge of the hazard but negligently refused to remove the hazard. *Straughter v. J.H. Harvey Co.*, 232 Ga. App. 29, 500 S.E.2d 353 (1998).

Recording over videotape justified sanction. — In a premises liability case brought by a customer against a retailer, the trial court did not exceed the court's authority in excluding testimony about a videotape sought to be admitted by the retailer that would have purportedly contradicted the customer's and the customer's parent's recollections of what had been recorded with regard to the customer being carjacked and shot in the retailer's parking lot as the retailer was on notice, or should have been aware, that the customer was contemplating litigation based on correspondence to the retailer. The retailer knew of the importance

of the tape, which depicted the robbery; failed to follow the retailer's own policy as to retaining tapes for seven years; and the trial court was within the court's discretion to have been "disturbed" that the retailer destroyed the tape by having other recordings made on top of the recording of the incident. *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 659 S.E.2d 905 (2008).

E-mail equally available to both parties. — Permittee alleged the Environmental Protection Division of the Georgia Department of Natural Resources (EPD) violated O.C.G.A. § 24-4-22 by intentionally destroying email correspondence between the permittee and EPD which was favorable to the former. As the permittee was equally in a position to produce the evidence since the alleged email exchange took place between the permittee and EPD, it was not prejudiced as a result of the alleged destruction of the evidence. *Agri-Cycle LLC v. Couch*, 284 Ga. 90,

663 S.E.2d 175 (2008).

Failure to report elevator accident. — Trial court erred in granting a directed verdict to a landlord in tenants' claims that the tenants were injured in a malfunctioning elevator. The landlord failed to report the incident and inspect the elevator as required by O.C.G.A. § 8-2-106, giving rise to the spoliation presumption under O.C.G.A. § 24-4-22 that the evidence would have favored the tenants. *Beach v. B.F. Saul Prop. Co.*, No. A09A1770, 2010 Ga. App. LEXIS 347 (Mar. 30, 2010).

Charging this O.C.G.A. § 24-4-22 authorized in the following cases. — See *Fountain v. Fuller E. Callaway Co.*, 144 Ga. 550, 87 S.E. 651 (1916); *Cocroft v. Cocroft*, 158 Ga. 714, 124 S.E. 346 (1924); *Layfield v. O'Neill*, 37 Ga. App. 265, 139 S.E. 924 (1927); *Murray v. Fitzgerald Convenient Ctrs., Inc.*, 239 Ga. App. 799, 521 S.E.2d 915 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 259 et seq.

Am. Jur. Proof of Facts. — Intentional Spoliation of Evidence, 18 POF3d 515.

C.J.S. — 31A C.J.S., Evidence, § 239.

ALR. — Validity of statute making concealment of or failure to produce books or papers presumptive evidence, 4 ALR 471.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 ALR 1139; 86 ALR 179; 162 ALR 495.

Adverse inference from failure of party to produce available witness or evidence, as affirmative or substantive proof, 70 ALR 1326.

Presumption of death as evidence, 115 ALR 404.

Presumption or inference from party's failure to produce witnesses within his control, as affected by his introduction of some evidence on the matter in question, 135 ALR 1375.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 ALR 1188.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person, 175 ALR 234.

Relationship between party and witness as

giving rise to or affecting presumption or inference from failure to produce or examine witness, 5 ALR2d 893.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 ALR3d 1450.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony, 34 ALR3d 775.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 ALR4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases, 77 ALR4th 463.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 ALR4th 571.

Adverse presumption or inference based

on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 ALR4th 616.

Adverse presumption or inference based on party's failure to produce or examine spouse—modern cases, 79 ALR4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 ALR4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 ALR4th 337.

Adverse presumption or inference based

on state's failure to produce or examine law enforcement personnel — modern cases, 81 ALR4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 ALR4th 939.

Effect of spoliation of evidence in tort actions other than product liability actions, 121 ALR5th 157.

Electronic spoliation of evidence, 3 ALR6th 13.

24-4-23. Presumption from failure to answer business letter.

In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from another to answer within a reasonable time. Otherwise he is presumed to admit the propriety of the acts mentioned in the letter of his correspondent and to adopt them. (Civil Code 1895, § 5155; Civil Code 1910, § 5741; Code 1933, § 38-120.)

History of Code section. — This Code section is derived from the decisions in *McLendon v. Wilson, Callaway & Co.*, 52 Ga.

42 (1874) and *Bray & Bro. v. Gunn*, 53 Ga. 144 (1874).

JUDICIAL DECISIONS

Constitutionality. — For a statutory presumption to pass constitutional muster, it must be shown with “substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” *Benham v. Edwards*, 501 F. Supp. 1050 (N.D. Ga. 1980), *aff'd* in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)).

Principle of former Code 1933, § 38-120 (see O.C.G.A. § 24-4-23) was the same as that expressed more generally in former Code 1933, § 38-409 (see O.C.G.A. § 24-3-36): “acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission.” *Metropolitan Life Ins. Co. v. Shalloway*, 151 F.2d 548 (5th Cir. 1945).

O.C.G.A. § 24-4-23 is applicable only when two parties have carried on mutual

correspondence in reference to a particular matter, and one of the parties has written a letter to the other making statements concerning a subject of which the latter has knowledge, and which the latter would naturally deny if true. Defendants may not rely upon their unilateral actions to establish a mutual correspondence. *Smith v. Freeport Kaolin Co.*, 687 F. Supp. 1550 (M.D. Ga. 1988).

Question is whether the evidence shows a due course of business as to warrant the application of O.C.G.A. § 24-4-23; the phrase “due course of business” has been construed to apply to those cases where two parties have carried on a mutual correspondence in reference to a particular matter, and one of the parties has written a letter concerning a matter which the other would naturally deny if not true. *Godwin v. Caldwell*, 231 Ga. App. 523, 500 S.E.2d 49 (1998).

Rebuttable presumption of fact. — Presumption of this statute is not an irrebuttable presumption of law, but one of

fact, and the failure to reply is subject to explanation. *Metropolitan Life Ins. Co. v. Shalloway*, 151 F.2d 548 (5th Cir. 1945); *Whitaker v. Paden*, 78 Ga. App. 145, 50 S.E.2d 774 (1948); *Georgia Health Care, Inc. v. Loeb*, 151 Ga. App. 350, 259 S.E.2d 734 (1979) (see O.C.G.A. § 24-4-23).

Presumption arising from a failure to answer a letter is not a presumption of law, but one of fact, and subject to explanation. *Godwin v. Caldwell*, 231 Ga. App. 523, 500 S.E.2d 49 (1998).

Excuses for not answering. — Fact that plaintiff failed to answer a letter written to plaintiff by agent of an insurance company being in evidence, it was competent for plaintiff to explain why plaintiff did not answer, though a part of the explanation was that plaintiff's counsel advised plaintiff not to answer. *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S.E. 18 (1890).

An exchange of several letters is not always necessary to establish mutual correspondence; thus, plaintiff contractor's letter which mentioned outstanding invoices and which followed two letters from defendant concerning problems with contractor's product and requesting service was sent in the ordinary course of business and a charge under O.C.G.A. § 24-4-23 was warranted. *Crotts Enters., Inc. v. John Payne Co.*, 219 Ga. App. 173, 464 S.E.2d 844 (1995).

Silence regarding terms of agreement. — Physician had a duty and obligation to respond to limitations on the physician's privileges set forth in an agreement with a hospital, and where the physician silently exercised the privileges for several years, the physician waived the physician's right to insist on compliance with other procedural requirements pertaining to the physician's termination. *St. Mary's Hosp. v. Cohen*, 216 Ga. App. 761, 456 S.E.2d 79 (1995).

Construction of lease agreement. — When a lessee informs the lessor, by means of three annual letters, of the construction the lessee is placing on a provision of the lease agreement, and receives no reply from the lessor, the lessor is precluded from relying on a different interpretation, since it is incumbent upon the lessor to advise the lessee that the lessor disagrees with the lessee's construction of the agreement. *Wiggins v. Engelhard Minerals & Chems. Corp.*, 328 F. Supp. 33 (M.D. Ga. 1970), *aff'd*, 443 F.2d 1358 (5th Cir. 1971).

Letter memorializing a conversation, to which recipient failed to respond, was admissible as an admission by silence. — Trial court did not err in allowing an attorney to read a letter memorializing a conversation between him and a decedent because the out-of-court statement of the decedent referenced in the letter was admissible as an admission by silence of the executor when the attorney mailed a package containing closing documents to the executor, including a receipt the decedent had executed, and the executor mailed a check to the attorney based on the erroneous assumption that the executor needed to do so in order to pay off the advance that had been received and was referenced in the receipt; the attorney mailed the letter to the executor, returned the check, and set forth the conversation with the decedent concerning the intent behind the receipt, and the executor's failure to respond could be construed as an acquiescence to the construction of the receipt set forth in the letter. *Jenkins v. Jenkins*, 300 Ga. App. 703, 686 S.E.2d 324 (2009).

Instructions. — It was not error for the court to fail to give in charge to the jury the provisions of this statute, there having been no timely written request of such instructions. *White Crown Fruit Jar Co. v. Cox Co.*, 19 Ga. App. 195, 91 S.E. 245 (1917) (see O.C.G.A. § 24-4-23).

Trial court properly charged a jury regarding the O.C.G.A. § 24-3-36 evidentiary presumption arising from a limited liability company's (LLC's) agent's failure to reply to a corporation's invoices because the LLC admitted receiving some of the corporation's goods and services, only disputing the amount due, and the failure to respond to an invoice was not a declaration against the LLC's interest pursuant to O.C.G.A. § 10-6-64; in addition, the charge was supported by O.C.G.A. § 24-4-23. *Forrest Cambridge Apts., LLC v. Redi-Floors, Inc.*, 295 Ga. App. 840, 673 S.E.2d 318 (2009).

Cited in *Cincinnati Glass & China Co. v. Stephens*, 3 Ga. App. 766, 60 S.E. 360 (1908); *Capital City Brick Co. v. Atlanta Ice & Coal Co.*, 5 Ga. App. 436, 63 S.E. 562 (1909); *Improved Fertilizer Co. v. Swift & Co.*, 15 Ga. App. 601, 84 S.E. 132 (1914); *Fireman's Fund Ins. Co. v. Hardin*, 40 Ga. App. 275, 149 S.E. 318 (1929); *Butler Bros. v. Goldstein*, 49 Ga. App. 109, 174 S.E. 202

(1934); *Colonial Oil Co. v. United States Guarantee Co.*, 56 F. Supp. 545 (S.D. Ga. 1944); *Western Union Tel. Co. v. Nix*, 73 Ga. App. 184, 36 S.E.2d 111 (1945); *Luckie v. Max Wright, Inc.*, 90 Ga. App. 243, 82 S.E.2d 660 (1954); *Bregman v. Rosenthal*, 212 Ga. 95, 90 S.E.2d 561 (1955); *Ross & Ross Auctioneers v. Testa*, 96 Ga. App. 821, 101 S.E.2d 767 (1958); *Goldstein v. Drexler*, 102 Ga. App. 90, 115 S.E.2d 744 (1960); *Sinclair Ref. Co. v. Consolidated Van & Storage Cos.*, 192 F. Supp. 87 (N.D. Ga. 1960); *Snellgrove v. Plywood Supply Co.*, 108 Ga. App. 87, 131 S.E.2d 839 (1963); *Progressive Mut. Ins. Co. v. Burrell Motors, Inc.*, 112 Ga. App. 88, 143

S.E.2d 757 (1965); *Hames v. Shaver*, 229 Ga. 412, 191 S.E.2d 861 (1972); *Batson-Cook Co. v. Loden & Co.*, 129 Ga. App. 376, 199 S.E.2d 591 (1973); *Merry v. Georgia Big Boy Mgt., Inc.*, 135 Ga. App. 707, 218 S.E.2d 694 (1975); *Whitlock v. PKW Supply Co.*, 154 Ga. App. 573, 269 S.E.2d 36 (1980); *Pollard v. Faris*, 159 Ga. App. 363, 283 S.E.2d 338 (1981); *Lyons Mfg. Co. v. Cedarbaum*, 174 Ga. App. 218, 329 S.E.2d 559 (1985); *Bruce Tile Co. v. Copelan*, 185 Ga. App. 469, 364 S.E.2d 603 (1988); *Bakery Servs., Inc. v. Thornton Chevrolet, Inc.*, 224 Ga. App. 31, 479 S.E.2d 363 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 815.

ALR. — Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 8 ALR 1163; 34 ALR 560; 55 ALR 460.

Presumption as to delivery of letter from

mailing other than at post office or in street letter box, 63 ALR 931.

Character and sufficiency of evidence to show that letter was mailed, 86 ALR 541.

Rebuttal of presumption of receipt of letter properly mailed and addressed, 91 ALR 161.

24-4-23.1. Presumption of payment of check.

(a) As used in this Code section:

(1) “Bank” means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

(2) “Check” means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as “share draft” or “negotiable order of withdrawal.”

(b) In any dispute concerning payment by means of a check, a copy of the check produced in accordance with Code Section 24-5-26, together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a copy thereof produced in the same manner, creates a presumption that the check has been paid. (Code 1981, § 24-4-23.1, enacted by Ga. L. 1996, p. 1306, § 16; Ga. L. 2010, p. 878, § 24/HB 1387.)

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, substituted a period for “; and” at the end of paragraph (a)(1).

24-4-23.2. Occupancy of railroad right of way.

In any action to establish a right, title, or interest in or to real property that is a part of a railroad right of way, including a right of ingress or egress, where such action is based upon occupancy of the railroad right of way by a person or entity other than the railroad corporation or railroad company, there shall be a presumption that any such occupancy of the railroad right of way is with the permission of the railroad corporation or railroad company. Such presumption may be rebutted. (Code 1981, § 24-4-23.2, enacted by Ga. L. 2008, p. 210, § 2/HB 1283.)

Effective date. — This Code section became effective July 1, 2008.

Editor’s notes. — Ga. L. 2008, p. 210, § 1, not codified by the General Assembly, provides that: “(a) The General Assembly finds that the railroads and their rights of way in Georgia:

“(1) Are essential to the continued viability of this state;

“(2) Are valuable resources which must be preserved and protected;

“(3) Are essential for the economic growth and development of this state;

“(4) Provide a necessary means of transporting raw materials, agricultural products, other finished products, and consumer goods and are also essential for the safe passage of hazardous materials;

“(5) Relieve congestion on the highways and keep dangerous products and materials off our highways;

“(6) Are vital for national defense and national security; and

“(7) Provide the most energy efficient means of transportation through this state, thus minimizing air pollution and fuel consumption.

“(b) The purpose of this Act is to protect the rights of way of railroads from loss by claims of adverse possession or other claims by prescription and to recognize the dimensions of these rights of way as they were identified and defined nearly 100 years ago.”

24-4-24. Estoppels defined; enumeration generally.

(a) Conclusive presumptions of law are termed estoppels; averments to the contrary of such presumptions shall not be allowed. Estoppels are not generally favored.

(b) Estoppels include presumptions in favor of:

(1) A record or judgment unreversed;

(2) The proper conduct of courts and judicial officers acting within their legitimate spheres;

(3) The proper conduct of other officers of the law after the lapse of time has rendered it dangerous to open the investigation of their acts in regard to mere formalities of the law;

(4) Ancient deeds and other instruments more than 30 years old, when they come from proper custody and possession has been held in accordance with them;

(5) Recitals in deeds, except payment of purchase money, as against a grantor, sui juris, acting in his own right, and his privies in estate, blood, and in law;

(6) A landlord's title as against his tenant in possession;

(7) Solemn admissions made in judicio;

(8) Admissions upon which other parties have acted, either to their own injury or to the benefit of the persons making the admissions.

Estoppels also include all similar cases where it would be more unjust and productive of evil to hear the truth than to forbear investigation. (Orig. Code 1863, § 3676; Code 1868, § 3700; Code 1873, § 3753; Code 1882, § 3753; Civil Code 1895, § 5150; Civil Code 1910, § 5736; Code 1933, § 38-114.)

Law reviews. — For article on the effect of judicial estoppel on *nolo contendere* plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ESTOPPEL BY JUDGMENT

ESTOPPEL BY DEED

EQUITABLE ESTOPPEL

1. SOLEMN ADMISSIONS IN JUDICIO

2. ESTOPPEL BY OTHER CONDUCT

General Consideration

An estoppel is a preclusion in law, which prevents a person from alleging or denying a fact, in consequence of the person's own previous act, allegation, or denial of a contrary tenor. *Davis v. Collier & Beers*, 13 Ga. 485 (1853).

Presumptions of law are sometimes conclusive, and an averment to the contrary will not be allowed. These are termed estoppels. *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924).

Difference between waiver and estoppel is slight but there is a difference. *Boston Ins. Co. v. Barnes*, 120 Ga. App. 585, 171 S.E.2d 626 (1969).

Estoppels rarely resorted to. — Estoppels are never resorted to, except when it would be more unjust and more productive of evil to hear the truth than to forbear the investigation. *Patterson v. Collier*, 75 Ga. 419, 54 Am. R. 472 (1885); *Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co.*, 51 Ga. App. 904, 181 S.E. 310 (1935); *Hollins v. State*, 133 Ga. App. 183, 210 S.E.2d 354 (1974).

Estoppels are not favored. *Wilkinson &*

Wilson v. Thigpen, 71 Ga. 497 (1883); *Corporation of Royal Exch. Assurance v. Franklin*, 158 Ga. 644, 124 S.E. 172, 38 A.L.R. 626 (1924); *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924).

Essential ingredient of estoppel is detriment or prejudice to one who asserts the estoppel. There must be inducement to change one's position for the worse. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

Reliance by invoking party. — In order to create an estoppel as authorized, the evidence must show that the party relying on such estoppel acted on the conduct of the opposite party to the relying party's detriment. *Swift & Co. v. Hall*, 94 Ga. App. 239, 94 S.E.2d 145 (1956); *State Farm Mut. Auto. Ins. Co. v. Penrow*, 142 Ga. App. 463, 236 S.E.2d 275 (1977).

Representation inducing injury. — An estoppel arises when one makes representations to another concerning a matter, about which the other acts to one's injury or to the benefit of the person making the representations. *Gostin v. Scott*, 80 Ga. App. 630, 56 S.E.2d 778 (1949); *Usry v. Hadden*, 87 Ga.

App. 710, 75 S.E.2d 275 (1953); *Walker v. Sutton*, 222 Ga. App. 638, 476 S.E.2d 34 (1996).

Good faith and reasonable diligence. — Since the whole doctrine of estoppel is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise, no equity will arise in that party's favor. *Bachrodt Realty Corp. v. Walker*, 237 Ga. 696, 229 S.E.2d 455 (1976).

Strangers not bound. — Estoppels must be mutual. Strangers can neither take advantage of, nor be bound by an estoppel. Its binding effect is between the immediate parties, their privies in blood, in law and by estate. *Howard v. Perkins*, 229 Ga. 279, 191 S.E.2d 46 (1972).

Legislative act. — Party is not estopped from denying any fact which is recited in a legislative act. *Dougherty v. Bethune*, 7 Ga. 90 (1849); *Thornton v. Lane*, 11 Ga. 459 (1852).

Unconstitutional act. — As between individuals, when no question of the general welfare of society or public policy is involved, the principle of estoppel runs throughout the law. Although an act be unconstitutional and void, it will operate as an estoppel upon the party applying for the estoppel, and procuring the estoppel's passage and accepting the estoppel's benefits. *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944).

Statute of frauds. — Summary judgment in favor of a psychiatrist in a consultant's breach of an oral contract claim was proper as the oral assumption by the psychiatrist of the debts of the medical practice that the psychiatrist purchased, including the consultant's fees, was barred by the Statute of Frauds, O.C.G.A. § 13-5-30(2), because it was not in writing; further, as it was conceded that the agreement was secondary in nature and not an original undertaking, claims that it was established pursuant to O.C.G.A. § 24-4-24 lacked merit. *Grumet v. Bunt*, 279 Ga. App. 728, 632 S.E.2d 486 (2006).

Waiver or estoppel defense is not available in a case involving only violations of Georgia and/or federal securities laws. *Jones v. Miles*, 656 F.2d 103 (5th Cir. 1981).

Cited in *Watkins Co. v. Rivers*, 37 Ga. App. 559, 140 S.E. 770 (1927); *Hardin v. Douglas*, 168 Ga. 213, 147 S.E. 506 (1929); *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931); *Dunlop Tire & Rubber Co. v. White*, 45 Ga. App. 268, 164 S.E. 414 (1932); *McDay v. Metropolitan Life Ins. Co.*, 51 Ga. App. 791, 181 S.E. 871 (1935); *Pickett v. Bank of Ellijay*, 182 Ga. 540, 186 S.E. 426 (1936); *Field v. Manly*, 185 Ga. 464, 195 S.E. 406 (1938); *Kinney v. Mayor of Milledgeville*, 185 Ga. 866, 196 S.E. 467 (1938); *Mitchell v. Hunt*, 185 Ga. 835, 196 S.E. 711 (1938); *Thomas v. Hudson*, 190 Ga. 622, 10 S.E.2d 396 (1940); *Anderson v. Black*, 191 Ga. 627, 13 S.E.2d 650 (1941); *Grice v. Grice*, 197 Ga. 686, 30 S.E.2d 183 (1944); *McCommons v. Reid*, 201 Ga. 500, 40 S.E.2d 73 (1946); *Jackson v. Moultrie Prod. Credit Ass'n.*, 76 Ga. App. 768, 47 S.E.2d 127 (1948); *Jones v. Major*, 80 Ga. App. 223, 55 S.E.2d 846 (1949); *Walden v. Camp*, 206 Ga. 593, 58 S.E.2d 175 (1950); *McEntyre v. Burns*, 81 Ga. App. 239, 58 S.E.2d 442 (1950); *Jackson v. Sapp*, 210 Ga. 134, 78 S.E.2d 23 (1953); *Owen v. Piel Paint Co.*, 100 Ga. App. 101, 110 S.E.2d 437 (1959); *Lee v. Boyer*, 217 Ga. 27, 120 S.E.2d 757 (1961); *Gulf Life Ins. Co. v. Belch*, 108 Ga. App. 480, 133 S.E.2d 622 (1963); *Gay v. Balkcom*, 219 Ga. 554, 134 S.E.2d 600 (1964); *Weyandt v. Ballard*, 110 Ga. App. 362, 138 S.E.2d 591 (1964); *Gruber v. Fulton County*, 111 Ga. App. 71, 140 S.E.2d 552 (1965); *Chastain v. Consolidated Credit Corp.*, 113 Ga. App. 225, 147 S.E.2d 807 (1966); *Holland v. Calhoun*, 114 Ga. App. 51, 150 S.E.2d 155 (1966); *Moorman v. Brumby*, 223 Ga. 39, 153 S.E.2d 444 (1967); *Travelodge Corp. v. Carwen Realty Co.*, 223 Ga. 821, 158 S.E.2d 378 (1967); *Bloodworth v. Bloodworth*, 226 Ga. 898, 178 S.E.2d 198 (1970); *Schoolcraft v. DeKalb County*, 126 Ga. App. 101, 189 S.E.2d 915 (1972); *Touchton v. Stewart*, 229 Ga. 303, 190 S.E.2d 912 (1972); *Smith v. Byess*, 127 Ga. App. 39, 192 S.E.2d 552 (1972); *First Nat'l Bank & Trust Co. v. Kunes*, 128 Ga. App. 565, 197 S.E.2d 446 (1973); *Tipton v. Harden*, 128 Ga. App. 517, 197 S.E.2d 746 (1973); *Brand v. Wofford*, 230 Ga. 750, 199 S.E.2d 231 (1973); *Hodges v. Youmans*, 129 Ga. App. 481, 200 S.E.2d 157 (1973); *Smith v. Varner*, 130 Ga. App. 484, 203 S.E.2d 717 (1973); *Smith v. E.B. Burney Constr. Co.*, 231 Ga. 772, 204 S.E.2d 93 (1974); *Gilbert v.*

General Consideration (Cont'd)

Reynolds, 233 Ga. 488, 212 S.E.2d 332 (1975); City of Macon v. Powell, 133 Ga. App. 907, 213 S.E.2d 63 (1975); Moya v. Hopper, 234 Ga. 230, 214 S.E.2d 920 (1975); Perimeter Dev. Corp. v. Haynes, 234 Ga. 437, 216 S.E.2d 581 (1975); Coleman v. Argonaut Ins. Co., 135 Ga. App. 182, 217 S.E.2d 439 (1975); Lamb v. Bryan, 236 Ga. 237, 223 S.E.2d 122 (1976); Herring v. Herring, 138 Ga. App. 145, 225 S.E.2d 697 (1976); Summerlot v. Crain-Daly Volkswagen, Inc., 138 Ga. App. 839, 227 S.E.2d 463 (1976); Pannell v. Moore, 237 Ga. 761, 229 S.E.2d 603 (1976); Joyner v. Redmond, 141 Ga. App. 121, 232 S.E.2d 637 (1977); Moody v. Mendenhall, 238 Ga. 689, 234 S.E.2d 905 (1977); Wilson v. State, 145 Ga. App. 33, 243 S.E.2d 304 (1978); State v. McDonald, 242 Ga. 487, 249 S.E.2d 212 (1978); Hercules, Inc. v. Adams, 150 Ga. App. 223, 257 S.E.2d 289 (1979); Citizens & S. Realty Investors v. L.G. Balfour Co., 152 Ga. App. 852, 264 S.E.2d 304 (1980); Tab Sales, Inc. v. D & D Distribs., Inc., 153 Ga. App. 779, 266 S.E.2d 558 (1980); Finley v. Sutton, 245 Ga. 813, 267 S.E.2d 252 (1980); Peoples Bank v. Austin, 159 Ga. App. 223, 283 S.E.2d 81 (1981); Chance v. Hanson, 160 Ga. App. 329, 287 S.E.2d 57 (1981); Georgia Power Co. v. Foster Wheeler Corp., 161 Ga. App. 641, 288 S.E.2d 720 (1982); Keen v. State, 164 Ga. App. 81, 296 S.E.2d 91 (1982); Lakeshore Marine, Inc. v. Hartford Accident & Indem. Co., 164 Ga. App. 417, 296 S.E.2d 418 (1982); Ritter v. Prudential Ins. Co. of Am., 538 F. Supp. 398 (N.D. Ga. 1982); Panter v. Miller, 165 Ga. App. 266, 299 S.E.2d 185 (1983); Stewart v. State, 165 Ga. App. 428, 300 S.E.2d 331 (1983); Spell v. Bible Baptist Church, Inc., 166 Ga. App. 22, 303 S.E.2d 156 (1983); Fuller v. State, 169 Ga. App. 468, 313 S.E.2d 745 (1984); Flanders v. Georgia Farm Bureau Mut. Ins. Co., 171 Ga. App. 188, 318 S.E.2d 794 (1984); Petkas v. Grizzard, 253 Ga. 407, 321 S.E.2d 323 (1984); Tyson v. State, 184 Ga. App. 309, 361 S.E.2d 386 (1987); Dawson v. State, 186 Ga. App. 718, 368 S.E.2d 367 (1988); Giddens Constr. Co. v. Fickling & Walker Co., 188 Ga. App. 558, 373 S.E.2d 792 (1988); Peavy v. McInvale, 192 Ga. App. 155, 384 S.E.2d 246 (1989); Bales v. Simmons, 201 Ga. App. 605, 411 S.E.2d 576 (1991); Nash v. State, 233 Ga.

App. 75, 503 S.E.2d 23 (1998); Dixon Dairy Farms, Inc. v. Conagra Feed Co., 245 Ga. App. 836, 538 S.E.2d 897 (2000); Hulcher Servs. v. R.J. Corman R.R., 247 Ga. App. 486, 543 S.E.2d 461 (2000); Bell v. Bell, 247 Ga. App. 462, 543 S.E.2d 455 (2000); Smith v. Direct Media Co., 247 Ga. App. 771, 544 S.E.2d 762 (2001).

Estoppel by Judgment

Scope of estoppel. — Doctrine of estoppel by judgment is applied only as to such matters within the scope of the pleadings in the previous litigation as necessarily had to be adjudicated in order for the previous judgment or decree to be rendered, or as to such matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. *Slaughter v. Slaughter*, 190 Ga. 229, 9 S.E.2d 70 (1940); *Mimms v. Sisk Decorating Co.*, 156 Ga. App. 572, 275 S.E.2d 148 (1980).

An estoppel by judgment occurs only as to such matters as were necessarily or actually adjudicated in the former litigation. *Greyhound Lines v. Cobb County*, 523 F. Supp. 422 (N.D. Ga. 1981), *aff'd*, 681 F.2d 1327 (11th Cir. 1982).

Res judicata and estoppel distinguished.

— Under the doctrine of *res judicata*, whenever there has been a judgment by a court of competent jurisdiction in a former litigation between the same parties, based upon the same cause of action as a pending litigation, the litigants are bound to the extent of all matters put in issue or which under the rules of law might have been put in issue by the pleadings in the previous litigation. A somewhat different rule applies in regard to the doctrine of estoppel by judgment since the latter doctrine has reference to previous litigation between the same parties based upon a different cause of action. In the latter case, there is an estoppel by judgment only as to such matters as were necessarily or actually adjudicated in the former litigation; that is to say, there is an estoppel by judgment only as to such matters within the scope of the previous pleadings as necessarily had to be adjudicated in order for the previous judgment to be rendered, or as to such matters, within the scope of those pleadings, as might or might not have been

adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. *Harvey v. Wright*, 80 Ga. App. 232, 55 S.E.2d 835 (1949).

To whom applicable. — Estoppels apply only as between parties and privies to the suit or litigation. *Wilkinson & Wilson v. Thigpen*, 71 Ga. 497 (1883).

Not binding on nonparty. — One who was physically present at a trial, but took no part therein, was not bound by a judgment in a case to which one was not a party. *Calhoun v. Williamson*, 76 Ga. App. 91, 45 S.E.2d 87 (1947).

Validity of conviction and sentence. — There is a presumption in favor of the validity of a conviction and sentence imposed upon the accused and the burden of overcoming that presumption in a habeas corpus proceeding is on the accused. *Cobb v. Dutton*, 222 Ga. 11, 148 S.E.2d 399 (1966); *Dutton v. Parker*, 222 Ga. 532, 150 S.E.2d 833 (1966); *Dutton v. Morris*, 222 Ga. 595, 151 S.E.2d 125 (1966); *Beavers v. Smith*, 227 Ga. 344, 180 S.E.2d 717 (1971); *Smith v. Brown*, 228 Ga. 584, 187 S.E.2d 142 (1972); *Brown v. Holland*, 228 Ga. 628, 187 S.E.2d 246 (1972); *Burton v. Caldwell*, 228 Ga. 795, 187 S.E.2d 900 (1972); *Caldwell v. Beard*, 232 Ga. 701, 208 S.E.2d 564 (1974).

Absence of transcript on appeal. — When the defendant does not request that the transcript of evidence of the trial be sent up on appeal, the verdict and judgment are presumed to be valid. *Hiller v. Culbreth*, 139 Ga. App. 351, 228 S.E.2d 374 (1976).

Criminal defendant's absence during trial. — Defendant's testimony that defendant was not present during defendant's trial but was in the judge's office was not sufficient to overcome the presumption in favor of the conviction as the able counsel representing the defendant may have with defendant's consent or in defendant's presence waived defendant's presence in the courtroom, which the defendant could have done; or the prisoner may have voluntarily absented oneself from the courtroom during the trial, in which case the defendant would not be allowed to take advantage of defendant's own laches. *Dutton v. Morris*, 222 Ga. 595, 151 S.E.2d 125 (1966).

Burden of proof in habeas corpus proceeding. — Presumption can no longer be indulged that since there is a presumption in

favor of the validity of a sentence, especially when based on a plea of guilty, the burden of overcoming this is upon the prisoner. *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971).

Burden of proof. — When a judgment is relied on to establish an estoppel, the burden is on the party relying on the former judgment to prove that the judgment is valid, and that the particular matter in controversy was necessarily or actually determined in the former litigation. *Hunter v. Associated Mtg. Cos.*, 183 Ga. 506, 188 S.E. 700 (1936); *Gormley v. Cleaveland*, 187 Ga. 457, 200 S.E. 793 (1939); *South Am. Managers, Inc. v. Reeves*, 220 Ga. 493, 140 S.E.2d 201 (1965); *Allen v. Smith*, 223 Ga. 265, 154 S.E.2d 605 (1967).

Admissibility of decree. — When a decree is offered in evidence to establish any particular state of facts, or as an adjudication upon the subject matter, such decree is admissible only when accompanied by the entire record of the suit in which the decree was rendered. *Holcombe v. Jones*, 197 Ga. 825, 30 S.E.2d 903 (1944).

Recital in final order. — When the final order upon an appraiser's return recites that notice has been published "as required by law," and the entire record with respect to the year's support is on its face full and complete, the recital must be accepted as true, in the absence of aliunde evidence conclusively showing that it is in fact untrue. *Southern Oldsmobile Co. v. Baker*, 25 Ga. App. 580, 103 S.E. 826 (1920).

Consent decree. — Decree made with the consent and at the instance of a party cannot be set aside by the party by bill of review, unless, by clerical error something has been inserted therein as by consent which had not been consented to. *Murphy v. Mayor of Savannah*, 73 Ga. 263 (1884).

Mandamus order. — Under the doctrine of estoppel by judgment, a mandamus order requiring the defendants to issue to the plaintiff a permit to operate taxicabs, which on review by the Supreme Court was affirmed, is conclusive against the defendants in a subsequent proceeding for contempt. *Settle v. McWhorter*, 203 Ga. 93, 45 S.E.2d 210 (1947).

Workers' compensation. — Doctrines of res judicata and estoppel by judgment are applicable to awards of the State Board of

Estoppel by Judgment (Cont'd)

Workers' Compensation on all questions of fact in matters in which the board has jurisdiction. *Mimms v. Sisk Decorating Co.*, 156 Ga. App. 572, 275 S.E.2d 148 (1980).

Rescission of contract of sale. — When the petition under consideration in the second suit arising from the same occurrence has already been held by the Court of Appeals on a previous appeal to state a cause of action for rescission of a contract of sale of a car based upon the fraud and deceit of the defendant, which judgment was not vacated, reversed, or modified and when the contents of the petition in the second suit are substantially the same as that of the previous action in which the plaintiff was nonsuited, it is error to dismiss the case on the ground that the plaintiff has made inconsistent elections as to the affirmation or repudiation of the contract in issue. *McBurney v. Woodward*, 86 Ga. App. 629, 72 S.E.2d 89 (1952).

Name of firm. — Defendants were estopped from denying the character and name under which the defendants traded and obtained credit after judgment had been rendered against the defendants covering the transaction. *Georgia Ice Co. v. Porter & Meakin*, 70 Ga. 637 (1883).

Regularity of judicial proceedings. — There is a presumption in favor of the regularity and legality of all proceedings in the superior court. *Johnson v. Cleveland*, 131 Ga. App. 560, 206 S.E.2d 704 (1974); *Bennett v. Adel Banking Co.*, 144 Ga. App. 282, 241 S.E.2d 23 (1977); *Key v. State*, 147 Ga. App. 800, 250 S.E.2d 527 (1978).

Judicial officer acting legally. — Presumption of law is that a judicial officer, or court, has acted legally within the officer's proper sphere. *Nashville, C. & St. L. Ry. v. Ham*, 78 Ga. App. 403, 50 S.E.2d 831 (1948).

Presumption of proper conduct of trial judge's duties. — In the absence of any evidence to the contrary, it is presumed that a trial judge's conduct in performing the judge's official duties was proper. *Riggins v. State*, 159 Ga. App. 791, 285 S.E.2d 579 (1981).

Juror excused properly. — In the absence of any evidence in the record as to who actually excused a juror in question and whether the person who excused the juror was one of the two persons authorized to do

so, it is presumed that the trial court and the court's officers performed their duties properly. *Thomas v. State*, 174 Ga. App. 560, 330 S.E.2d 777 (1985).

Judgment supported by facts. — In reviewing judgments of the lower court, the Court of Appeals presumes that such order or judgment is supported by every fact essential to make it valid and binding. *Pichulik v. Simpson*, 123 Ga. App. 604, 181 S.E.2d 925 (1971); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols*, 138 Ga. App. 593, 226 S.E.2d 742 (1976).

Ministerial acts by judicial officer. — There is a presumption in favor of the regularity and legality of all proceedings in the courts, but circumstances attending a purely ministerial act may be investigated, even though the person performing the act is a judicial officer. *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Rebuttable presumption. — Presumption in favor of the regularity of judgments and proper conduct of courts and judicial officers set forth in statute is rebuttable; the ordinary rules of evidence apply in such rebuttal. *Balkcom v. Vickers*, 220 Ga. 345, 138 S.E.2d 868 (1964).

Estoppel by Deed

Estoppel cannot be basis of title to land. — *Davis v. Auerbach*, 78 Ga. App. 575, 51 S.E.2d 527 (1949).

Although O.C.G.A. § 24-4-24 prohibits a grantor from denying recitals contained within the grantor's deed, it is insufficient to establish title. *Yaali, Ltd. v. Barnes & Noble, Inc.*, 269 Ga. 695, 506 S.E.2d 116 (1998).

Parties bound. — Recitals in deeds bind not only the parties thereto, but their privies in estate. *Atlanta Land & Loan Co. v. Haile*, 106 Ga. 498, 32 S.E. 606 (1899); *Wyley Loose Leaf Co. v. Bird*, 159 Ga. 246, 125 S.E. 496 (1924); *Doe v. Newton*, 171 Ga. 418, 156 S.E. 25 (1930); *Williams v. Harris*, 207 Ga. 576, 63 S.E.2d 386 (1951); *Bell v. Studdard*, 220 Ga. 756, 141 S.E.2d 536 (1965).

Administrator bound. — When the grantor filed a sworn bill, alleging that the grantor made an instrument as a deed, and that the instrument was procured by fraud, and sought to have the instrument canceled or reformed, after the grantor's death, the grantor's administrator, who was made a

party in the grantor's stead, was estopped from denying the character of the paper as a deed. *Youngblood v. Youngblood*, 74 Ga. 614 (1885).

Specificity of recital. — In order to create an estoppel, the recital in the deed must be specific, and an estoppel by a recital in a deed will not extend beyond the specific fact contained in the recital. *Toland v. Brewster*, 144 Ga. 236, 86 S.E. 1089 (1915); *Doe v. Newton*, 171 Ga. 418, 156 S.E. 25 (1930).

Conclusiveness of recital as to consideration. — When the statement in a deed as to its consideration is merely by way of recital, the actual consideration of the deed is subject to explanation; but if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it cannot be varied by parol. *Sikes v. Sikes*, 162 Ga. 302, 133 S.E. 239 (1926); *Shapiro v. Steinberg*, 179 Ga. 18, 175 S.E. 1 (1934).

Recital of payment of the purchase-money in a deed or other contract does not estop the maker from denying the fact and proving the contrary. *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945).

Recital of administrator. — Statute will not allow an administrator to dispute the truth of a solemn recital contained in the administrator's deed that the property was exposed for sale and that the highest bid was a stated sum, and that the administrator held the property therefor. The administrator may deny that the administrator has received the proceeds of the sale, but cannot deny the truth of the recital that the property was sold at public outcry for a stated sum. *Gammage v. Perry*, 29 Ga. App. 427, 116 S.E. 126 (1923).

Collection of proceeds of sale by executrix. — An executrix who duly and legally advertises and sells the land of an estate and makes a deed thereto in accordance with the sale cannot avoid liability to the heirs or creditors of the estate by showing that the executrix did not in fact collect the proceeds of the sale. *Carder v. Arundel Mtg. Co.*, 47 Ga. App. 309, 170 S.E. 312 (1933).

Usurious note secured by deed. — One who makes a usurious note and secures the note's payment by executing a deed to realty, the usury not appearing upon the face of the papers is, as against another whom one induces to purchase the note by represent-

ing that it and the deed "are valid and all right" (the purchase being made in good faith and in ignorance of the usury), estopped from setting up the usury in the transaction. *Henry v. McAllister*, 99 Ga. 557, 26 S.E. 469 (1896).

Restrictive covenants. — Plaintiff was not estopped by acquiescence from seeking to enjoin violations of restrictive covenants by defendants merely because the same covenants were previously violated by other and different parties, by more remote sales. *Dooley v. Savannah Bank & Trust Co.*, 199 Ga. 353, 34 S.E.2d 522 (1945).

Easement. — Grantee who accepts a deed to the property granted is estopped to deny the truth of a recital that the grantor had previously granted an easement or interest in the property to another person. *Toland v. Brewster*, 144 Ga. 236, 86 S.E. 1089 (1915).

Reliance on plat. — When an owner of land sells a part of the land in lots for residential purposes, the sales being made with reference to a plat by which another part of the land is designated as a park, and when the purchasers in buying rely upon the plat, the seller is estopped from asserting a claim adverse to the right of the purchasers, or their assigns, to have the land restricted to use as a park and to share such use. *Caffey v. Parris*, 186 Ga. 303, 197 S.E. 898 (1938).

Reacquisition of property. — When the grantor in a first security deed reacquired the property by purchasing the property at a sale under a power contained in such deed, a junior security deed made to another by the same grantor immediately attached as a first claim upon the property, and constituted an encumbrance thereon as against a subsequent grantee of such purchaser, notwithstanding the second security deed may show upon the deed's face that the deed is a junior deed. *Federal Land Bank v. Bank of Lenox*, 192 Ga. 543, 16 S.E.2d 9 (1941).

Mortgagee. — If claimant at time of execution of mortgage stated to the mortgagee that property belonged to her husband, the mortgagor, and he acted thereon in making the loan and taking the mortgage, she would be estopped from asserting her title to the property as against the plaintiff, the mortgagee. *Tanner v. Tanner*, 52 Ga. App. 460, 183 S.E. 666 (1936).

Exception of interest in land contained in a deed is notice to the grantee and the

Estoppel by Deed (Cont'd)

grantee's successors. *Brown v. Mathis*, 201 Ga. 740, 41 S.E.2d 137 (1947).

No title to easement defeated claim of title by estoppel. — Because at the time the appellee executed the deed to the appellant the appellee had no title to the easement which the appellee attempted to convey to appellant, the appellant's claim of title by estoppel was completely without merit. *Elrod v. Elrod*, 272 Ga. 188, 526 S.E.2d 339 (2000).

Equitable Estoppel**1. Solemn Admissions in Judicio****Admission in judicio conclusively binding.**

— Solemn admission in judicio is, at least until withdrawn after notice, conclusively binding upon the parties thereto. *Tribble v. State*, 89 Ga. App. 593, 80 S.E.2d 711 (1954); *Spector v. Model Constr. Co.*, 95 Ga. App. 14, 96 S.E.2d 900 (1957); *State Farm Mut. Auto. Ins. Co. v. Anderson*, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963); *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967).

Daughter who admitted that assets she took from her grandmother still belonged to her grandmother was not allowed to subsequently claim that she received the assets as a loan, and the probate court properly denied the daughter's motion for an order requiring the grandmother's guardian to return assets the guardian seized from the daughter, based on the daughter's claim that she has a legal right to the property. *In re McCool*, 267 Ga. App. 445, 600 S.E.2d 403 (2004).

Applicable to facts in particular case. —

Admissions in judicio apply only to facts in litigations in a particular case. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Inconsistent positions. — When a person has assumed a certain position in a litigation, and has succeeded in maintaining that position through a judgment or decision of the court, or through the acquiescence of the opposite party, to the detriment of that party, the person will not be permitted to assume a contrary position in a subsequent suit between the parties relating to the same subject-matter. *Florence, Phillips & Co. v.*

Newsome, 26 Ga. App. 501, 106 S.E. 619 (1921).

Testimony in case between other parties.

— Admissions made in one suit do not estop a witness from testifying differently in a case between other parties. *Wilkinson & Wilson v. Thigpen*, 71 Ga. 497 (1883).

Admission in pleadings. — Party to a suit or proceeding will not be allowed to disprove an admission made in the party's pleadings, without withdrawing the pleading from the record. *Duke v. Ayers*, 163 Ga. 444, 136 S.E. 410 (1927); *Anderson v. Oakley*, 133 Ga. App. 758, 212 S.E.2d 875 (1975).

Admission not withdrawn. — Trial court properly granted a seller's motion for partial summary judgment, and denied the escrow agent's motion to dismiss, in the seller's suit to recover the earnest money deposited by the buyers as the buyers admitted in their answer that the buyers knew the identity and location of the property, and although the buyers later amended their answer to raise a Georgia Statute of Frauds, O.C.G.A. § 13-5-30, defense, the buyers never withdrew their admission, and the buyers and the escrow agent were bound by the admission; the admission constituted a solemn admission in judicio under O.C.G.A. § 24-4-24(b)(7), and created a conclusive presumption of law under § 24-4-24(a). *Nhan v. Wellington Square, LLC*, 263 Ga. App. 717, 589 S.E.2d 285 (2003).

Admissions in forfeiture complaint. —

District attorney was bound by an admission in judicio in a forfeiture complaint since the complaint admitted that the claimants were the purported owners or interest holders of real and personal property sought to be forfeited, and went on to recite the recordation of the book and page of the deed in the superior court clerk's records that listed claimants as owners of the property. *Bell v. State*, 234 Ga. App. 693, 507 S.E.2d 535 (1998).

Civil Practice Act did not wipe out or destroy the law in Georgia to the effect that a party to an action is bound by material allegations made in the party's pleadings so long as the allegations remain in the party's pleadings, and the plaintiff's contradictory pleadings, if any, are to be construed in favor of the defendant. *Anderson v. Oakley*, 133 Ga. App. 758, 212 S.E.2d 875 (1975).

Parties and privies bound. — Estoppels by admissions made in pleading apply only

between parties and privies to the suit or litigation in which the admissions relied on as an estoppel were made. *Murray County v. Pickering*, 198 Ga. 354, 31 S.E.2d 722 (1944).

Admissions contained in stricken plea may be introduced in evidence by the opposite party. Such admissions when thus made are to be taken as true, because the admissions are asserted by the party personally; and while the party may withdraw the admissions formally from the pleadings, the party cannot by a mere withdrawal avoid the effect of the admissions since the admissions may still be used as evidence against the party. *Stallings v. Britt*, 204 Ga. 250, 49 S.E.2d 517 (1948).

Admission of prima facie case. — Defendant who in a plea has admitted a prima facie case in favor of the plaintiff for the purpose of obtaining the opening and conclusion in the case cannot, after having failed to carry the burden thus assumed, make an amendment withdrawing such admission and thus preclude the plaintiff from the right to rely upon the admission contained in the original plea. *Fisher v. George S. Jones Co.*, 108 Ga. 490, 34 S.E. 172 (1899).

An agreed statement of facts entered into between the parties to an action for the purpose of dispensing with proof on some or all of the issues presented by the pleadings constitutes a solemn admission in *judicio*, and so long as the admission remains in the case, the admission is conclusive so as to preclude either party from introducing evidence to disprove or contradict the admission. *United States Fid. & Guar. Co. v. Clarke*, 187 Ga. 774, 2 S.E.2d 608 (1939); *State Farm Mut. Auto. Ins. Co. v. Anderson*, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963); *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967); *Holland-America Line v. United Coops.*, 124 Ga. App. 375, 183 S.E.2d 620 (1971).

Criminal defendant's agreed statement of facts. — In criminal cases, the defendant's agreed statement of facts upon which a case is to be tried constitutes a solemn admission in *judicio* and direct evidence of the fact stated. *Tribble v. State*, 89 Ga. App. 593, 80 S.E.2d 711 (1954).

Defendant's stipulation to the elements of the criminal charge against defendant, in-

cluding venue, reserving for appeal only the issue of the sufficiency of the search warrant affidavit, was conclusively binding upon defendant and waived defendant's right to raise the issue of venue on appeal. *Sanders v. State*, 252 Ga. App. 609, 556 S.E.2d 505 (2001).

Repudiation of stipulations from former trial. — On a new trial of a case, either party may, as a matter of right, withdraw from and repudiate an agreed statement of facts had at the former trial, by giving proper and timely notice of such intended action to the opposite party, provided the opposite party has not been injured thereby. In such case, the agreed statement of facts is admissible in evidence against the party making the statement, in favor of the opposite party. It is not, however, absolutely binding and conclusive upon the party by whom the statement was signed, but it is that party's right to disprove, rebut, or explain any statement therein contained. *United States Fid. & Guar. Co. v. Clarke*, 187 Ga. 774, 2 S.E.2d 608 (1939).

Statements of counsel during the trial of a case may be regarded as admissions in *judicio*. *Gregory v. Star Enters., Inc.*, 122 Ga. App. 12, 176 S.E.2d 241 (1970).

Alleged admission in *judicio* by investor's attorney in prior action that investor's note and agreement were enforceable did not harm investor's case as the investor presented evidence that the investor owed nothing under the note and agreement; also, the corporation could not rely on that admission since issue preclusion based upon admissions in *judicio* was based on the equitable doctrine of estoppel and the alleged statement was made in reliance on fraudulent representations made by the three individual principals to which equity did not apply. *Kothari v. Patel*, 262 Ga. App. 168, 585 S.E.2d 97 (2003).

Suggestions of counsel. — If, in discussing a case, every suggestion or passing statement of each attorney touching what might be the effect of a deed, will, or other instrument would irrevocably fix that construction upon it, the courts might be much hampered in placing a proper judicial construction on the paper and might sometimes be compelled to construe the same clause in very conflicting ways, none of which might be the correct way. The eloquence of the advocate may sometimes soar a little without being

Equitable Estoppel (Cont'd)**1. Solemn Admissions in Judicio (Cont'd)**

weighted down with the fear of estoppel. *Orkin Exterminating Co. v. Gill*, 222 Ga. 760, 152 S.E.2d 411 (1966).

Unfavorable testimony of party. — Party testifying in the party's own behalf is not entitled to a finding in the party's favor if that version of the party's testimony which is most unfavorable to the party shows that the party is not entitled to recover. *Norair Eng'r Corp. v. Saint Joseph's Hosp.*, 147 Ga. App. 595, 249 S.E.2d 642 (1978).

Confession. — Complete confession from the witness stand of participation in the crime provides more than sufficient evidence to convict. *Jenkins v. State*, 237 Ga. 493, 228 S.E.2d 877 (1976).

Mandamus. — When in a mandamus proceeding plaintiffs in error took position that bill of exceptions was certified conditionally in order that the trial court might have jurisdiction to sign another certificate, plaintiffs are later estopped to contend that the certificate is unconditional. *NAACP v. Williams*, 98 Ga. App. 74, 104 S.E.2d 923 (1958), cert. denied, 359 U.S. 550, 79 S. Ct. 947, 3 L. Ed. 2d 1023 (1959).

Condemnation. — Once the assessor has made the award in a condemnation proceeding the condemnor is estopped from taking a position contrary to its solemn admissions in judicio and dismissing the suit. *Housing Auth. v. Mercer*, 123 Ga. App. 38, 179 S.E.2d 275 (1970).

Testimony of insured. — None of insured's testimony as to whether nephew of insured was covered by motor vehicle policy at time of vehicle accident constituted an admission in judicio binding upon insurer. *Allstate Ins. Co. v. Sapp*, 223 Ga. App. 443, 477 S.E.2d 869 (1996).

2. Estoppel by Other Conduct

Elements. — In order to constitute estoppel by conduct, there must concur: first, a false representation or concealment of facts; second, it must be within the knowledge of the party making the one or concealing the other; third, the person affected thereby must be ignorant of the truth; fourth, the person seeking to influence the conduct of the other must act intentionally for that purpose; and, fifth, persons complaining

shall have been induced to act by reason of such conduct of the other. *Calhoun v. Williamson*, 76 Ga. App. 91, 45 S.E.2d 87 (1947).

Origin of estoppel in pais is found in the doctrine of equity that if a representation be made to another who deals upon the faith of the representation, the former must make the representation good if the former knew or was bound to know the representation to be false. *Elliott v. Keith*, 102 Ga. 117, 29 S.E. 155 (1897); *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Basis of equitable estoppel is to promote the equity and justice of the individual case by preventing a party from asserting the party's rights under a general technical rule of law, when the party has so conducted oneself that it would be contrary to equity and good conscience for that party to allege and prove the truth. *Davis v. Auerbach*, 78 Ga. App. 575, 51 S.E.2d 527 (1949).

Party invoking estoppel must show detriment and reliance. — One invoking the conduct of another as constituting an estoppel in pais must show that one has acted thereon to one's detriment, or has been hurt thereby, before one can successfully urge such conduct as an estoppel in pais. *Tompkins v. Philips*, 12 Ga. 52 (1852); *Gaither v. Gaither*, 23 Ga. 521 (1857); *Rowe v. Sam Weichselbaum Co.*, 3 Ga. App. 504, 60 S.E. 275 (1908); *Hancock v. King*, 133 Ga. 734, 66 S.E. 949 (1910); *Union Brokerage Co. v. Beall Bros.*, 30 Ga. App. 748, 119 S.E. 533 (1923); *Kaufman v. Young*, 32 Ga. App. 135, 122 S.E. 822 (1924).

No creation of new right. — Operation of this principle is not direct so as to create a new right in the opposite party, but primarily indirect and negative against the party making the statement, precluding the party and the party's privies from denying the truth of the statement or basing a defense on the statement's untruth. *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924); *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Estoppel cannot be waived. — While two contracting parties may agree that waivers must be in writing, there is no authority that holds the parties may agree that an estoppel may not arise against one or the other party if one's conduct is such as to amount to estoppel. *Boston Ins. Co. v. Barnes*, 120 Ga. App. 585, 171 S.E.2d 626 (1969).

Pleading unnecessary. — While the general rule is that estoppel, to be relied on, must be pleaded yet there are well-recognized exceptions to this general rule. Thus, since it is unnecessary to file a replication, this rule does not apply when the plaintiff relies upon estoppel in order to defeat a defense raised by the defendant in the defendant's answer, and in such a case evidence in rebuttal of other evidence of the defendant is admissible for the plaintiff for the purpose of showing an estoppel, even though estoppel is not pleaded, nor, if the elements and facts of an estoppel are set out, is it necessary that the pleader should have used the word "estoppel." *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Estoppel is question for jury, unless it is unequivocally established. *Tune v. Beeland*, 131 Ga. 528, 62 S.E. 976 (1908); *Corporation of Royal Exch. Assurance v. Franklin*, 158 Ga. 644, 124 S.E. 172, 38 ALR 626 (1924); *Calhoun v. Williamson*, 76 Ga. App. 91, 45 S.E.2d 87 (1947); *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981).

Estoppel is usually an issue of fact to be decided by the jury. *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981).

Changing reason for conduct after litigation begins. — Rule which prevents one who has given a reason for one's conduct and decision in a matter from placing one's conduct upon another and different ground after litigation has begun is but an application of the principle of estoppel in pais, and applies only when one's conduct has caused another to act respecting the matter to the injury and detriment of the latter, and when the latter would be placed at an inequitable disadvantage, should the former be allowed to rely upon a ground other than that first urged as a reason for one's conduct and decision in the matter. *Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co.*, 51 Ga. App. 904, 181 S.E. 310 (1935).

Silence. — When one under a duty to speak fails to do so, one is thereafter estopped to deny what one's silence imports. *Cheek v. J. Allen Couch & Son Funeral Home*, 125 Ga. App. 438, 187 S.E.2d 907 (1972).

Estoppel of minor. — Admissions by one, upon which others have acted, either to their own injury or for the benefit of the person making the admissions, are deemed

estoppels and even minors may be estopped by their admissions from denying the truth of the admissions, or by their silence when the circumstances call for a disclosure of their claims or their rights, provided the minor has arrived at those years of discretion when a fraudulent intent can be reasonably imputed to the minor; a married woman has no legal rights that can exempt her from this rule of law and justice; that is, the law of estoppel in pais. *Wootten v. Braswell*, 48 Ga. App. 312, 172 S.E. 679 (1934).

Minority defense to contract. — Defendant is estopped from exercising one's privilege of avoiding a fair and reasonable contract upon the ground of defendant's minority at the time the agreement was made, when it appears that the defendant has consumed its irrestorable benefits; and when it appears that the plaintiff, dealing in good faith and being free from negligence was induced to act to plaintiff's injury by reason of the false and fraudulent representation of the defendant with respect to defendant's apparent majority. *Hood v. Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924).

Existence or effect of contract. — Person may be estopped from questioning the existence or effect of a contract, the existence of which the person has asserted to the other party, to the person's own benefit or the injury of the other. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Nonsuit by consent. — Party is estopped from complaint of the grant of the nonsuit when it appears, from the record, that a nonsuit was granted upon motion of the party's counsel. *Patterson v. Sams*, 2 Ga. App. 755, 59 S.E. 18 (1907).

Validity of title to personalty. — False and fraudulent representations as to the validity of the title to personalty, acted on by another to that person's injury, will estop the maker of the representations from setting up title to the property. *Roberts v. Davis*, 72 Ga. 819 (1884).

Silence concerning purchase of chattel. — Mere silence by one who stands by and sees another make a gift to a third person of a chattel in which one has an interest will not alone estop one from asserting one's title against the donee. *Hartz v. Hartz*, 144 Ga. 98, 86 S.E. 220 (1915).

Inducement to buy property. — One who by acts or declarations induces another to

Equitable Estoppel (Cont'd)**2. Estoppel by Other Conduct (Cont'd)**

buy property, as the property of a third person, is thereby estopped from setting up title in themselves to that property; but to make such acts or declarations a bar, it should appear that the acts or declarations were known to the purchaser, and that the purchaser acted upon the acts or declarations, and not upon the purchaser's own knowledge or judgment. *McCune v. McMichael*, 29 Ga. 312 (1859).

Time of insisting on invalidity of instrument. — Though an instrument may be “absolutely void,” this does not imply that there is no limit to the time within which its void character may be insisted upon. Truth is always precious, but it may become too late to assert it. It may be “more unjust and productive of more evil to hear the truth than to forbear the investigation”. *Sutton v. Aiken*, 62 Ga. 733 (1879).

Acceptance of insurance premiums and placing the money in the general funds of the defendant insurer amounted to such an unconditional acceptance as to estop the defendant to contend that the insured's policy was not in force. *Progressive Fire Ins. Co. v. Morrison*, 72 Ga. App. 473, 34 S.E.2d 173 (1945); *Georgia Cas. & Sur. Co. v. Rainwater*, 132 Ga. App. 170, 207 S.E.2d 610 (1974).

Change in insurance policy. — Insurer may be estopped from relying on a provision in a policy that the agent or officer cannot waive or change the insurance unless by writing attached, when the agent consents to changes in the policy, but fails to make the writing. *Corporation of Royal Exch. Assurance v. Franklin*, 158 Ga. 644, 124 S.E. 172, 38 A.L.R. 626 (1924).

Clause in insurance policy. — An insurer is estopped to deny coverage under a clause which provided that a lack of occupancy for more than 60 days would void coverage, since the insurer, through the insurer's agent, knew of the lack of occupancy when the building was first insured, and at all times thereafter. *Boston Ins. Co. v. Barnes*, 120 Ga. App. 585, 171 S.E.2d 626 (1969).

Contesting amount of note. — Estoppel to contest the amount of a note does not result from paying part and obtaining an indefinite extension of time for payment of the bal-

ance. *Long v. Lawson*, 7 Ga. App. 460, 67 S.E. 123 (1910).

Extension of time from holder of note. — Maker of promissory notes who obtains from the holder an extension of time for the payment of the principal due on each note, and, as a consideration therefor, pays the interest due on each of the notes, is precluded thereby from setting up that the holder is not the owner thereof. Such agreement, it is true, does not change the real title to the notes, but it bars the maker from contesting the ownership with the holder. *Yarbrough v. Seagraves*, 47 Ga. App. 436, 170 S.E. 553 (1933).

Estoppel can lie to bar defense of usury. *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981).

When note requiring usury was prepared by a borrower and presented to an unwary lender doctrine of estoppel was applicable. *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981).

Silence by guarantors at time of renewing of corporate obligations estops them as a matter of law from asserting defenses of which they then had knowledge. *Citizens & S. Nat'l Bank v. Yeager Enters.*, 247 Ga. 797, 279 S.E.2d 674 (1981).

Performance bond. — When there is no evidence that the makers of a performance bond acted on any conduct or declarations of the surety in releasing a third party from liability for the bond premium, the surety was not estopped from maintaining an action on an application signed by the makers whereby the makers obligated themselves to pay the premium on the bond. *Loftis Plumbing & Heating Co. v. American Sur. Co.*, 74 Ga. App. 590, 40 S.E.2d 667 (1946).

Sureties on government bond. — Sureties on county treasurer's bond are estopped from setting up by parol that the bond was delivered conditionally, the treasurer having a commission, and possession of the revenues in consequence of the bond. *Lewis v. Board of Comm'rs*, 70 Ga. 486 (1883).

Surety on bond to dissolve garnishment is estopped from denying that the garnishee had effects belonging to the defendants or that the garnishee was indebted to the defendants in a sum equal to the amount that might be recovered against the defendants. *Nevin v. Fouche*, 77 Ga. 47 (1886).

Delivery of assets to parties not entitled. — Delivery of assets to parties, who were not

entitled, was, to that extent, a devastavit, and the party entitled is not estopped by the party's acts of consenting to the distribution, from claiming of the administrator the party's full rights as heir-at-law. *Davis v. Bagley*, 40 Ga. 181, 2 Am. R. 570 (1869).

When chattels are mistakenly delivered to the vendee of realty subsequent to the sale thereof upon the vendee's representation that the chattels were included in the sale, when in fact the chattels were not so included, such delivery is not a waiver of the rights of the plaintiff to a recovery of the chattels upon plaintiff's ascertainment of the true state of facts, nor is the plaintiff estopped thereby from asserting title to the personality. *Gostin v. Scott*, 80 Ga. App. 630, 56 S.E.2d 778 (1949).

Payment to general contractor. — When subcontractor and homeowner had an agreement subsequent to the original contract whereby subcontractor consented for homeowner to make payment for all work to the general contractor which payment was made, the subcontractor's action worked as an estoppel against the subcontractor. *Hill v. Brooks*, 133 Ga. App. 138, 210 S.E.2d 176 (1974).

Violator of bylaw seeking benefit of bylaw. — One who borrows money from a building and loan association cannot set up, in defense to an action for the recovery of the money, that the loan was made in disregard of a bylaw prohibiting the making of loans to any persons other than those who have been members of the association for a stated period. Whatever may be the object of such a bylaw, one who obtains a benefit from a violation of the bylaw is estopped from taking any advantage of the fact that such violation occurred. *Reynolds v. Georgia State Bldg. & Loan Ass'n*, 102 Ga. 126, 29 S.E. 187 (1897).

Sale for benefit of creditors. — Doctrine of estoppel would apply and forbid a dissatisfied creditor from in any manner interfering with or preventing the consummation of an agreement to turn a stock of goods over to a third person to sell for the benefit of creditors, to which one had been a consenting party. *Stovall Co. v. Shepherd Co.*, 10 Ga. App. 498, 73 S.E. 761 (1912).

Purchaser setting up invalidity of judicial sale. — In suit by a sheriff upon a bid at the sale of personalty, the bidder is estopped

from setting up as a defense the invalidity of the sale when, after bidding off the property, the bidder was given possession of the property, and removed the property, so that the sheriff could not find the property to resell the property. *McDonald v. Ellis*, 17 Ga. App. 471, 87 S.E. 711 (1916).

When year's support was set apart to a widow and minor children, and the widow, in order to obtain a loan upon the property, represented to the lender that she needed the loan as a support for herself and the children, and the loan was made upon the faith of such representation, and the lender was not negligent in failing to ascertain the truth, the lender is protected, and may enforce a security deed executed as a part of the transaction, whether or not the money was used, or was intended to be used, for a different purpose. *Reynolds v. Baxter*, 177 Ga. 849, 171 S.E. 706 (1933).

Forfeiting dower. — While the right of dower is highly favored and carefully guarded by the courts, yet if the widow should practice fraud upon innocent purchasers, and induce them to become purchasers of land subject to her dower, under the impression that they were getting property free from such encumbrance, she would be estopped from setting up her right to dower in such land. *Knox v. Higginbotham*, 75 Ga. 699 (1885). (The right of dower is abolished. See O.C.G.A. § 53-1-1.).

Purchase by wife on own account. — Admission by a wife that she is purchasing goods on her own account amounts to an estoppel; and, in a subsequent suit against her for the purchase price of the goods, it will preclude her from setting up the defense that it was the husband's debt. *Wolff & Happ v. Hawes*, 105 Ga. 153, 31 S.E. 425 (1898).

Validity of election. — Although a constable, while occupying the constable's office and performing the duties thereof, entered as a candidate for the office in a void election and was defeated, this conduct would not estop the constable from attacking the validity of the election and claiming title to the office for the unexpired portion of the term for which the constable was elected and qualified at the regular election held two years previously. *Motes v. Davis*, 188 Ga. 682, 4 S.E.2d 597 (1939).

Erroneous legal advice given by a person is not an "admission" within the meaning of

Equitable Estoppel (Cont'd)**2. Estoppel by Other Conduct (Cont'd)**

this statute, although such advice may have been acted upon to another's injury and to the benefit of the party giving it. This is especially true when it does not appear that the advice was given in bad faith or with intent to deceive or defraud. *Lee v. Hill*, 28 Ga. App. 312, 111 S.E. 211 (1922) (see O.C.G.A. § 24-4-24.).

Insufficient evidence of equitable estoppel. — Trial court did not err in awarding summary judgment to the State Medical

Education Board, making a student liable for both the amount of the scholarship received and attorney's fees as: (1) estoppels were disfavored under Georgia law; (2) the student came forward with no more than hearsay to support a claim that oral misrepresentations of fact were made regarding the scholarship; (3) the contract was not rescinded by either party; (4) no mutual mistake of fact was found; and (5) any impossibility in performing the contract was personal to the student. *Calabro v. State Med. Educ. Bd.*, 283 Ga. App. 113, 640 S.E.2d 581 (2006).

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Am. Jur. Proof of Facts. — Equitable Adoption, 18 POF2d 531.

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C.J.S. — 31A C.J.S., Evidence, §§ 183, 227.

ALR. — Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 ALR 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 ALR 842.

Effect of filing affidavit of forgery against ancient deed, 18 ALR 908.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment, 20 ALR 1369; 28 ALR 1333; 64 ALR 900.

Dispensing with proof of proper custody as condition of admission of ancient document, 29 ALR 630.

Estoppel of mortgagor or seller to deny existence of property mortgaged or sold, 40 ALR 382.

Decree of divorce or pleadings or evidence in divorce suit as estoppel to deny marriage between the parties thereto, 45 ALR 925.

Waiver of or estoppel to assert lien by filing claim with or receiving dividend from assignee for creditors, 55 ALR 993.

Nature of conveyance or covenants which will create estoppel to assert after-acquired

title or interest in real property, 58 ALR 345; 144 ALR 554.

Effect of intrusting another with stock certificate endorsed or assigned in blank to estop owner as against a bona fide purchaser or pledgee for value, 73 ALR 1405.

Estoppel by conduct during testator's life to dissent from or attack validity of will, 74 ALR 659.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 ALR 1129.

Provision in sale contract to the effect that only conditions incorporated therein shall be binding, 75 ALR 1032; 127 ALR 132; 133 ALR 1360.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 ALR 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 ALR 1501.

Waiver of, or estoppel to assert, debtor's exemption, by laches or delay, 82 ALR 648.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 ALR 1153.

Estoppel by recitals in municipal bonds as to lawfulness of issue, 86 ALR 1057; 158 ALR 938.

Estoppel of municipal corporation or other political subdivision by recitals in its bonds to dispute their validity as affected by the character of the owner of bonds as an original holder or a transferee, 86 ALR 1129.

Distinction between judgment as bar to cause of action and as estoppel as to particular fact, 88 ALR 574.

Estoppel of municipality to deny that it gave its consent to street franchise, 89 ALR 619.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 ALR 1295.

Statement or estimate by mortgagee as to amount due or to become due, made to prospective purchaser or subsequent mortgagee of property, as basis of estoppel, 90 ALR 1432.

Voluntary payment or other relief by insurance carrier under Workmen's Compensation Act as estoppel to deny issuance of policy or that case is within coverage, 91 ALR 1530.

Estoppel by silence or delay, after knowledge, in disclosing forgery of guaranty, 96 ALR 379.

Personal liability of officer or his bond as affected by his failure to file return of his proceedings after seizing property under writ or process, 98 ALR 692.

Entrusting possession of securities to bank officer or employee who uses them to make a fraudulent showing of bank assets as estoppel of owner to reclaim them as against bank receivers, 100 ALR 679.

Estoppel to assert usury against innocent purchaser of usurious instrument, 110 ALR 451.

Acts done by executor or administrator in a representative capacity as estoppel in individual capacity, or vice versa, 110 ALR 599.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure, 111 ALR 1285.

Doctrine of election or estoppel as applicable as against beneficiary of will where provision for other beneficiary is invalid, not for reasons personal to former, but because of statute or public policy, 112 ALR 377.

Testimony or sworn statements in prior

action or proceeding as basis of estoppel in favor of one not a party or privy thereto, 113 ALR 925.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 ALR 121.

Promissory estoppel, 115 ALR 152; 48 ALR2d 1069.

Tax exemption as affected by failure to claim or delay in claiming it for past years, 115 ALR 1484.

Judgment or order in connection with appointment of executor or administrator as *res judicata*, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 ALR 594.

Conclusiveness of charter as regards character, kind, or purposes of corporation, 119 ALR 1012.

Judgment in action for personal injury or death as *res judicata* as to negligence or contributory negligence in subsequent action for death in same accident of person whose estate was represented by defendant in first action, 119 ALR 1469.

Pleading waiver, estoppel, and *res judicata*, 120 ALR 8.

Distinction between effect of fact to create presumption of further fact and its effect as *prima facie* evidence of the further fact in determining burden of proof and weight of evidence, 121 ALR 1078.

Estoppel as ground for holding defendant liable for negligence in conduct of business which appears to be his but which in fact belongs to another, 122 ALR 256.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need not be made at time due, as binding upon creditor by way of estoppel, 124 ALR 1248.

Doctrine of estoppel as applicable against one's right to hold a public office or his status as a public officer, 125 ALR 294.

Mistake as to date of lapse of policy in insurer's statement of reason for denial of claim under policy as affecting its right to insist upon lapse as defense, 125 ALR 1270.

Liability of one exercising the rights of an owner of realty for injuries due to its condition, as affected by want of legal title, 130 ALR 1525.

Waiver or estoppel predicated upon surviving partner's surrender of possession of partnership property to personal representative of deceased partner, 137 ALR 1024.

Estoppel to assert invalidity of decree of divorce for lack of domicile at divorce forum or failure to obtain jurisdiction of person of defendant, 140 ALR 914; 153 ALR 941; 175 ALR 538.

Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 ALR 1184.

Ultimate fact, as distinguished from evidentiary fact, as regards effect of judgment as estoppel, 142 ALR 1243; 152 ALR 1193.

Falsity of representation or warranty as defense to action upon policy of insurance on life of infant, 143 ALR 331.

What amounts to waiver, estoppel, or loss of bank's right to set off depositor's indebtedness against deposit or to apply deposit upon indebtedness, 143 ALR 453.

Estoppel by silence or other conduct (other than failure to file) to assert against estate claim antedating decedent's death, 146 ALR 1179.

Estoppel of mechanic's lien claimant as predicable upon his representations to owner as to payment made to claimant by contractor or subcontractor, 155 ALR 350.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 155 ALR 690.

Provision of life insurance policy limiting insurer's liability under specified conditions to return of premiums, as subject to waiver or estoppel by reason of agent's knowledge of breach of condition respecting insured's health, 163 ALR 691.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 ALR 1209.

Estoppel of intervenor to assert claim against original complainant, 166 ALR 911.

Construction and application of statute respecting estoppel of insurer where insured was examined by medical examiner, 172 ALR 143.

Right of tenant, as against landlord, to acquire or assert title based on foreclosure of

lien or sale for tax or special assessment, 172 ALR 1181.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warrant as to conditions affecting cost, 173 ALR 308.

Applicability of doctrine of estoppel against government and its governmental agencies, 1 ALR2d 338.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Estoppel of mortgagee to contest the mortgagor's title, 11 ALR2d 1397.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 15 ALR2d 534.

Insurer's demand for additional or corrected proof of loss as waiver or estoppel as to right to assert contractual limitation provision, or as suspending running thereof, 15 ALR2d 955.

Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287.

Estoppel of one selling or conveying property to dissolved or defunct corporation to deny its existence, 20 ALR2d 1084.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest its validity, 21 ALR2d 1457.

Estoppel of United States, state, or political subdivision by deed or other instrument, 23 ALR2d 1419.

Estoppel to rely on statute of limitations, 24 ALR2d 1413.

Estoppel to contest will or attack its validity, 28 ALR2d 116.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 ALR2d 636.

Insurer's admission of liability, offers of settlement, and negotiations for adjustment or settlement, as waiver of proof of property loss, 49 ALR2d 87.

Denial of liability as waiver of proofs of loss required by insurance policy, 49 ALR2d 161.

Presumption of consideration from revenue stamps on deed, 51 ALR2d 1004.

Estoppel by lease: effect of lessor's after-acquired title or interest during lease term, 51 ALR2d 1238.

Right to attack validity of statute, ordinance, or regulation relating to occupational or professional license as affected by applying for, or securing license, 65 ALR2d 660.

Estoppel of oil and gas lessee to deny lessor's title, 87 ALR2d 602.

Estoppel of one doing business with personal representative purporting to carry on decedent's business, to assert representative's personal liability, 3 ALR3d 757.

Modern status of doctrine of *res judicata* in criminal cases, 9 ALR3d 203.

Purchaser of real property as precluded from attacking validity of zoning regulations existing at the time of the purchase and affecting the purchased property, 17 ALR3d 743.

Judgment in action against seller or supplier of product as *res judicata* in action against manufacturer for injury from defective product, or vice versa, 34 ALR3d 518.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 ALR3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 ALR3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 ALR3d 907.

Judgment against parents in action for loss of minor's services as precluding minor's action for personal injuries, 41 ALR3d 536.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 ALR3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 ALR3d 703.

Setting aside arbitration award on ground of interest or bias of arbitrators, 56 ALR3d 697.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

Modern status of rules regarding materiality and effect of false statement by insurance applicant as to previous insurance cancellations or rejections, 66 ALR3d 749.

Modern status of law as to equitable adoption or adoption by estoppel, 97 ALR3d 347.

Estoppel of state or local government in tax matters, 21 ALR4th 573.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 ALR4th 1170.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 ALR4th 90.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 ALR5th 233.

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 ALR5th 179.

24-4-25. Estoppel relating to real estate.

(a) Where an estoppel relates to the title to real estate, the party claiming to have been influenced by the other party's acts or declarations must not only have been ignorant of the true title, but also ignorant of any convenient means of acquiring such knowledge.

(b) Where both parties have equal knowledge or equal means of obtaining the truth, there shall be no estoppel. (Civil Code 1895, § 5151; Civil Code 1910, § 5737; Code 1933, § 38-115.)

History of Code section. — This Code section is derived from the decision in *Wilkins v. McGhehee*, 86 Ga. 764, 13 S.E. 84 (1891).

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 *Mercer L. Rev.* 187 (1979).

JUDICIAL DECISIONS

In general. — Purchaser must be ignorant of the falsity of the alleged inducements and really act upon them and not upon purchaser's own knowledge or judgment and have no convenient means of acquiring knowledge of title. *Tune v. Beeland*, 131 Ga. 528, 62 S.E. 976 (1908); *Stonecipher v. Kear*, 131 Ga. 688, 63 S.E. 215, 127 Am. St. R. 248 (1908); *Wall v. Louisville & N.R.R.*, 143 Ga. 417, 85 S.E. 325 (1915); *Norman v. McMillan*, 151 Ga. 363, 107 S.E. 325 (1921); *Jackson v. Lipham*, 158 Ga. 557, 123 S.E. 887 (1924).

Elements of estoppel. — In order to constitute estoppel by conduct, there must occur: (1) a false representation or concealment of facts; (2) it must be within the knowledge of the party making the one or concealing the other; (3) the person affected thereby must be ignorant of the truth; (4) the person seeking to influence the conduct of the other must act intentionally for that purpose; and (5) persons complaining shall have been induced to act by reason of such conduct of the other. *Jones v. Tri-State Elec. Coop.*, 212 Ga. 577, 94 S.E.2d 497 (1956).

Estoppels do not convey title in this state. *Kennedy v. Hannans*, 246 Ga. 55, 268 S.E.2d 646 (1980).

Recovery of land. — If estoppel by acts or false declarations can in any case be the basis upon which to predicate the recovery of land, it falls clearly within the provisions of this statute. *Groover v. Simmons*, 163 Ga. 778, 137 S.E. 237 (1927) (see O.C.G.A. § 24-4-25).

Good faith and reasonable diligence. — Party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted in good faith and reasonable diligence; otherwise, no equity will arise in the party's favor. *Travelodge Corp. v. Carwen Realty Co.*, 223 Ga. 821, 158 S.E.2d 378 (1967).

Exercise of due diligence. — No estoppel defense is available when a party fails to exercise due diligence to obtain information concerning the title. *Allen v. Bacon*, 171 Ga. 479, 156 S.E. 20 (1930).

No ignorance of true title. — When there was nothing in the evidence showing or tending to show that the defendant or any of

its predecessors in title were ignorant of the true title when they purchased, the evidence failed to establish any estoppel which would preclude the plaintiff from asserting and recovering on plaintiff's legal title. *Seaboard Air-Line Ry. v. Holliday*, 165 Ga. 200, 140 S.E. 507 (1927); *Bank of Lenox v. Webb Naval Stores Co.*, 171 Ga. 464, 156 S.E. 30 (1930).

Ignorance of true title. — Fact that a deed from a husband to his wife, under which a wife claimed title, may have been based upon a valuable consideration and duly recorded would not necessarily prevent a subsequent purchaser, by security deed, from relying upon the principle of estoppel, if the subsequent purchaser was in fact ignorant of the true title. *Roop Grocery Co. v. Gentry*, 195 Ga. 736, 25 S.E.2d 705 (1943).

Ignorance of adverse interest. — It must appear that the party to the deed was ignorant of the interest of the attesting witness. *Duncan v. Beasley*, 174 Ga. 28, 161 S.E. 829 (1931).

No means of acquiring knowledge. — When the estoppel relates to real estate, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct of another was personally not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. *Bennett v. Davis*, 201 Ga. 58, 39 S.E.2d 3 (1946).

Means of knowing over extended period of time. — If a person having legal title to land, which fact the person does not know but has convenient means of knowing, and after a lapse of 27 years, during which time the person was under no legal disability, the person still has not learned the fact of the person's interest in the land, and in those circumstances the person induces one to buy the land from a third person by representations that the land is the property of such third person, the person's misrepresentations to the purchaser innocently made, coupled with the person's delay in ascertaining the truth, will amount to constructive fraud, and may be pleaded as an estoppel by the purchaser on the faith of the title of the person's vendor. *Lanier v. Bryant*, 180 Ga. 409, 179 S.E. 346 (1935).

Equal means of knowledge. — Disclaimer of interest by a distributee, in ignorance,

when the other party had equal means of knowledge, is no estoppel as to the distributee or the grantee. *Peyton v. Stephens*, 130 Ga. 338, 60 S.E. 563, 124 Am. St. R. 170 (1908).

Contrary to a cotenant's contention, the cotenant's affidavit did not create an issue of fact as to whether heirs should have been estopped from challenging the cotenant's adverse possession claim relating to certain real estate; the cotenant had equal means to obtain the truth about the status of a probate case by which the cotenant claimed exclusive possession of the property at issue, and the consequences of letting the case languish. *Ward v. Morgan*, 280 Ga. 569, 629 S.E.2d 230 (2006).

Prior recorded deed becomes constructive notice for subsequent purchasers and the holder of a prior recorded interest will not be subject to estoppel. *Pressley v. Maxwell*, 242 Ga. 360, 249 S.E.2d 49 (1978).

Recorded deed as means of acquiring knowledge. — Recorded deed is not necessarily such "convenient means of acquiring knowledge" of title, within the contemplation of former Code 1933, § 38-115 (see O.C.G.A. § 24-4-25), as to abrogate the effect of former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4) on one who remains silent while a third party represents to another that the third party owns certain property which in actuality belongs to the aphonic one. *Anderson v. Manning*, 221 Ga. 421, 144 S.E.2d 772 (1965); *Pressley v. Maxwell*, 242 Ga. 360, 249 S.E.2d 49 (1978).

Admission in favor of third person. — Admissions against one's title to land, and in favor of the title of a third person, will not be estopped in behalf of one to whom the admissions were not made, and who has merely heard of the admissions, it not appearing that the admissions were made for the purpose of being acted upon, or with any design or intention that the admissions should be acted upon. *Randolph v. Merchants & Mechanics Banking & Loan Co.*, 181 Ga. 671, 183 S.E. 801 (1936).

Agent's knowledge. — Estoppel did not result from an agent's knowledge when a contract provided that knowledge must be brought directly to the principal by the opposite party. *Sovereign Camp Woodmen of the World v. Griffin*, 30 Ga. App. 217, 117 S.E. 261 (1923).

Improvements. — One who has title to land and sees another who is in bona fide possession thereof place valuable improvements thereon, without giving notice of one's title, is not thereby subsequently estopped from asserting one's title. *Owen v. Miller*, 209 Ga. 875, 76 S.E.2d 772 (1953).

Merely attesting deed will not work an estoppel. *Duncan v. Beasley*, 174 Ga. 28, 161 S.E. 829 (1931).

Burden of proof rests upon the party asserting an estoppel to establish all the elements necessary to constitute an estoppel. *Hartsfield Loan & Sav. Co. v. Garner*, 184 Ga. 283, 191 S.E. 119 (1937); *Bennett v. Davis*, 201 Ga. 58, 39 S.E.2d 3 (1946).

Limitation on § 51-6-4. — Former Code 1933, § 36-115 (see O.C.G.A. § 24-4-25) limited former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4) to purchasers without notice. *Fuller v. Calhoun Nat'l Bank*, 59 Ga. App. 419, 1 S.E.2d 86 (1939).

Construction with § 51-6-4. — Principle stated in former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4), does not depend for the principle's operation upon the existence or absence of mere constructive notice, nor will a recorded deed necessarily constitute a "convenient means of acquiring such knowledge," within the meaning of former Code 1933, § 38-115 (see O.C.G.A. § 24-4-25); this latter statute should be construed in harmony with the former. *Roop Grocery Co. v. Gentry*, 195 Ga. 736, 25 S.E.2d 705 (1943).

Cited in *Hill v. Neely*, 151 Ga. 276, 106 S.E. 729 (1921); *Aiken v. Baynes*, 170 Ga. 784, 154 S.E. 451 (1930); *Ingram v. Smith*, 57 Ga. App. 438, 195 S.E. 882 (1938); *Clarence L. Martin, P.C. v. Chatham County Tax Comm'r*, 258 Ga. App. 349, 574 S.E.2d 407 (2002).

RESEARCH REFERENCES

ALR. — Estoppel to assert title to real property by conduct subsequent to contract between third persons, 1 ALR 1482.

Estoppel of one not a party to a transac-

tion involving real property by failure to disclose his interest in the property, 50 ALR 668.

Failure to record or delay in recording an

instrument affecting real property as basis of estoppel in favor of creditors not directly within protection of recording Acts, 52 ALR 183.

Nature of conveyance or covenants which will create estoppel to assert after-acquired title or interest in real property, 58 ALR 345; 144 ALR 554.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 ALR 1129.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 ALR 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 ALR 1501.

Permitting record title to real property to stand in another's name as estopping owner to avail himself of statute or rule requiring authority to contract regarding real estate to be in writing, 78 ALR 588.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 ALR 1153.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord af-

firmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 ALR 1295.

Estoppel to question validity of proceedings extending boundaries of municipality, 101 ALR 581.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Promissory estoppel, 115 ALR 152; 48 ALR2d 1069.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 ALR 690.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest this validity, 21 ALR2d 1457.

Estoppel to rely on statute of limitations, 24 ALR2d 1413.

Estoppel of oil and gas lessee to deny lessor's title, 87 ALR2d 602.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

24-4-26. Trustees estopped to set up title adverse to trust.

Trustees and other representatives with custody of papers have ample opportunities to discover defects in the title of property in their care and are estopped from setting up title adverse to their trust. (Civil Code 1895, § 5153; Civil Code 1910, § 5739; Code 1933, § 38-117.)

History of Code section. — This Code section is derived from the decisions in

Benjamin v. Gill, 45 Ga. 110 (1872) and Allen v. Solomon, 54 Ga. 483 (1875).

JUDICIAL DECISIONS

Executors. — When the plaintiff maintained a suit for specific performance of the contract alleged, in which plaintiff sought to have decreed in oneself title to the entire property owned by plaintiff's testatrix at the time of the testatrix's death, and devised by the testatrix and given to the executor (plaintiff) and other beneficiaries, it was held that plaintiff was estopped on the ground that plaintiff had the will probated

and qualified as executor, and continued in the office of executor for two years, during which time plaintiff had discharged the duties of plaintiff's office and had paid out large sums of money; this conduct being inconsistent with plaintiff's claim of title to the entire estate of plaintiff's testatrix. Hardeman v. Ellis, 162 Ga. 664, 135 S.E. 195 (1926); Scoggins v. Strickland, 265 Ga. 417, 456 S.E.2d 208 (1995).

Multiple executors. — Rule which prohibits a person from suing oneself does not apply when there are two or more executors. *Spratlin v. Spratlin*, 216 Ga. 27, 114 S.E.2d 370 (1960).

Ownership in estate. — When ownership is once shown to be in an estate, the executor cannot acquire title by adverse holding by reason of this statute. *Dozier v. McWhorter*, 117 Ga. 786, 45 S.E. 61 (1903) (see O.C.G.A. § 244-26).

Claim anterior to appointment. — An administrator who sells property at public outcry, executing a deed, and signing as administrator is estopped from setting up any title or interest, based upon a claim anterior to the administrator's appointment. *Gammage v. Perry*, 29 Ga. App. 427, 116 S.E. 126 (1923).

Title not vested. — Rule of estoppel against an administrator does not operate if the legal title to land in controversy was not vested in the decedent at the time of death. *Crummey v. Crummey*, 190 Ga. 774, 10 S.E.2d 859 (1940).

Mistake of law. — When claimant contended that this statute should not be applied because claimant did not know at the time claimant was appointed administrator that claimant had title to the land, and testified that the claimant believed that when the claimant lost the claimant's deed the claimant's title had been killed, the claimant acted with full knowledge of the facts, but under a mistake of law as to the claimant's legal rights; such testimony was not sufficient to demand a finding that the claimant was not estopped under this statute. *Wright v. Thompson*, 190 Ga. 173, 8 S.E.2d 640 (1940) (see O.C.G.A. § 244-26).

Claim not setting up title. — There is nothing inimical in the principle that an heir, next of kin, or creditor is favored in the appointment of an administrator, and is not precluded from receiving proper share or claim from the assets of the estate, since such a claim does not have the legal effect of setting up a "title adverse to their trust." *Crummey v. Crummey*, 190 Ga. 774, 10 S.E.2d 859 (1940).

Guardian. — Law will not permit a guardian to act in such way that the guardian's own personal interest may come in conflict with the interest of the guardian's ward with respect to the estate of the latter in the guardian's charge. *Allen v. Wade*, 203 Ga. 753, 48 S.E.2d 538 (1948).

Trustee of corporations. — Principles apply to a trustee holding choses in action for a corporation. *Caswell v. Vanderbilt*, 35 Ga. App. 34, 132 S.E. 123 (1926).

Inconsistent positions. — When one is in a situation in which one may elect between two inconsistent positions or proceedings, the choice of one's position or proceeding must be made before bringing suit. One cannot bring either action without selecting and determining to accept and occupy a position consistent with that action or position and inconsistent with the other. *Spratlin v. Spratlin*, 216 Ga. 27, 114 S.E.2d 370 (1960).

Cited in *Bussey v. Bussey*, 157 Ga. 648, 121 S.E. 821 (1924); *Parnelle v. Cavanaugh*, 191 Ga. 464, 12 S.E.2d 877 (1940); *Maxwell v. Hollis*, 216 Ga. 224, 115 S.E.2d 360 (1960); *Bloodworth v. Bloodworth*, 224 Ga. 717, 164 S.E.2d 823 (1968); *Dowdy v. Jordan*, 128 Ga. App. 200, 196 S.E.2d 160 (1973); *Kelley v. Kelley*, 129 Ga. App. 257, 199 S.E.2d 399 (1973).

RESEARCH REFERENCES

ALR. — Acts done by executor or administrator in a representative capacity as estoppel in individual capacity, or vice versa, 110 ALR 599.

Action by employee in reliance on employment contract which violates statute of frauds as rendering contract enforceable, 54 ALR3d 715.

244-27. Equitable estoppel.

In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by

which another has been misled to his injury. (Civil Code 1895, § 5152; Civil Code 1910, § 5738; Code 1933, § 38-116.)

History of Code section. — This Code section is derived from the decision in *Wilkins v. McGhehee*, 86 Ga. 764, 13 S.E. 84 (1891).

Law reviews. — For article, "The Legisla-

tive Process in Georgia Local Government Law," see 5 Ga. L. Rev. 1 (1971). For article, "Promissory Estoppel and the Georgia Statute of Frauds," see 15 Ga. L. Rev. 204 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION ILLUSTRATIONS

General Consideration

Elements. — In order to constitute estoppel by conduct, there must concur: (1) a false representation or concealment of facts; (2) it must be within the knowledge of the party making the one or concealing the other; (3) the person affected thereby must be ignorant of the truth; (4) the person seeking to influence the conduct of the other must act intentionally for that purpose; and (5) persons complaining shall have been induced to act by reason of such conduct of the other. *Harris v. Abney*, 208 Ga. 518, 67 S.E.2d 724 (1951); *Cobb County Rural Elec. Membership Corp. v. Board of Lights & Water Works*, 211 Ga. 535, 87 S.E.2d 80 (1955); *Jones v. Tri-State Elec. Coop.*, 212 Ga. 577, 94 S.E.2d 497 (1956).

Function of estoppel. — Estoppel may be used to prevent a party from denying at the time of litigation a representation that was made by that party and accepted and reasonably acted upon by another party with detrimental results to the party that acted thereon. *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980).

Estoppels are not favored by Georgia law. *Cobb County Rural Elec. Membership Corp. v. Board of Lights & Water Works*, 211 Ga. 535, 87 S.E.2d 80 (1955).

Estoppels are rarely resorted to, except when it would be more unjust and more productive of evil to hear the truth than to forbear the investigation. *Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co.*, 51 Ga. App. 904, 181 S.E. 310 (1935).

Estoppel does not create new rights. — Doctrines of estoppel are primarily negative

in their operation against the party making the statement or admission, rather than creative of any new rights in the opposite party. *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980).

Existing rights. — An estoppel in pais operates only upon existing rights, not upon rights subsequently acquired. *Atlantic C.L.R.R. v. Williams*, 50 Ga. App. 726, 179 S.E. 136 (1934); *Gellis v. B.L.I. Constr. Co.*, 148 Ga. App. 527, 251 S.E.2d 800 (1978).

Estoppel cannot legalize or vitalize that which the law declares unlawful and void. *Macon Ambulance Serv., Inc. v. Snow Properties, Inc.*, 218 Ga. 262, 127 S.E.2d 598 (1962).

Existing cause of action required. — Without some proper legal cause of action, establishing all the elements of equitable estoppel will not entitle plaintiff to relief. *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980).

Conduct of party. — Equitable estoppel arises from the conduct of a party, using the word "conduct" in the term's broadest meaning as including that party's spoken words, the party's positive acts, and the party's silence when there is a duty to speak, and proceeds on the consideration that the author of misfortune shall not personally escape the consequences and cast the burden on another. Accordingly, it holds a person to a representation made or position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled, to that person's injury. *McArthur v. Southern Airways, Inc.*, 404 F.

Supp. 508 (N.D. Ga. 1975), vacated on other grounds, 569 F.2d 276 (5th Cir. 1978).

Contrary to equity and good conscience.

— Equitable estoppel is an established principle of Georgia law and arises when a party has so acted that the party has by the party's conduct either gained some advantage for the party or caused some disadvantage to another by reason of which it would be contrary to equity and good conscience to permit the party to allege and prove the truth. *A.S. Int'l Corp. v. Salem Carpet Mills, Inc.*, 441 F. Supp. 125 (N.D. Ga. 1977).

Estoppel in pais. — Doctrine of estoppel in pais proceeds wholly on the theory that the party to be estopped has, by the party's declarations or conduct, misled another to the party's prejudice, so that it would be a fraud upon the party to allow the true state of the facts to be proved. *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

No equitable estoppel arises when no harm or disadvantage is presented as injury is essential for an equitable estoppel. *Blackburn v. Blackburn*, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

Inducement and injury. — To assert an estoppel in pais one must show that one has lost or the other party gained something which makes it unjust for the latter to insist upon preexistent rights. There must be inducement by which one changes one's position for the worse. Injury is its essence. *Meeks v. Adams La. Co.*, 49 F. Supp. 489 (S.D. Ga. 1943), modified sub nom., *Meeks v. Taylor*, 138 F.2d 458 (5th Cir. 1943), cert. denied, 321 U.S. 773, 64 S. Ct. 611, 88 L. Ed. 1067 (1944).

Inducement to forego valuable right. — When a party by making an invalid agreement or promise induces another to forego a valuable legal right, one waives and is estopped to deny the right of the promisee to have the agreement carried out or the promise fulfilled. *Pethel v. Waters*, 220 Ga. 543, 140 S.E.2d 252 (1965).

Injury or disadvantage. — When in a case no facts appear from which it can be said that a party has been injured or placed at any disadvantage by the conduct of the party allegedly estopped, no estoppel resulted therefrom. *City of Atlanta v. Anglin*, 209 Ga. 170, 71 S.E.2d 419, appeal dismissed, 344 U.S. 870, 73 S. Ct. 169, 97 L. Ed. 675 (1952).

Changing reason for conduct. — Rule which prevents one who has given a reason for one's conduct and decision in a matter from placing one's conduct upon another and different ground after litigation has begun is but an application of the principle of estoppel in pais, and applies only where one's conduct has caused another to act respecting the matter to the injury and detriment of the latter, and if the latter would be placed at an inequitable disadvantage, should the former be allowed to rely upon a ground other than that first urged as a reason for one's conduct and decision in the matter. *Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co.*, 51 Ga. App. 904, 181 S.E. 310 (1935).

Good faith and reasonable diligence. — Party seeking the benefit of estoppel must not only have been free from fraud, but must have acted in good faith and reasonable diligence; otherwise no equity will arise in that party's favor. *Tybrisa Co. v. Tybeeland, Inc.*, 220 Ga. 442, 139 S.E.2d 302 (1964); *Travelodge Corp. v. Carwen Realty Co.*, 223 Ga. 821, 158 S.E.2d 378 (1967); *Whitcomb Produce Co. v. Bonanza Int'l, Inc.*, 154 Ga. App. 92, 267 S.E.2d 627 (1980).

Reliance. — Party claiming estoppel must have relied and acted upon declarations or conduct of the other party and not on one's own knowledge or judgment. *Tybrisa Co. v. Tybeeland, Inc.*, 220 Ga. 442, 139 S.E.2d 302 (1964).

Doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as contracts. *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

Representation to invoking party. — General rule is that for an estoppel by misrepresentation to arise the false representation must be made to the person seeking the benefit of the estoppel or intended for communication to that person. *James Talcott, Inc. v. Carder*, 300 F.2d 654 (5th Cir. 1962).

Contract by estoppel presupposes that one party has a defense to imposition of contractual liability but, by reason of one's conduct, is estopped to assert it. *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 278 S.E.2d 182 (1981).

Equal knowledge or means of knowing truth. — There is no estoppel by conduct

General Consideration (Cont'd)

when both parties have equal knowledge or equal means of obtaining the truth. *Gay v. Laurens County*, 213 Ga. 518, 100 S.E.2d 271 (1957); *Yancey Bros. Co. v. Dehco, Inc.*, 108 Ga. App. 875, 134 S.E.2d 828 (1964); *Tybrisa Co. v. Tybeeland, Inc.*, 220 Ga. 442, 139 S.E.2d 302 (1964).

Duty to speak. — In cases of estoppel through silence there must be not only the right but the duty to speak before failure to do so can operate as an estoppel. *Tybrisa Co. v. Tybeeland, Inc.*, 220 Ga. 442, 139 S.E.2d 302 (1964).

Testimony of party at second trial. — In a second trial of a case, a party is not estopped to give testimony at the second trial which is different from the party's testimony given at the first trial. *Central of Ga. Ry. v. Brower*, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962).

Burden of proof rests upon the party asserting an estoppel to establish all the elements necessary to constitute an estoppel. *Hartsfield Loan & Sav. Co. v. Garner*, 184 Ga. 283, 191 S.E. 119 (1937); *Bennett v. Davis*, 201 Ga. 58, 39 S.E.2d 3 (1946).

Burden of pleading. — In order for an estoppel to be proved, it must be properly pleaded; a defendant who relies upon equitable estoppel must set up the same by answer in the suit of one's adversary. *Citizens & S. Bank v. Barron*, 181 Ga. 351, 181 S.E. 859 (1935); *Hartsfield Loan & Sav. Co. v. Garner*, 184 Ga. 283, 191 S.E. 119 (1937).

Pleading concealment of facts. — It is not error for the trial court to strike the plaintiff in error's plea of estoppel when there is no allegation showing a concealment of facts which resulted in the party asserting the estoppel acting to one's detriment. *Beeland v. Alston*, 101 Ga. App. 584, 114 S.E.2d 545 (1960).

Question for jury. — When the facts relied on to establish estoppel do not unequivocally show an estoppel in pais, the jury, and not the judge, should determine whether the facts constitute such an estoppel. *Tune v. Beeland*, 131 Ga. 528, 62 S.E. 976 (1908).

As a factual determination, estoppel is a matter to be determined by a jury. *Mathis v. Rock Springs Whsle. Co.*, 157 Ga. App. 726, 278 S.E.2d 484 (1981).

Estoppel of state. — State can only be estopped from asserting the state's right to the state's own property by legislative enactment or resolution. *State Hwy. Dep't v. Strickland*, 214 Ga. 467, 105 S.E.2d 299 (1958).

Cited in *Kennesaw Guano Co. v. Miles & Co.*, 132 Ga. 763, 64 S.E. 1087 (1909); *Hill v. Neely*, 151 Ga. 276, 106 S.E. 729 (1921); *Hotel Equip. Co. v. Liddell*, 32 Ga. App. 590, 124 S.E. 92 (1924); *Aiken v. Baynes*, 170 Ga. 784, 154 S.E. 451 (1930); *Dunlop Tire & Rubber Co. v. White*, 45 Ga. App. 268, 164 S.E. 414 (1932); *Taylor v. Wilson*, 185 Ga. 321, 195 S.E. 155 (1938); *Langston v. Nash*, 192 Ga. 427, 15 S.E.2d 481 (1941); *Hughes v. Cobb*, 195 Ga. 213, 23 S.E.2d 701 (1942); *Lankford v. Holton*, 195 Ga. 317, 24 S.E.2d 292 (1943); *Loftis Plumbing & Heating Co. v. American Sur. Co.*, 74 Ga. App. 590, 40 S.E.2d 667 (1946); *Nimmons v. Ballentine Motors of Ga., Inc.*, 92 Ga. App. 566, 88 S.E.2d 748 (1955); *Cox v. Zucker*, 214 Ga. 44, 102 S.E.2d 580 (1958); *Consumers Financing Corp. v. Lamb*, 218 Ga. 343, 127 S.E.2d 914 (1962); *Calhoun v. Eaves*, 114 Ga. App. 756, 152 S.E.2d 805 (1966); *Hileman v. Knable*, 391 F.2d 596 (3d Cir. 1968); *Martin v. GMC, Fisher Body Div.*, 226 Ga. 860, 178 S.E.2d 183 (1970); *Yancey v. Harris*, 234 Ga. 320, 216 S.E.2d 83 (1975); *Perimeter Dev. Corp. v. Haynes*, 234 Ga. 437, 216 S.E.2d 581 (1975); *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977); *Dulock v. Shiver*, 239 Ga. 604, 238 S.E.2d 397 (1977); *Lumpkin v. North Am. Acceptance Corp.*, 143 Ga. App. 666, 239 S.E.2d 554 (1977); *McFarland v. Beardsly*, 148 Ga. App. 645, 252 S.E.2d 72 (1979); *Hunnicut v. Southern Farm Bureau Life Ins. Co.*, 256 Ga. 611, 351 S.E.2d 638 (1987); *Kirkland v. Pioneer Mach., Inc.*, 243 Ga. App. 694, 534 S.E.2d 435 (2000); *Smith v. Direct Media Co.*, 247 Ga. App. 771, 544 S.E.2d 762 (2001); *U.S.A. Gas, Inc. v. Whitfield County*, 298 Ga. App. 851, 681 S.E.2d 658 (2009).

Illustrations

Admission in favor of third person. — Admissions against one's title to land, and in favor of the title of a third person, will be no estoppel in behalf of one to whom they were not made and who has merely heard of them, it not appearing that they were made for the purpose of being acted upon or with

any design or intention that they should be acted upon. *Randolph v. Merchants & Mechanics Banking & Loan Co.*, 181 Ga. 671, 183 S.E. 801 (1936).

Silence after sale by tenant in common. — When plaintiff did not stand by at the time of the sale with knowledge that the sale was taking place, but only remained silent after learning of the sale previously made and of the valuable, permanent, and expensive improvements made thereon by the purchaser, the plaintiff is not estopped to assert the plaintiff's title or claim of interest in the property within seven years from the date of the sale. *Owen v. Miller*, 209 Ga. 875, 76 S.E.2d 772 (1953).

Persons acquiescing in partitions. — Persons sui juris, who acquiesced in a partition and took possession of their shares, could not recover from a grantee of one partitioner. *Watkins v. Gilmore*, 130 Ga. 797, 62 S.E. 32 (1908).

Recorded deed. — Fact that a deed from a husband to his wife, under which a wife claimed title, may have been based upon a valuable consideration and duly recorded would not necessarily prevent a subsequent purchaser, by security deed, from relying upon the principle of estoppel, if he was in fact ignorant of the true title. *Roop Grocery Co. v. Gentry*, 195 Ga. 736, 25 S.E.2d 705 (1943).

Innocent representations coupled with delay in ascertaining truth. — If a person having legal title to land, which fact person does not know but has convenient means of knowing, and after a lapse of 27 years, during which time person was under no legal disability, person still has not learned the fact of the person's interest in the land, and in those circumstances the person induces one to buy the land from a third person by representations that the land is the property of such third person, the person's misrepresentations to the purchaser innocently made, coupled with the person's delay in ascertaining the truth, will amount to constructive fraud, and they may be pleaded as an estoppel by the purchaser on the faith of the title of the person's vendor. *Lanier v. Bryant*, 180 Ga. 409, 179 S.E. 346 (1935).

Valuable improvements on land. — One who has title to land and sees another who is in bona fide possession thereof place valu-

able improvements thereon, without giving notice of one's title, is not thereby subsequently estopped from asserting ones' title. *Owen v. Miller*, 209 Ga. 875, 76 S.E.2d 772 (1953).

Restrictive covenant. — Plaintiff was not estopped by acquiescence from seeking to enjoin violations of restrictive covenants by defendants merely because the same covenants were previously violated by other and different parties by more remote sales. *Dooley v. Savannah Bank & Trust Co.*, 199 Ga. 353, 34 S.E.2d 522 (1945).

Waiver of landlord's lien. — Even if the claimant by the claimant's signature to the waiver of the claimant's landlord's lien against the immediately preceding bill of sale to secure debt, and by the express reference in the claimant's waiver to such bill of sale, did not in effect so recognize the covenant and warranty of title made by the debtor in the bill of sale to the property in question as to be conclusively bound thereby the same as if the claimant had signed the bill of sale as a party thereto, the claimant will at least be prima facie presumed to have read the bill of sale, to which the claimant expressly referred, or to have had knowledge of its essential contents; the claimant will be assumed not to have acted without knowledge of the property on which the claimant expressly waived the claimant's lien. *Federal Intermediate Credit Bank v. Sherrod*, 50 Ga. App. 501, 178 S.E. 477 (1935).

Condemnation. — When there was no evidence of intentional deception on the part of the plaintiff, or any conduct which actually misled the defendant, the plaintiff would not be estopped from asserting any of the plaintiff's legal rights in injunction proceedings against the condemnation of property for a railroad right of way. *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 62 S.E. 52 (1908).

Claiming equitable title to property. — When a wife, who claimed the equitable title to property, knowingly permitted her husband to retain the legal title and possession thereof, and credit was extended to him upon the faith of his apparent ownership or arose from the purchase of his outstanding promissory note, she was estopped from asserting her secret equity as against a creditor, whether or not he had reduced his claim to judgment, who had no notice of

Illustrations (Cont'd)

such equity. *Rowe v. Cole*, 171 Ga. 391, 155 S.E. 473 (1930), later appeal, 176 Ga. 592, 168 S.E. 882 (1933), and 183 Ga. 477, 188 S.E. 668 (1936).

Actual knowledge. — When one knows that one owns the title to or an interest in real or personal property, and knowingly permits or acquiesces in the property's sale, encumbrance, or pledge by another, one will be estopped from setting up one's title or interest against the person who by such conduct has been misled to one's injury; however, when the estoppel relied upon is not one by deed or from an express contract, signed by the person against whom the rule is invoked, and is merely an equitable estoppel, it is the general rule that such person must, before the injury, have had actual knowledge of the transfer, sale, or encumbrance, and the material facts and circumstances attending the transaction. *Federal Intermediate Credit Bank v. Sherrod*, 50 Ga. App. 501, 178 S.E. 477 (1935).

Husband and wife. — Wife was estopped from claiming title to personalty in her husband's possession and mortgaged by him. *Whitchard v. Exchange Nat'l Bank*, 15 Ga. App. 190, 82 S.E. 770 (1914).

Consent of wife to include her property in husband's mortgage. — Fact that a wife may have consented for her husband to include personal property, belonging to her, in a mortgage executed by him to secure his individual debt would not estop her from thereafter setting up her title to the property, where the mortgagee had knowledge of the true ownership of the property at the time the mortgage was executed. *Whitchard v. Exchange Nat'l Bank*, 15 Ga. App. 190, 82 S.E. 770 (1914).

Signing ancillary agreement. — When one who is not a party to the instrument of sale signs an ancillary agreement thereon, which agreement is material to the force and effect of the instrument on the signer, and which expressly refers to the preceding instrument, one is estopped from asserting any interest one may have. *Federal Intermediate Credit Bank v. Sherrod*, 50 Ga. App. 501, 178 S.E. 477 (1935).

Failure to file will. — One's failure to move in the matter of compelling another to file the alleged will after one's refusal, and to

apply to have the will probated for so long a time, is such gross negligence as would amount to constructive fraud against a purchaser from the other without notice of the will and acting on faith of one's apparent title as heir at law, and would estop one and one's assigns from setting up title under the subsequently probated will as against such purchaser from the husband claiming as heir at law. *Hadden v. Stevens*, 181 Ga. 165, 181 S.E. 767 (1935).

Acceptance of insurance premiums and placing the money in the general funds of the defendant insurer amounted to such an unconditional acceptance as to estop the defendant to contend that the insured's policy was not in force at the date of the fire. *Progressive Fire Ins. Co. v. Morrison*, 72 Ga. App. 473, 34 S.E.2d 173 (1945).

State utility company and railroad station owner were estopped from contending that debtor's lease had been terminated prior to the debtor's bankruptcy filing since a revised memorandum effecting only the minor change of extending a termination date did not serve to negate the debtor's reasonable reliance on the previously established general terms of the contested deal. *Historic Macon Station Ltd. Partnership v. Piedmont-Forrest Corp.*, 152 Bankr. 358 (Bankr. M.D. Ga. 1993).

Invalidity of franchise. — Regardless of the amount of expenditures holder of franchise and transferee might have made in connection therewith, no equitable estoppel would arise against city barring it from challenging validity of the franchise since there was evidence to show such expenses were incurred with knowledge of the invalidity of the franchise and therefore good faith was wholly lacking. *Mid-Georgia Natural Gas Co. v. City of Covington*, 211 Ga. 163, 84 S.E.2d 451 (1954).

Bank's refusal to honor check. — Car auction contended that a bank should have been equitably estopped from denying that the bank had an obligation to honor checks drawn on a special account. However, the bank made no intentional misrepresentations and had no duty to disclose the bank's customer's financial status. The car auction, also, did not act with reasonable diligence by relying on the credit history of the customer's father instead of performing the auction's standard credit check. *Georgia Cas. &*

Sur. Co. v. Tennille Banking Co. (In re Smith), 51 Bankr. 904 (Bankr. M.D. Ga. 1985).

Use of other's name in making purchase to escape sales tax payment. — Use of out-of-state party's name and address to avoid payment of state sales tax does not give rise to estoppel to assert title to diamond ring since such party knew of the use of her name and address and has not adversely changed position in reliance thereon. *Kornegay v. Thompson*, 157 Ga. App. 558, 278 S.E.2d 140 (1981).

Wife who benefited from a loan obtained by her husband from his mother because it protected the marital home from foreclosure was not estopped from pursuing a claim to the residence, where it was not shown that the wife was in any way directly involved in the discussions and negotiations that procured the loan. *Watkins v. Watkins*, 256 Ga. 58, 344 S.E.2d 220 (1986).

No evidence party misled to that party's detriment. *Cowen v. Snellgrove*, 169 Ga. App. 271, 312 S.E.2d 623 (1983).

In a dispute between adjoining landowners over title to approximately six acres of land, because appellant adjoining neighbors failed to identify any evidence of deception on the part of the adjoining landowner or the landowner's predecessors, the trial court did not err by omitting a jury charge on equitable estoppel. *Pirkle v. Turner*, 281 Ga. 846, 642 S.E.2d 849 (2007).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. *Byers v. McGuire Props.*, 285 Ga. 530, 679 S.E.2d 1 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Equitable Adoption, 18 POF2d 531.

ALR. — Estoppel to assert title to real property by conduct subsequent to contract between third persons, 1 ALR 1482.

What names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence, 5 ALR 1580.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 ALR 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 ALR 842.

Denial of, or expression of doubt as to paternity or other relationship as estoppel to assert right of inheritance by virtue of such relationship, 33 ALR 579.

Estoppel of mortgagee or seller to deny existence of property mortgaged or sold, 40 ALR 382.

Failure to record or delay in recording an instrument affecting real property as basis of estoppel in favor of creditors not directly within protection of recording acts, 52 ALR 183.

Execution of deed in representative or fiduciary capacity as estoppel of one in his individual capacity, 64 ALR 1556.

Effect of intrusting another with stock certificate endorsed or assigned in blank to estop owner as against a bona fide purchaser or pledgee for value, 73 ALR 1405.

Estoppel by conduct during testator's life to dissent from or attack validity of will, 74 ALR 659.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 ALR 1129.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 ALR 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 ALR 1501.

Waiver of, or estoppel to assert, debtor's exemption, by laches or delay, 82 ALR 648.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagee, to set up usury in mortgage as a

defense or rely upon it as a ground of relief in equity, 82 ALR 1153.

Estoppel of municipality to deny that it gave its consent to street franchise, 89 ALR 619.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him, 89 ALR 1166.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 ALR 1295.

Intrusting possession of securities to bank officer or employee who uses them to make a fraudulent showing of bank assets as estoppel of owner to reclaim them as against bank receivers, 100 ALR 679.

Estoppel to question validity of proceedings extending boundaries of municipality, 101 ALR 581.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Waiver of, or estoppel to assert, or election not to assert, forfeiture of executory land contract because of default in payment, 107 ALR 345.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 ALR 121.

Promissory estoppel, 115 ALR 152; 48 ALR2d 1069.

Tax exemption as affected by failure to claim or delay in claiming it for past years, 115 ALR 1484.

Estoppel as ground for holding defendant liable for negligence in conduct of business which appears to be his but which in fact belongs to another, 122 ALR 256.

Estoppel to assert invalidity of foreign decree of divorce for lack of domicile at divorce forum or failure to obtain jurisdiction of person of defendant, 122 ALR 1321; 140 ALR 914; 153 ALR 941; 175 ALR 538.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need not be made at time due, as binding upon creditor by way of estoppel, 124 ALR 1248.

Doctrine of estoppel as applicable against

one's right to hold a public office or his status as a public officer, 125 ALR 294.

Mistake as to date of lapse of policy in insurer's statement of reason for denial of claim under policy as affecting its right to insist upon lapse as defense, 125 ALR 1270.

Estoppel to rely on statute of limitations, 130 ALR 8; 24 ALR2d 1413.

Estoppel by acquiescence or delay to question validity of plan for reorganization of bank, 139 ALR 659.

Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 ALR 1184.

What agreement or conduct subsequent to assignment of lease amounts to assumption by assignee of covenants of lease, or estoppel to deny such assumption, 148 ALR 393.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 ALR 690.

Estoppel to invoke rule or statute against perpetuities, 162 ALR 156.

Estoppel of intervener to assert claim against original complainant, 166 ALR 911.

Construction and application of statute respecting estoppel of insurer where insured was examined by medical examiner, 172 ALR 143.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warranty as to conditions affecting cost, 173 ALR 308.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Insurer's demand for additional or corrected proof of loss as waiver or estoppel as to right to assert contractual limitation provision, or as suspending running thereof, 15 ALR2d 955.

Estoppel of one selling or conveying property to dissolved or defunct corporation to deny its existence, 20 ALR2d 1084.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest its validity, 21 ALR2d 1457.

Estoppel to contest will or attack its validity, 28 ALR2d 116.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 ALR2d 636.

Insurer's admission of liability, offers of settlement, and negotiations for adjustment or settlement, as waiver of proof of property loss, 49 ALR2d 87.

Denial of liability as waiver of proofs of loss required by insurance policy, 49 ALR2d 161.

Estoppel to assert that article annexed to realty is or is not a fixture, 60 ALR2d 1209.

Right to attack validity of statute, ordinance, or regulation relating to occupational or professional license as affected by applying for, or securing license, 65 ALR2d 660.

Partial payment on private building or construction contract as waiver of defects, 66 ALR2d 570.

Waiver of, or estoppel to rely upon, contractual limitation of time for bringing action against municipality or other political subdivision, 81 ALR2d 1039.

Purchaser's right to set up invalidity of contract because of violation of state securities regulation as affected by doctrines of estoppel or *pari delicto*, 84 ALR2d 479.

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 ALR2d 920.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 ALR2d 1389.

Quantum or degree of evidence necessary to prove an equitable estoppel, 4 ALR3d 361.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 ALR3d 1270.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Agreement of parties as estopping reliance on statute of limitations, 43 ALR3d 756.

Estoppel of municipality as to encroachments upon public streets, 44 ALR3d 257.

Promises to settle or perform as estopping reliance on statute of limitations, 44 ALR3d 482.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 ALR3d 760.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 ALR3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 ALR3d 703.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 ALR3d 182.

Failure of creditor, or creditor's assignee, to secure credit insurance as affecting rights or liabilities of debtor, upon debtor's loss, 88 ALR3d 794.

Modern status of law as to equitable adoption or adoption by estoppel, 97 ALR3d 347.

Liability insurer's waiver of right, or estoppel, to set up breach of cooperation clause, 30 ALR4th 620.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 ALR4th 90.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 ALR5th 233.

ARTICLE 3

PARTICULAR MATTERS OF PROOF

24-4-40. Evidence of identity; burden in civil actions.

(a) Concordance of name alone is some evidence of identity. Residence, vocation, ownership of property, and other like facts may be proved. Reasonable certainty is all that can be required.

(b) In civil actions parties are generally relieved from the onus of proving identity, as it is a fact generally more easily disproved than

established. (Civil Code 1895, § 5178; Civil Code 1910, § 5765; Code 1933, § 38-304.)

History of Code section. — This Code section is derived from the decision in *Mullery v. Hamilton*, 71 Ga. 720 (1884).

Law reviews. — For article, "DNA Fingerprinting: A Scientific Perspective," see 42 *Mercer L. Rev.* 1099 (1991).

JUDICIAL DECISIONS

Constitutionality of speech identification. — Requiring a suspect in a criminal case to verbalize specified words for identification purposes, whether or not the words used are the same as those allegedly used during the commission of the offense, does not violate an accused's privilege against self-incrimination accorded the accused by the United States Constitution and the state statutes and Constitution. *Tate v. State*, 153 Ga. App. 508, 265 S.E.2d 818 (1980).

Identification testimony admissible when it is relevant and supported by facts. *Clark v. State*, 153 Ga. App. 829, 266 S.E.2d 577 (1980).

Jury question. — Question of identity is one for the jury. *Calhoun v. Herrin*, 125 Ga. App. 518, 188 S.E.2d 273 (1972).

Identity of names is generally prima facie evidence of identity of persons. *Hardrick v. State*, 96 Ga. App. 670, 101 S.E.2d 99 (1957).

Concordance of name is sufficient to show that the defendant and the individual previously convicted was the same person, in the absence of any denial by the defendant and no proof to the contrary. *Hammond v. State*, 139 Ga. App. 820, 229 S.E.2d 685 (1976).

In the absence of a denial by the defendant that the defendant was the perpetrator of a previous crime and any proof to the contrary, a concordance of name is sufficient to show that the defendant and the individual previously convicted were the same person. *Lewis v. State*, 234 Ga. App. 873, 508 S.E.2d 218 (1998).

Under O.C.G.A. § 24-440(a), if a defendant has the same name as is specified in a certified copy of a conviction, the concordance of name alone is some evidence of identity; without evidence to the contrary, the concordance of name established the previous conviction. Additionally, defendant stated the sentence set forth in the final disposition and acknowledged that defendant served the sentence. *Patterson v. State*, 259 Ga. App. 630, 577 S.E.2d 850 (2003).

Adoption of name. — Witness may testify as to the identity of another person by showing that the other person has assumed and adopted the name in question. *Hardrick v. State*, 96 Ga. App. 670, 101 S.E.2d 99 (1957).

Reference to person in case. — If a witness mentions the name of a person, it will be referred to the person in the case of that name, rather than to some outsider. *Swift v. Oglesby & Smith*, 8 Ga. App. 540, 70 S.E. 97 (1911).

If pretrial showup may have been unnecessarily suggestive, the criteria to determine whether there was a substantial likelihood of irreparable misidentification are: (1) opportunity to view the defendant at the scene; (2) witness's degree of attention; (3) accuracy of prior description; (4) level of certainty demonstrated at confrontation; and (5) time lapse. *Tate v. State*, 153 Ga. App. 508, 265 S.E.2d 818 (1980); *Smith v. State*, 160 Ga. App. 60, 286 S.E.2d 45 (1981).

Two-prong test for admissibility of preindictment lineup. — In determining whether the eyewitness testimony following a preindictment investigative lineup should be admitted, each case must be considered on its own facts and a two-prong test must be applied: (1) whether the photographic display was impermissibly suggestive, and, if it was, the court must consider (2) whether there was a substantial likelihood of irreparable misidentification. *Cheeves v. State*, 157 Ga. App. 566, 278 S.E.2d 148 (1981).

In considering whether lineup is impermissibly suggestive, evil to be avoided is likelihood of misidentification of an accused. *James v. State*, 157 Ga. App. 645, 278 S.E.2d 187 (1981).

Reliability of any identification procedure requires determination of whether it was in any way tainted by illegal pretrial showup or lineup or by use of photographs; in such situations the court should consider the

totality of the circumstances and determine first if the procedures were impermissibly suggestive, and, if so, did that procedure give rise to a substantial likelihood of irreparable misidentification. *Miller v. State*, 158 Ga. App. 21, 279 S.E.2d 289 (1981).

Photo array was not impermissibly suggestive because the eyewitnesses testified that the eyewitnesses looked at the lineup outside the presence of each other, read an admonition form before looking at the lineup, and picked out defendant's photograph; furthermore, the officer showing the lineup to the eyewitnesses did not tell the eyewitnesses that the eyewitnesses had picked the "right" photograph. *Pace v. State*, 272 Ga. App. 16, 611 S.E.2d 694 (2005).

Vocal verification is analogous to visual verification. *Wallace v. State*, 156 Ga. App. 525, 275 S.E.2d 110 (1980).

Photographic array can be suggestive when used close in time to a lineup, but when the record is devoid of specifics which would substantiate a claim of misidentification and the witness is able to identify appellant from the array, the procedure is not impermissibly suggestive. *Coleman v. State*, 150 Ga. App. 380, 258 S.E.2d 12 (1979).

Evidence of other offenses of a similar nature may be admitted in criminal prosecutions for the purpose of identifying the accused and for the purpose of showing a common motive, plan, scheme, bent of mind, or course of conduct. *Laws v. State*, 153 Ga. App. 166, 264 S.E.2d 700 (1980); *Chambers v. State*, 154 Ga. App. 620, 269 S.E.2d 42 (1980).

Admissible evidence. — Personal appearance, conversations, account one gave of

oneself, one's family connections and associations, are admissible. *Mullery v. Hamilton*, 71 Ga. 720 (1883).

Evidence sufficient. — In the instant suit by the beneficiary on a policy insuring the life of one's brother, even if under this rule the burden of providing that the person, bearing the same name as the insured and as to whom proof of death by pleuro-pneumonia was made, was the insured named in the policy, the onus was sufficiently met by the plaintiff's testimony, admitted without objection, that plaintiff's brother, of the name stated in the policy, was a world war veteran, that the Veterans' Bureau in Washington, D.C., informed plaintiff of plaintiff's brother's death, and that upon further inquiry plaintiff found that plaintiff's brother had died in a town in New Jersey, no evidence having been presented by the defendant to dispute such identity, a finding on that question was demanded for the plaintiff. *Progressive Life Ins. Co. v. Haygood*, 53 Ga. App. 231, 185 S.E. 534 (1936).

Cited in *Townsend v. Rechsteiner*, 195 Ga. 618, 24 S.E.2d 776 (1943); *Green v. State*, 74 Ga. App. 390, 39 S.E.2d 765 (1946); *Robinson v. State*, 209 Ga. 650, 75 S.E.2d 9 (1953); *Hitchcock v. Rochelle*, 104 Ga. App. 775, 123 S.E.2d 268 (1961); *Taylor v. Marsh*, 107 Ga. App. 575, 130 S.E.2d 770 (1963); *Walden v. State*, 121 Ga. App. 142, 173 S.E.2d 110 (1970); *Hicks v. Simpson*, 229 Ga. 214, 190 S.E.2d 73 (1972); *Hobbs v. State*, 229 Ga. 556, 192 S.E.2d 903 (1972); *Gerdine v. State*, 136 Ga. App. 561, 222 S.E.2d 128 (1975); *Hill v. State*, 162 Ga. App. 637, 292 S.E.2d 512 (1982); *Perry v. State*, 222 Ga. App. 445, 474 S.E.2d 199 (1996); *Roebuck v. State*, 277 Ga. 200, 586 S.E.2d 651 (2003).

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Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 576 et seq. 29A Am. Jur. 2d, Evidence, §§ 1399, 1400, 1403 et seq.

Am. Jur. Proof of Facts. — Lineups and Showups — Admissibility and Effect of Pre-trial Identification, 19 POF2d 435.

Foundation for DNA Fingerprint Evidence, 8 POF3d 749.

C.J.S. — 31A C.J.S., Evidence, § 263. 32A C.J.S., Evidence, § 1304, 1305.

ALR. — Footprints as evidence, 31 ALR 204; 35 ALR2d 856.

Baptismal certificate or church record as evidence of age, 36 ALR 689.

Admissibility and weight of evidence of resemblance on question of paternity or other relationship, 40 ALR 97; 95 ALR 314.

Admissibility in action for death of statements against interest by decedent, 114 ALR 921.

Blood grouping tests, 163 ALR 939; 46 ALR2d 1000.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction, 11 ALR2d 870.

Admissibility of declaration of persons other than members of family as to pedigree, 15 ALR2d 1412.

Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 ALR2d 1216.

Fingerprints, palm prints, or bare footprints as evidence, 28 ALR2d 1115.

Identification of accused by his voice, 70 ALR2d 995.

Homicide: identification of victim as person named in indictment or information, 86 ALR2d 722.

What evidence is admissible to identify plaintiff as person defamed, 95 ALR2d 227.

Admissibility of evidence of showup iden-

tification as affected by allegedly suggestive showup procedures, 39 ALR3d 791.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures, 39 ALR3d 1000.

Malicious prosecution: liability for instigation or continuation of prosecution of plaintiff mistakenly identified as person who committed an offense, 66 ALR3d 10.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Admissibility of bare footprint evidence, 45 ALR4th 1178.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 ALR5th 672.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 ALR5th 423.

24-4-41. Proof of de facto officer.

An officer de facto may be proved to be such by his acts, without the production of his commission or appointment. (Orig. Code 1863, § 3687; Code 1868, § 3711; Code 1873, § 3764; Code 1882, § 3764; Civil Code 1895, § 5168; Civil Code 1910, § 5754; Code 1933, § 38-207.)

JUDICIAL DECISIONS

De facto notary doctrine. — Pursuant to the de facto notary doctrine, an expert's affidavit satisfied the requirements of O.C.G.A. § 9-11-9.1, despite the fact that the commission of the notary who attested the affidavit had expired. *Thomas v. Gastroen-*

terology Assocs. of Gainesville, P.C., 280 Ga. 698, 632 S.E.2d 118 (2006).

Cited in *Howell v. State*, 162 Ga. 14, 134 S.E. 59 (1926); *Consolidated Eng'g Co. v. U.I.R. Contractors*, 136 Ga. App. 923, 222 S.E.2d 692 (1975).

24-4-42. Judgment admissible; effect.

A judgment shall be admissible between any parties to show the fact of the rendition thereof; between parties and privies it is conclusive as to the matter directly in issue, until reversed or set aside. (Orig. Code 1863, § 3749; Code 1868, § 3773; Code 1873, § 3826; Code 1882, § 3826; Civil Code 1895, § 5233; Civil Code 1910, § 5820; Code 1933, § 38-623.)

Law reviews. — For article on the effect of a conviction that is based on a nolo

contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Direct or indirect relitigation prohibited.

— Questions settled by a former final judgment must be considered an end of the litigation; those questions cannot be litigated in other actions, directly or indirectly. *Smith v. Robinson*, 214 Ga. 835, 108 S.E.2d 317 (1959).

Issues in second suit are concluded as between parties and their privies if they were made in the first suit or if, under the rules of pleading and evidence, they could have been put in issue. *Roadway Express, Inc. v. McBroom*, 61 Ga. App. 223, 6 S.E.2d 460 (1939).

Mere witness not estopped. — While an adjudication of the same subject matter in issue in a former suit between the same parties by a court of competent jurisdiction is an end of litigation, the plaintiff is not estopped by the judgment rendered in the court of ordinary (now probate court) in a proceeding to which the plaintiff was not a party, although the plaintiff appeared as a witness therein. *McAfee v. Martin*, 211 Ga. 14, 83 S.E.2d 605 (1954).

Entire record must be offered. — When a judgment is relied on as establishing any particular state of facts it can be proved only by offering in evidence the entire proceedings in which the judgment was rendered. *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980).

New rule of law irrelevant. — Judgment of the Court of Appeals, reversing a judgment of the trial court cannot be set aside on motion in the trial court, upon the ground that since the rendition of the decision by the Court of Appeals, the Supreme Court, in another case, announced a rule of law contrary to the decision of the Court of Appeals. *Atkinson v. Battle*, 11 Ga. App. 837, 76 S.E. 597 (1912).

Decree in chancery is evidence, not merely of the fact of its rendition, but also of all the consequences resulting therefrom. It may be given in proof against persons who were not parties to the bill, in support of the plaintiff's right or title to sue. *Hardwock v. Hook*, 8 Ga. 354 (1850).

Judgment cannot be collaterally questioned by third persons, except on the ground of fraud and collusion, in the procurement of the judgment. Creditors or

bona fide purchasers may attack a judgment fraudulently obtained, whenever the judgment interferes with their rights, either at law or in equity. *Hammock v. McBride*, 6 Ga. 178 (1849).

Same parties and privies. — Debtor's transfer of real property to the debtor's wife, a default judgment in a lawsuit, which the trustee claimed rendered the debtor insolvent, in which the wife did not participate and which was filed after the transfer did not prove the debtor's insolvency at the time of the transfer for purposes of former O.C.G.A. § 18-2-22(3); the wife's status as the debtor's wife, standing alone, did not establish privity with the debtor, and the judgment against the debtor did not bind the wife. *Thurmond v. Turner* (In re Turner), No. 00-72597-PWB, 2006 Bankr. LEXIS 2745 (Bankr. N.D. Ga. Sept. 19, 2006).

Irregular judgment. — Although the judgment of a court may be irregular, still the judgment may be given in evidence for many purposes. *Bryan v. Watson*, 20 Ga. 480 (1856).

Consent order in previous litigation involving an insurer and insured in subsequent litigation, unreversed and not set aside, which recites that a compromise settlement release is valid according to all its terms and provisions is conclusive on the parties as to any claim under the policy. *Mutual of Omaha Ins. Co. v. Morris*, 120 Ga. App. 525, 171 S.E.2d 378 (1969).

Litigation of jurisdiction. — When in an action for divorce brought by wife, the husband appeared and filed an answer denying the allegations as to residence and also filed a plea to the jurisdiction, the question as to jurisdiction was necessarily litigated despite the fact that he had not appeared to defend the action in person, and the result was binding on the husband, in the absence of fraud, accident, or mistake, unmixed with negligence on his part. *Johnson v. Johnson*, 188 Ga. 800, 4 S.E.2d 807 (1939).

Issue directly litigated. — When the defendant in a trover suit sues the plaintiff therein for divorce, and the question of title to the automobile is adjudicated by a court of competent jurisdiction, without objection by either party, in the action for divorce, the judgment rendered in that case, when the

issue as to the title of the automobile is directly made, is conclusive on that question in the trover case. *Maddox v. Carithers*, 77 Ga. App. 280, 47 S.E.2d 888 (1948).

When custody of minor child was vested in the mother by prior judgment, until and unless it was set aside in accordance with law, it was conclusive against the father, and was res judicata in a habeas corpus proceeding by the father. *Levens v. Edge*, 217 Ga. 418, 122 S.E.2d 728 (1961).

Res judicata in criminal case. — Court properly sustained the state's plea of res judicata and dismissed on oral motion the defendant's special plea, where the judgment pleaded in bar thereof adjudicated the issue, as the judgment so pleaded by the state had been neither reversed nor modified by any exception which the accused had taken to it, such unreversed and unmodified judgment had consequently become and was the law of the case. *Seymour v. State*, 210 Ga. 571, 81 S.E.2d 808 (1954).

Evidence of original divorce decree. — Trial court presiding over an action for modification of alimony erred in refusing to allow the introduction into evidence of the

original divorce decree. *Cotton v. Cotton*, 272 Ga. 276, 528 S.E.2d 255 (2000).

Admissibility of civil judgment in criminal case. — Judgment in a civil action is not admissible in a criminal action to prove any fact determined in the civil action. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, application for stay of execution, 449 U.S. 888, 100 S.Ct. 2960, 64 L. Ed. 2d 837 (1980).

Cited in *Holton v. Mercer*, 65 Ga. App. 53, 15 S.E.2d 253 (1941); *Turner v. Avant*, 205 Ga. 426, 54 S.E.2d 269 (1949); *Carswell v. Shannon*, 209 Ga. 596, 74 S.E.2d 850 (1953); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *Shaw v. Miller*, 215 Ga. 413, 110 S.E.2d 759 (1959); *Beckanstin v. Dougherty County Council of Architects*, 215 Ga. 543, 111 S.E.2d 361 (1959); *Blanton v. Blanton*, 217 Ga. 542, 123 S.E.2d 758 (1962); *Swinney v. Reeves*, 224 Ga. 274, 161 S.E.2d 273 (1968); *Shaw v. Caldwell*, 229 Ga. 87, 189 S.E.2d 684 (1972); *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975); *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981); *Childers v. Tauber*, 160 Ga. App. 713, 288 S.E.2d 5 (1981); *Cole v. Jordan*, 161 Ga. App. 409, 288 S.E.2d 260 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1277 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

C.J.S. — 32A C.J.S., Evidence § 1027.

ALR. — Judgment in favor of less than all parties to contract as bar to action against other parties, 2 ALR 124.

Conviction or acquittal as evidence of facts on which it was based, in a civil action, 31 ALR 261; 18 ALR2d 1287.

Judgment in action on commercial paper as affecting party to the paper who was not a party to the suit, 34 ALR 152.

Conclusiveness of decree assessing stockholders of insolvent corporation as against nonresident stockholders not personally served within the state in which it was rendered, 48 ALR 669; 175 ALR 1419.

Judgment in action for services of physician or surgeon as bar to action against him for malpractice, 49 ALR 551.

Suit in one state or country to enforce a contract as regards real property therein as a

bar to suit in another state or country to enforce the contract as regards the property therein, 52 ALR 180.

Judgment in action for death as a bar to an action for the same death in another jurisdiction or under another statute, 53 ALR 1275.

Necessity of verdict against servant or agent as condition of verdict against master or principal for tort of servant or agent, 78 ALR 365.

Admissibility and effect of finding or order on claim under Workmen's Compensation Act for personal injury, in proceedings on claim for compensation for death, 88 ALR 1179.

Necessity of offering in evidence the record in the prior case in support of plea or claim that former judgment is bar or res judicata, 96 ALR 944.

Judgment in favor of defendant in action for personal injuries as bar to suit for death caused by such injuries, and vice versa, 99 ALR 1091.

Homestead exemption as exception to

rule that judgment is conclusive as to defenses which might have been but were not raised, 103 ALR 934.

Extraterritorial recognition and effect, as regards marital status, of a decree of divorce or separation rendered in a state or country in which neither of the parties was domiciled, 105 ALR 817; 1 ALR2d 1385; 28 ALR2d 1303.

Findings or order upon application for alimony pendente lite in action for divorce or separation as *res judicata*, 105 ALR 1406.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Adjudication in fixing inheritance, succession, or estate tax, as conclusive for other purposes, 117 ALR 1227.

Judgment against tort-feasor's insurer in action by injured person as *res judicata* in similar action by another person injured in same accident, 121 ALR 890.

Rule of *res judicata* as applied to judicial construction of will, 136 ALR 1180.

Judgment as conclusive as against, or in favor of one not a party of record or privy to a party, who prosecuted or defended suit on behalf and in the name of party, or assisted him or participated with him in its prosecution or defense, 139 ALR 9.

Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and the nonliability of the other, 142 ALR 727.

Conclusiveness as to merits of judgment of court of foreign country, 148 ALR 991.

Judgment in wrongful death action as *res judicata* in a subsequent action in same jurisdiction for the same death under same statute brought by or for benefit of statutory beneficiary whose status as such was ignored in the former action, 148 ALR 1346.

Judgment for or against ward, cestui que trust, trustor, or distributee, as *res judicata* as to guardian, trustee, assignee for creditors, receiver, or personal representative, not a party to action or proceeding in which judgment was rendered, 162 ALR 1024.

Judgment in tax case as to one period as *res judicata* as to another period, 162 ALR 1204.

Judgment for defendant based on the

statute of limitations as bar to maintenance of action in another state, 164 ALR 693.

Judgment based on construction of instrument as *res judicata* of its validity, 164 ALR 873.

Privity between cotenants for purposes of doctrine of *res judicata*, 169 ALR 179.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicil, since Williams decision, 1 ALR2d 1385; 28 ALR2d 1303.

Denial of divorce in sister state or foreign country as *res judicata* in another suit for divorce between the same parties, 4 ALR2d 107.

Privity as between lessor or bailor and lessee or bailee of personal property as regards effect of judgment in third person's action for damages against lessee or bailee as *res judicata* in lessor's or bailor's subsequent action against third person for damage to the property, or vice versa, 4 ALR2d 1378.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as *res judicata* as to validity of another will, deed, or other instrument, 25 ALR2d 657.

Decree granting or refusing injunction as *res judicata* in action for damages in relation to matter concerning which injunction was asked in first suit, 26 ALR2d 446.

Judgment involving real property against one spouse as binding against other spouse not a party to the proceeding, 58 ALR2d 701.

Decree in suit for "separation" as *res judicata* in subsequent suit for divorce or annulment, 90 ALR2d 745.

Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 ALR3d 933.

Judgment in action against codefendants for injury or death of person, or for damage to property, as *res judicata* in subsequent action between codefendants as to their liability *inter se*, 24 ALR3d 318.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 ALR3d 350.

Judgment in action against seller or supplier of product as *res judicata* in action

against manufacturer for injury from defective product, or vice versa, 34 ALR3d 518.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 ALR3d 472.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect, 91 ALR3d 1170.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action or vice versa, 94 ALR3d 676.

24-4-43. Calendars as proof of dates.

Stern's United States calendar and Stafford's office calendar shall be admissible in proof of dates for the space of time covered by them respectively without further proof. (Ga. L. 1882-83, p. 135, § 1; Civil Code 1895, § 5169; Ga. L. 1897, p. 87, § 1; Civil Code 1910, § 5755; Code 1933, § 38-208.)

24-4-44. American Experience Mortality Tables.

In all civil cases where the life expectancy of a person shall be an issue, the American Experience Mortality Tables shall be admissible as evidence of the life expectancy of such person. (Ga. L. 1956, p. 68, § 1.)

Cross references. — The American Experience Mortality Table, appendix to this volume.

Law reviews. — For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on

the Carlisle table, see 9 Ga. St. B.J. 293 (1973). For article, economic evaluation of damages in personal injury and wrongful death litigation, see 19 Ga. St. B.J. 60 (1982). For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B.J. 100 (1988).

JUDICIAL DECISIONS

Permanent injuries. — Court errs in failing to charge that mortality tables are to be used only if the injuries sued for are permanent, and that the value of the victim-wife's services and consortium in the future, for the loss of which the plaintiff husband sought recovery, should be reduced to present cash value where there is an issue as to whether or not the injuries sustained by the plaintiff wife were permanent. *Davison-Paxon Co. v. Archer*, 91 Ga. App. 131, 85 S.E.2d 182 (1954).

Jury not bound by tables. — While stan-

dard mortality tables are admissible in evidence as an aid to the jury in determining the life expectancy of a deceased person, the jurors are not bound by such tables, but may use any method known to them as upright and intelligent individuals in applying their knowledge of the common phenomena and facts of human experience to the evidence, where sufficient facts appear as to the age, health, physical condition, and habits of the deceased to afford a basis for a proper conclusion. *Pollard v. Gorman*, 52 Ga. App. 127, 182 S.E. 678 (1935).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1033.

ALR. — Instructions regarding determination of life expectancy in action for personal injuries or death, 87 ALR 910.

Admissibility and weight of mortality tables as evidence as affected by lack of normal health, 116 ALR 416.

Shortening of life expectancy as element

of damages recoverable in action by person injured or in action under survival statute or death statute, 131 ALR 1351.

Use of mortality tables as aid in determining life expectancy of young child whose age is not tabulated therein, 162 ALR 1003.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 ALR2d 419.

Cost of annuity as a factor for consideration in fixing damages in personal injury or death action, 53 ALR2d 1454.

Counsel's use, in trial of personal injury or wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence, relating to damages, 86 ALR2d 239.

24-4-45. Other mortality tables.

(a) In addition to any other lawful methods of computing the value of the life of a decedent in wrongful death cases or of determining the present value of future due earnings or amounts in cases involving permanent personal injuries, there shall be admissible in evidence, as competent evidence in such cases, either or both of the following mortality tables:

- (1) The Commissioners 1958 Standard Ordinary Mortality Table;
- (2) Annuity Mortality Table for 1949, Ultimate.

(b) In addition to the provisions set out in subsection (a) of this Code section, the jury or court shall be authorized in cases of wrongful death or permanent personal injuries to use any table determined by the jury or court, whichever is the trier of fact, to be accurate in showing the value of annuities on single lives according to the mortality tables listed in subsection (a) of this Code section.

(c) The admissible evidence provided for in subsections (a) and (b) of this Code section shall not be the exclusive method which the jury or court hereafter is required to use in such cases but shall be supplementary to other lawful and allowable evidence and method for such purpose otherwise obtaining in this state. (Ga. L. 1970, p. 168, §§ 1, 3, 4; Ga. L. 1995, p. 10, § 24.)

Cross references. — The Commissioners 1958 Standard Ordinary Mortality Table and the Annuity Mortality Table for 1949, Ultimate, appendix to this volume.

Law reviews. — For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on

the Carlisle table, see 9 Ga. St. B.J. 293 (1973). For article, economic evaluation of damages in personal injury and wrongful death litigation, see 19 Ga. St. B.J. 60 (1982). For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B.J. 100 (1988).

JUDICIAL DECISIONS

Jury's findings must be fair. — While a jury has latitude in determining the value of a person's life in considering income, health, life expectancy, etc., and are not bound by mortality tables which may be

introduced in evidence and may reduce the value of a person's life to its present cash value by any method satisfactory to them which produces a definite result that is fair and reasonable and is authorized by the

evidence, their final finding as to the present cash value of the decedent's life must be fair and within reason and adjusted to the evidence within the latitudes above mentioned. *Swift & Co. v. Lawson*, 95 Ga. App. 35, 97 S.E.2d 168 (1957).

Expert testimony. — Evidence offered by an expert on the value of the life of the deceased may take into account statistical studies and inflationary trends. *Georgia S. & Fla. Ry. v. Odom*, 152 Ga. App. 664, 263 S.E.2d 469 (1979).

Table properly admitted. — Trial court

did not err in admitting into evidence, over objection, a mortality table and in charging the jury on permanent injury since plaintiff was injured on February 28, 1983, and at the time of trial on March 19, 1986, was still disabled from performing some normal, everyday functions, and the court limited any damages awarded to future pain and suffering. *Cox v. Cantrell*, 181 Ga. App. 722, 353 S.E.2d 582 (1987).

Cited in *Piggly-Wiggly S., Inc. v. Tucker*, 139 Ga. App. 873, 229 S.E.2d 804 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1348 et seq.

C.J.S. — 32A C.J.S., Evidence, § 1033.

ALR. — Medical books or treatises as independent evidence, 65 ALR 1102; 84 ALR2d 1338.

Remarriage tables, 25 ALR2d 1464.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 ALR2d 419.

Cost of annuity as a factor for consideration in fixing damages in personal injury or death action, 53 ALR2d 1454.

Admissibility of evidence as to experiments or tests in civil action for death, injury, or property damage against electric power company or the like, 54 ALR2d 922.

Counsel's use, in trial of personal injury or

wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence, relating to damages, 86 ALR2d 239.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 ALR3d 88.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker, 47 ALR4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 ALR4th 134.

Admissibility of evidence, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs on issue of life expectancy, 86 ALR4th 1135.

24-4-46. United States Department of Agriculture inspection certificates prima-facie evidence.

All inspection certificates issued by the United States Department of Agriculture over the signature of any inspector thereof which are admissible in courts of the United States as prima-facie evidence of the truth of the statements therein contained shall be admissible in all courts of the State of Georgia as prima-facie evidence of the truth of the statements therein contained. (Ga. L. 1939, p. 315, § 1.)

24-4-47. Written finding or report by authorized federal officer that person is dead or missing as evidence; signature and certification deemed prima facie authorized.

(a) A written finding of presumed death made by officers or employees of the United States authorized to make such findings pursuant to any law of the United States or a duly certified copy of such finding shall be received

in any court, office, or other place in this state as evidence of the death of the person therein found to be dead, and the date, circumstances, and place of his disappearance.

(b) An official written report, record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead, or alive, made by an officer or employee of the United States authorized by any law of the United States to make the same shall be received in any court, office, or other place in this state, as evidence that such person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead, or alive, as the case may be.

(c) For the purposes of subsections (a) and (b) of this Code section, any finding, report, record, or duly certified copy thereof, purporting to have been signed by an officer or employee of the United States as is described in this Code section shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima-facie evidence of his authority so to certify. (Ga. L. 1945, p. 417, §§ 1-3.)

U.S. Code. — Payments to missing federal employees, 5 U.S.C., § 5561 et seq. Payments to missing service personnel, 37 U.S.C., § 551 et seq.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8A Am. Jur. Pleading and Practice Forms, Death, § 168.	affected by fact that person was fugitive from justice, 44 ALR 1488.
ALR. — Circumstances justifying inference of death of insured before the lapse of seven years from his disappearance, 34 ALR 1389; 61 ALR 1327.	Death certificate as evidence, 96 ALR 324.
Presumption of death from absence as	Presumption of death as evidence, 115 ALR 404.
	Presumption against suicide as overcome by death certificate, coroner's verdict, or similar documentary evidence, 159 ALR 181.

24-4-48. Admissibility of photographs, motion pictures, videotapes, and audio recordings.

(a) For purposes of this Code section, “unavailability of a witness” includes situations in which the authenticating witness:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;
- (2) Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

An authenticating witness is not unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

(b) Subject to any other valid objection, photographs, motion pictures, videotapes, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

(c) Subject to any other valid objection, photographs, motion pictures, videotapes, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered, provided that prior to the admission of such evidence the date and time of such photograph, motion picture, or videotape recording shall be contained on such evidence and such date and time shall be shown to have been made contemporaneously with the events depicted in the photograph, videotape, or motion picture.

(d) This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, videotapes, and audio recordings but shall be supplementary to any other statutes and lawful methods existing in this state. (Code 1981, § 24-4-48, enacted by Ga. L. 1996, p. 443, § 1; Ga. L. 1997, p. 143, § 24.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, “authenticating” was substituted for “authenticating” in the undesignated paragraph at the end of subsection (a).

Law reviews. — For article, “Understanding and Challenging Photographic Evi-

dence: What the Camera Never Saw,” see 10 Ga. St. B.J. 20 (2004). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

For review of 1996 evidence legislation, see 13 Ga. St. U. L. Rev. 167.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AUDIOTAPES

PHOTOS

VIDEOTAPES

General Consideration

Brief nonresponsive reference to polygraph test did not open the door to the cross-examination of a witness about the witness's polygraph test; additionally, the polygraph reference did not prejudice a defendant because the reference indicated nothing about the results of the polygraph. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Internet chat session transcript admissible. — Transcript of an internet chat session was admissible because the operator of the machine which produced the transcript, or one who personally witnessed the events recorded, testified that the videotape accurately portrayed what the witness saw take place at the time the events occurred. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Transcript of an Internet chat room conversation between defendant and a police officer, posing as a 14-year-old girl, was properly admitted as similar transaction evidence in defendant's trial for pimping, contributing to the delinquency of a minor, and sexual exploitation of a minor; the officer was present to testify, personally witnessed the real-time chat recorded in the transcript as it was taking place, and testified that the transcript accurately represented the on-line conversation; the officer's testimony was tantamount to that of a witness to an event and was sufficient to authenticate the transcript. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Cited in *Ross v. State*, 262 Ga. App. 323, 585 S.E.2d 666 (2003); *Dingler v. State*, 293 Ga. App. 27, 666 S.E.2d 441 (2008).

Audiotapes

9-1-1 call admissible. — An audioteape of a witness's 9-1-1 emergency telephone call that was admitted into evidence without meeting foundation requirements was properly au-

thenticated by testimony of the witness that the witness had reviewed the tape and that the tape accurately portrayed the conversation the witness had with the 9-1-1 operator, with no deletions, additions, or alterations. *Hudson v. State*, 273 Ga. 124, 538 S.E.2d 751 (2000).

Audioteape of two 9-1-1 calls was properly admitted into evidence since the records custodian of the county 9-1-1 communications bureau presented detailed testimony as to the process used in producing both the original audiotapes and the copy admitted into evidence, the records custodian explained that calls are automatically recorded without the intervention of the 9-1-1 operator, and the records custodian further testified that the copy was a true and correct copy of the original recording. *Shaw v. State*, 247 Ga. App. 867, 545 S.E.2d 399 (2001).

Audioteape of deceased victim admissible. — With regard to a defendant's convictions for malice murder and kidnapping with bodily injury as a result of the defendant killing a former girlfriend who was also the mother of the defendant's two children, the trial court did not err by admitting an audioteape of a telephone conversation between the victim and the defendant since the state laid a proper foundation for the admission of the audioteape by adequately demonstrating that the victim was the person who made the tape, the victim was a party to the conversation, and the tape was not inadmissible under O.C.G.A. § 16-11-62. *Griffin v. State*, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, *Garza v. State*, 2008 Ga. LEXIS 865 (Ga. 2008).

Proper foundation for admission of audioteape. — Deed grantee laid a proper foundation pursuant to O.C.G.A. § 24-4-48(c) for purposes of admission of an audioteape in a deed grantor's action to set aside the deed since the grantee testified that the tape was of a voice mail left on a cell phone that went unanswered, and that the voice on the tape was that of the grantor. *Dae*

Audiotapes (Cont'd)

v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306 (2009).

Improper foundation for admission of audiotape in controlled drug buy. — Trial court erred in admitting an audiotape recording of a controlled drug sale by a confidential informant (CI) with defendant as neither party to the sale testified as to the authenticity and accuracy of the recording, and O.C.G.A. § 24-4-48 could not be the vehicle by which the tape was admitted because the essential criterion, the unavailability of an authenticating witness, could not be met; another audiotape of a second controlled buy was properly admitted as a police officer who listened to the transaction via a bug that had been attached to the CI testified that the tape recording was a fair and accurate portrayal of the conversation. *Brown v. State*, 274 Ga. App. 302, 617 S.E.2d 227 (2005).

Claim of error in admission of tape rejected. — Defendant's claim that an audiotape was improperly admitted into evidence was rejected as defendant did not include the tape in the record and defendant failed to specify the harm that resulted from any error in admitting the tape. *Dupree v. State*, 267 Ga. App. 561, 600 S.E.2d 654 (2004).

Transcript of audiotape and photographs. — Since a proper foundation for a transcript of defendant's statements to the police was laid by the trial court properly informing the jury that the transcript was not to be considered independent evidence, and that the jury had to return the transcript after listening to an audiotape thereof, admission of the transcript was proper; in addition, the photographs of the victim, which were not unduly gruesome or prejudicial, were admissible. *Palmer v. State*, 277 Ga. 124, 587 S.E.2d 1 (2003).

Photos

Proper foundation for admission of photo. — Since the defendant failed to establish the photo's origins or source, and also failed to connect the photo to the threatening letters defendant claimed defendant received while in jail, under O.C.G.A. § 24-4-48(b), the trial court did not abuse the court's discretion in finding that a

proper foundation was not laid for the photo's admission. *Sweet v. State*, 276 Ga. 545, 580 S.E.2d 231 (2003).

Defendant's motion for a mistrial based on the admission of a photograph of the victim's head was not an abuse of discretion as: (1) if pre-autopsy photographs were relevant and material to any issue in the case, they were admissible even if they were duplicative and might inflame the jury; (2) photographs showing the extent and nature of the victim's wounds were material and relevant, even if the cause of death was not in dispute; (3) the state had the burden to prove beyond a reasonable doubt that the defendant caused the death of the victim with malice aforethought; and (4) the photograph was relevant to the state's claim that the defendant had done so by shooting a single shot into the victim's head with a .38 revolver. *Bradley v. State*, 281 Ga. 173, 637 S.E.2d 19 (2006).

Child victim provided proper foundation. — Photos that were introduced not to show that they accurately represented the sexual events depicted, but rather to show that the defendant possessed sexually explicit photographs, were admissible after the photos were identified by the child victim as being photographs shown to the victim by the defendant and by other witnesses as the photos shown to the child victim on the defendant's computer. *Abernathy v. State*, 278 Ga. App. 574, 630 S.E.2d 421 (2006).

Trial court did not abuse its discretion in admitting numerous sexually explicit photographs and several video recordings into evidence as they were authenticated by showing the photographs to either minor victim during their testimony and having them identify themselves as being fairly depicted therein; in addition, both victims also testified that they viewed the digital video recordings prior to the admission of that evidence and were able to recognize themselves as being fairly depicted in those recordings. *Walthall v. State*, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

No foundation for admission of photo. — Trial court properly refused to admit photos of a subdivision, tendered by a utility to rebut testimony by the condemnees' appraiser that property around power lines was usually the last piece of residential property to be developed, and was usually relegated to

low income housing because the utility (1) failed to authenticate the pictures by showing the identity or address of the subdivision; (2) failed to present any evidence as to the value of the property in the pictures; and (3) failed to demonstrate whether the subdivision was built before or after the power lines were installed. *Ga. Power Co. v. Jones*, 277 Ga. App. 332, 626 S.E.2d 554 (2006).

Trial court erred in allowing an officer to identify the defendant in two surveillance photographs, based on the officer's familiarity with the defendant's appearance and absent a change in the defendant's appearance, because the testimony was offered to establish a fact which the jurors could decide for themselves; hence, the evidence was erroneously admitted as invading the jury's province to decide the issue. *Mitchell v. State*, 283 Ga. App. 456, 641 S.E.2d 674 (2007).

Photos of a deceased body. — Photographs of a victim's body after the body had been taken to the crime lab were material, relevant, and admissible as the photographs showed the location, nature, and extent of the victim's multiple gunshot wounds. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Trial court did not err in admitting two post-incision autopsy photographs of the victim, despite the fact that the depicted injuries might not have been the direct cause of the victim's death, as the internal injuries could not have been shown by photographs of the outside of the body and were material in corroborating the details of the assault on the victim, which ultimately resulted in death. *Lyons v. State*, 282 Ga. 588, 652 S.E.2d 525 (2007), overruled on other grounds, *Garza v. State*, 2008 Ga. LEXIS 865 (Ga. 2008).

In a defendant's prosecution for, inter alia, felony murder, a photograph of the victim's body just prior to the beginning of the autopsy did not violate the rule pertaining to post-autopsy incision photographs as the incision marks shown related to an organ harvest after attempts to keep the victim alive failed; photographs that displayed the body's exposed rib cage and the calcification of ribs broken weeks before the victim's death were also properly admitted as those injuries formed the basis of charges against the defendant of cruelty to a child and

aggravated assault, separate from the acts that immediately caused the victim's death. *Berryhill v. State*, 285 Ga. 198, 674 S.E.2d 920 (2009).

Photographs properly admitted. — In a boundary line dispute, the fact that the surveyor who prepared an exhibit depicting the area at issue did not testify, and that the exhibit did not contain a surveyor's stamp or signature, was not certified or authenticated, was not incorporated into a deed, and was labeled "not to scale," did not preclude the exhibit's admission. It was an aerial photo that a defendant used to explain the defendant's testimony about the defendant's understanding of the location of the boundary line and, thus, was properly admitted. *Griggs v. Fletcher*, 294 Ga. App. 60, 668 S.E.2d 521 (2008).

Videotapes

Videotape without authentication insufficient. — Introduction into evidence of videotapes, depicting a male and female engaged in sexual activity, without authentication by the operator of the machine which produced the videotapes, or by one who personally witnessed the events recorded, was error and required reversal of convictions for aggravated child molestation and sexual exploitation of a child. *Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998).

First and third portions of a videotape were not properly authenticated under O.C.G.A. § 24-4-48, as the subject child molestation victims were not sleeping in these segments of the videotape, and the victims, both of whom testified at trial, were available to authenticate these portions of the videotape; neither child was asked during testimony to confirm that the videotape accurately portrayed the events the children had witnessed. *Smith v. State*, 285 Ga. App. 658, 647 S.E.2d 346 (2007).

Evidence sufficient to authenticate videotape. — To establish that tape was taken from a surveillance camera at the scene of the crime, testimony of the store supervisor, the agent who found the tape, the forensic photographer who repaired the tape, and the investigator who created the state's exhibit was sufficient authentication. *Tolver v. State*, 269 Ga. 530, 500 S.E.2d 563 (1998).

Videotapes (Cont'd)

Surveillance tape of a convenience store robbery was admissible into evidence because, even though the tape showed the wrong date because a store employee did not know how to properly set the videorecorder, the tape was properly authenticated by the store clerk and customers that were in the store during the robbery. *Wallace v. State*, 267 Ga. App. 801, 600 S.E.2d 808 (2004).

Since the victim was semiconscious at the time of acts of alleged child molestation due to drug and alcohol use, the victim was an unavailable witness under O.C.G.A. § 24-4-48 for purposes of authenticating a videotape found at the scene; however, the trial court did not err in admitting the videotape because, in a pretrial statement to police, the defendant acknowledged that the victim had performed oral sex on the defendant on the evening in question and did not dispute the accuracy of the tape's depiction of it, the victim identified herself on the tape, another victim was identified on the videotape by the victim's mother, and another attendee at the party identified herself on the videotape. *Wilson v. State*, 279 Ga. App. 459, 631 S.E.2d 391 (2006), cert. denied, 2006 Ga. LEXIS 1036 (Ga. 2006).

Trial court was authorized to find that a segment of a videotape reliably showed the facts for which the videotape was offered and was admissible under O.C.G.A. § 24-4-48(b); that a child molestation victim appeared on the tape and that the defendant made the tape was shown by the testimony of the investigating officer, who identified the victim and who recognized the defendant's voice on the segment of the tape showing the victim to be asleep. *Smith v. State*, 285 Ga. App. 658, 647 S.E.2d 346 (2007).

Fast food restaurant video surveillance tape was properly admitted under O.C.G.A. § 24-4-48(d), although the tape lacked date and time stamps, because other evidence authenticated the tape, including identification of the tape by a police officer who saw the tape, date and time stamps on still photographs from the tape, and the tape's corroboration of an employee's description of events. *Dixon v. State*, 300 Ga. App. 183, 684 S.E.2d 679 (2009).

Date and time stamp on videotape. — Defendant argued only that a proper foundation was not laid under O.C.G.A. § 24-4-48(c) because no competent witness testified as to the date and time of the tape; however, since the videotape was not admitted under that portion of the statute which required a date and time on such evidence, that enumeration of error presented nothing for review. *Rogers v. State*, 294 Ga. App. 195, 670 S.E.2d 106 (2008).

Admitted to authenticate videotape. — Trial court did not abuse the court's discretion when the court found that the state exercised due diligence in attempting to locate a robbery victim who had moved or by allowing a police officer to testify about out-of-court statements the victim made after a robbery to authenticate a videotape showing the robbery. *Fernandez v. State*, 263 Ga. App. 750, 589 S.E.2d 309 (2003).

Defendant unavailable as authenticating witness due to right against self-incrimination. — Child pornography defendant was deemed unavailable as an authenticating witness of seized photographic and videotape evidence against the defendant because defendant could not be compelled to testify due to the constitutional right against self-incrimination; but even though defendant was unavailable, the evidence was admissible through the testimony of the seizing officers. *Craft v. State*, 252 Ga. App. 834, 558 S.E.2d 18 (2001), cert. denied, 537 U.S. 1025, 123 S. Ct. 537, 154 L. Ed. 2d 437 (2002).

Videotaped statement of testifying witness properly admitted. — Defendant's right of confrontation was not violated by the admission of a videotaped statement of a witness, who did not remain silent at the trial, and who completely denied making any statement to the police regarding the murder. *Wilson v. State*, 277 Ga. 114, 587 S.E.2d 9 (2003).

Surveillance videotape was properly admitted, and the trial court's reliability finding was upheld on appeal, based on the surrounding testimony, despite the fact that the state was unable to present testimony from a witness who actually observed the events transpire contemporaneously with the recording of the tape; moreover, the

tape was not rendered inadmissible merely because the tape did not contain the date and time on which it was recorded, as such went to the weight of the evidence, and not the admissibility. *Holloway v. State*, 287 Ga. App. 655, 653 S.E.2d 95 (2007).

A hotel surveillance tape was properly admitted under O.C.G.A. § 24-4-48. Testimony that security personnel in the dispatch office were not trained to operate machinery in the dispatch room and did nothing more than replace spent tapes with fresh ones established that the devices producing the images were not operated by a person or under the personal control or in the presence of an individual operator; the fact that the date-time stamp was 104 minutes “off” went to the weight of the evidence, not to the evidence’s admissibility; and the purported poor quality of the recording did not preclude the tape’s admissibility. *Dawson v. State*, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Trial court did not abuse its discretion in admitting a videotape of the footage from

surveillance cameras depicting the defendant’s theft of the victim’s property because the victim testified that the victim recognized self on the tape, and police officers testified that they viewed the tape at the U. S. Attorney’s Office shortly after the theft. *Sheppard v. State*, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

Voicemail message properly authenticated. — With regard to a defendant’s murder conviction, the trial court did not err by admitting the tape of the voicemail message the defendant left on the victim’s sibling’s voicemail service shortly before the shooting based on the defendant’s contention that the voicemail itself, as opposed to the tape of the voicemail, was not properly authenticated because competent evidence sufficient to establish the reliability of the voicemail message for purposes of authentication was admitted at trial via the testimony of the sibling as to retrieval of the message and the state presenting evidence of the phone records. *Henley v. State*, 285 Ga. 500, 678 S.E.2d 884 (2009), cert. denied, U.S. , 130 S. Ct. 800 175 L. Ed. 2d 559 (2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

Am. Jur. Proof of Facts. — Foundation for Contemporaneous Videotape Evidence, 16 POF3d 493.

Am. Jur. Trials. — Preparing and Using Photographs in Civil Cases, 3 Am. Jur. Trials 1.

Preparing and Using Photographs in Criminal Cases, 3 Am. Jur. Trials 335.

Uses, Techniques, and Reliability of Polygraph Testing, 42 Am. Jur. Trials 313.

Audio Recordings: Evidence, Experts and Technology, 48 Am. Jur. Trials 1.

Video Technology, 58 Am. Jur. Trials 481.

The Daubert Challenge to the Admissibility of Scientific Evidence, 60 Am. Jur. Trials 1.

ALR. — Admissibility in evidence of aerial photographs, 85 ALR5th 671.

Construction and application of silent witness theory, 116 ALR5th 373.

Admissibility in state criminal case of results of polygraph (lie detector) test—Post *Daubert* cases, 10 ALR6th 463.

ARTICLE 4

DNA ANALYSIS UPON CONVICTION OF CERTAIN SEX OFFENSES

Law reviews. — For note on 2000 amendments of O.C.G.A. §§ 24-4-60 to 24-4-63, 24-4-65, see 17 Ga. St. U.L. Rev. 181 (2000).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Qualifying Foundation for DNA Fingerprint Evidence, 8 POF3d 749.
Child Witness to Testify, 35 POF2d 665.
Hair Analysis, 38 POF2d 377.

24-4-60. Requirement for DNA analysis of blood of persons convicted of certain sex offenses or convicted of a felony and incarcerated in a state correctional facility; storage of profile in data bank.

(a) As used in subsection (b) of this Code section, the term “state correctional facility” means a penal institution under the jurisdiction of the Department of Corrections, including inmate work camps and inmate boot camps; provided, however, that such term shall not include a probation detention center, probation diversion center, or probation boot camp under the jurisdiction of the Department of Corrections.

(b) Any person convicted of a criminal offense defined in Code Section 16-6-1, relating to the offense of rape; Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-3, relating to the offense of statutory rape; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; Code Section 16-6-5.1, relating to the offense of sexual assault against persons in custody, sexual assault against a person detained or a patient in a hospital or other institution, or sexual assault by a practitioner of psychotherapy against a patient; Code Section 16-6-6, relating to the offense of bestiality; Code Section 16-6-7, relating to the offense of necrophilia; or Code Section 16-6-22, relating to the offense of incest, shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. In addition, on and after July 1, 2000, any person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony prior to July 1, 2000, and who currently is incarcerated in a state correctional facility in this state for such offense. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony in this state on or after July 1, 2000, and who is incarcerated in a private correctional facility in this state for such offense pursuant to a contract with the Department of Corrections upon entering the facility, and for any person convicted of a felony prior to July 1, 2000, and who is incarcerated in a private correctional facility in this state pursuant to contract with the Department of Corrections. The analysis

shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63.

(c)(1) On and after July 1, 2007, any person who is placed on probation shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person if such person is convicted of a felony violation of any of the following:

- (A) Chapter 5 of Title 16, relating to crimes against persons;
- (B) Code Section 16-6-1, relating to the offense of rape;
- (C) Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy;
- (D) Code Section 16-6-3, relating to the offense of statutory rape;
- (E) Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation;
- (F) Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes;
- (G) Code Section 16-6-5.1, relating to the offense of sexual assault against persons in custody, sexual assault against a person detained or a patient in a hospital or other institution, or sexual assault by a practitioner of psychotherapy against a patient;
- (H) Code Section 16-6-6, relating to the offense of bestiality;
- (I) Code Section 16-6-7, relating to the offense of necrophilia;
- (J) Code Section 16-6-22, relating to the offense of incest;
- (K) Code Section 16-7-1, relating to the offense of burglary;
- (L) Code Section 16-8-40, relating to the offense of robbery;
- (M) Code Section 16-8-41, relating to the offense of armed robbery;
- (N) Code Section 16-10-23, relating to the offense of impersonating an officer;
- (O) Code Section 16-10-24, relating to the offense of obstruction of an officer;
- (P) Article 4 of Chapter 11 of Title 16, relating to dangerous instrumentalities and practices; and
- (Q) Chapter 13 of Title 16, relating to controlled substances.

(2) The analysis shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63. The Department of Corrections shall be responsible for collecting such sample. (Code 1981, § 24-4-60, enacted by Ga. L. 1992, p. 2034, § 1; Ga. L. 2000, p. 1075, § 1; Ga. L. 2004, p. 485, § 1; Ga. L. 2005, p. 60, § 24/HB 95; Ga. L. 2007, p. 408, § 1/HB 314.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, “this Code section” was substituted for “this Code Section” near the beginning of subsection (a) and a comma was substituted for a semicolon following “the offense of incest” in the first sentence of subsection (b).

Editor’s notes. — Ga. L. 2000, p. 1075, § 6, not codified by the General Assembly, provides: “The provisions of this Act shall not be construed as requiring the Department of Corrections or the Georgia Bureau of Investigation to fully implement this Act prior to funds being appropriated or other-

wise available for such purpose. If funds are not available, the director of the Georgia Bureau of Investigation or the director’s designee shall be authorized to designate those offenses for which samples shall be analyzed.”

Law reviews. — For article, “The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws,” see 20 Ga. St. U.L. Rev. 565 (2004).

For note on 1992 enactment of this article, see 9 Ga. St. U.L. Rev. 260 (1992). For note, “Padgett v. Donald: Why Not So Special,” see 57 Mercer L. Rev. 673 (2006).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 24-4-60 did not authorize unreasonable searches in violation of the fourth amendment because the bodily intrusion of taking a blood or saliva sample was minimal, the state had a compelling interest in obtaining reliable and accurate identifying characteristics of individuals convicted of felonies, and those valid law enforcement interests outweighed a convicted felon’s privacy interests; to the extent that probable cause or individualized suspicion was required to justify a search, the prisoners’ felony convictions provided that justification. *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003).

Where prisoners were challenging the constitutionality of O.C.G.A. § 24-4-60, defendants were entitled to summary judgment on their privacy claims because the prisoners’ right to privacy in their identification, assuming one existed, was substantially outweighed by the interests of the state in having available a DNA database that could be used in solving crimes and exonerating

the innocent. *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003).

O.C.G.A. § 24-4-60 does not violate the fourth amendment or Ga. Const. 1983, Art. I, Sec. I, Para. XIII, as Georgia’s legitimate interest in creating a permanent identification record of convicted felons for law enforcement purposes outweighs the minor intrusion involved in taking prisoners’ saliva samples and storing DNA profiles, given prisoners’ reduced expectation of privacy in their identities. *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

Prisoners’ challenge to the requirement in O.C.G.A. § 24-4-60 that incarcerated felons submit saliva samples for DNA profiling was without merit; the bodily intrusion required by the statute to obtain saliva samples for DNA profiling did not impinge their fourteenth amendment right to privacy. *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

Although prisoners retain a right to bodily privacy under Ga. Const. 1983, Art. I, Sec. I, Para. I, the extraction of saliva required by O.C.G.A. § 24-4-60 did not violate that right because the statute promotes law enforcement, and is narrowly tailored to promote that purpose by requiring DNA profiling on a limited population of incarcerated felons and forbidding release of the DNA profiles except for law enforcement purposes. *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

The classification of subjecting convicted felons but not convicted misdemeanants to the DNA identification process is rationally related to the Georgia legislature's legitimate law enforcement purpose of creating a permanent identification record of convicted felons because the statute encompasses all convicted felons whose crimes and/or past histories were serious enough to warrant a sentence to confinement, as opposed to lesser punishment, and the legislature acted reasonably and not arbitrarily when the legislature focused on those convicted felons who are housed in a correctional facility where DNA samples can be efficiently and economically obtained. As a result, O.C.G.A. § 24-4-60 rationally relates to the legitimate state interest the statute is intended to promote and does not violate equal protection. *Quarterman v. State*, 282 Ga. 383, 651 S.E.2d 32 (2007).

O.C.G.A. § 24-4-60 does not violate the fourth amendment, the search and seizure provisions of the Georgia Constitution, or a convicted felons' rights to privacy under the United States or Georgia Constitutions. *Quarterman v. State*, 282 Ga. 383, 651 S.E.2d 32 (2007).

O.C.G.A. § 24-4-60 does not violate a defendant's right under the Georgia Constitution to not incriminate oneself as the privilege against self-incrimination in the United States Constitution does not protect an individual from government compulsion to provide blood or other biological samples and, although the right against self-incrimination in the Georgia Constitution has been construed liberally to limit the state from forcing an individual to affirmatively produce any evidence, oral or real, regardless of whether or not it is testimonial, § 24-4-60 does not force a convicted felon to remove

incriminating evidence but only to submit an incarcerated person's body for the purpose of having the evidence removed. *Quarterman v. State*, 282 Ga. 383, 651 S.E.2d 32 (2007).

O.C.G.A. § 24-4-60 does not violate the eighth amendment because the statute, requiring all convicted felons incarcerated in a state correctional facility to provide a sample for DNA analysis to determine the identification characteristics specific to the person, does not impose any form of punishment. Further, the purpose of establishing a DNA databank has been identified, and the methods for obtaining data provided by the statute are not excessive measures in response to the purpose, therefore, without any showing of the use of excessive force that might arguably state a claim of cruel and unusual punishment in obtaining DNA samples through involuntary means, the statute is deemed not penal and the means used to enforce the statute have not been shown to be malicious or grossly disproportionate to the refusal to comply with the statutory mandate. *Quarterman v. State*, 282 Ga. 383, 651 S.E.2d 32 (2007).

Application. — As a person who was convicted of a felony prior to July 1, 2000, and who on that date was incarcerated on such offense, the defendant was properly subject to compulsory blood sampling to establish a DNA profile for storage in the state's DNA data bank. *Dingler v. State*, 281 Ga. App. 721, 637 S.E.2d 120 (2006).

In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, use of evidence comparing DNA on lip balm found at the crime scene with defendant's blood sample and with evidence retained from a prior rape prosecution that resulted in defendant's acquittal did not violate O.C.G.A. § 24-4-60 et seq. *Fortune v. State*, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

Collection of DNA not unconstitutional on day of release from prison. — Trial court properly denied the defendant's motion to suppress the match of the defendant's DNA collected pursuant to O.C.G.A. § 24-4-60 on the day the defendant was released from prison for separate crimes because the DNA extraction was not a result of an illegal detention and the DNA seizure would have occurred regardless of the any illegal search or seizure; the correct calculation of the

defendant's remaining sentence after the entry of an order vacating some of those convictions was a matter for the Department of Corrections, not the trial court, and the order directing the defendant's release was not necessarily evidence that the defendant's detention after a certain date was illegal. The defendant's argument that the defendant was a probationer at the time of the search was meritless. *Leftwich v. State*, 299 Ga. App. 392, 682 S.E.2d 614 (2009), cert. denied, No. S09C2013, 2009 Ga. LEXIS 710

(Ga. 2009); cert. denied, U.S. , 130 S. Ct. 1913, 176 L. Ed. 2d 386 (2010).

Purpose of Georgia's DNA collection statute was not to punish, but to obtain a reliable, immutable form of identification for placement in a DNA database, and all the relevant evidence in the case indicated that the statute would not increase the punishment of anyone to whom the statute was applied. *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003).

RESEARCH REFERENCES

ALR. — Validity, construction, and operation of state DNA database statutes, 76 ALR5th 239.

24-4-61. Time and procedure for withdrawal of blood samples.

(a) Each sample required pursuant to Code Section 24-4-60 from persons who are to be incarcerated shall be withdrawn within the first 30 days of incarceration at the receiving unit or at such other place as is designated by the Department of Corrections. Each sample required pursuant to Code Section 24-4-60 from persons who are to be released from a state correctional facility or private correctional facility shall be withdrawn within the 12 months preceding such person's release at a place designated by the Department of Corrections. The required samples from persons who are not sentenced to a term of confinement shall be withdrawn as a condition of probation. The Division of Forensic Sciences of the Georgia Bureau of Investigation shall publish in its quality manuals the procedures for the collection and transfer of samples to such division pursuant to Code Section 35-3-154. Personnel at a Department of Corrections facility shall implement the provisions of this Code section as part of the regular processing of offenders.

(b) Samples collected by oral swab or by a noninvasive procedure may be collected by any individual who has been trained in the procedure. Only a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, graduate laboratory technician, or phlebotomist shall withdraw any sample of blood to be submitted for analysis. No civil liability shall attach to any person authorized to take a sample as provided in this article as a result of the act of taking a sample from any person submitting thereto, provided the sample was taken according to recognized medically accepted procedures. However, no person shall be relieved from liability for negligence in the withdrawing of any blood sample.

(c) Chemically clean sterile disposable needles shall be used for the withdrawal of all samples of blood. The containers for blood samples, oral

swabs, and the samples obtained by noninvasive procedures shall be sealed and labeled with the subject’s name, social security number, date of birth, race, and gender plus the name of the person collecting the sample and the date and place of collection. The containers shall be secured to prevent tampering with the contents. The steps set forth in this subsection relating to the taking, handling, identification, and disposition of samples are procedural and not substantive. Substantial compliance therewith shall be deemed to be sufficient. The samples shall be transported to the Division of Forensic Sciences of the Georgia Bureau of Investigation not more than 15 days following withdrawal and shall be analyzed and stored in the DNA data bank in accordance with Code Sections 24-4-62 and 24-4-63. (Code 1981, § 24-4-61, enacted by Ga. L. 1992, p. 2034, § 1; Ga. L. 2000, p. 1075, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, “Code Sections” was substituted for “Code Section” in the last sentence of subsection (c).
Pursuant to Code Section 28-9-5, in 2000, “of the Georgia Bureau of Investigation” was inserted following “Division of Forensic Sciences” in the last sentence of subsection (c).
Editor’s notes. — Ga. L. 2000, p. 1075, § 6, not codified by the General Assembly,

provides: “The provisions of this Act shall not be construed as requiring the Department of Corrections or the Georgia Bureau of Investigation to fully implement this Act prior to funds being appropriated or otherwise available for such purpose. If funds are not available, the director of the Georgia Bureau of Investigation or the director’s designee shall be authorized to designate those offenses for which samples shall be analyzed.”

RESEARCH REFERENCES

ALR. — Authentication of blood sample taken from human body for purposes other than determining blood alcohol content, 77 ALR5th 201.

24-4-62. Procedure for analysis and storage of blood sample; use of remainder of sample not subjected to analysis; confidentiality of results.

Whether or not the results of an analysis are to be included in the data bank, the bureau shall conduct the DNA analysis in accordance with procedures adopted by the bureau to determine identification characteristics specific to the individual whose sample is being analyzed. The director of the Georgia Bureau of Investigation or his or her designated representative shall complete and maintain on file a form indicating the name of the person whose sample is to be analyzed, the date and by whom the sample was received and examined, and a statement that the seal on the container containing the sample had not been broken or otherwise tampered with. The remainder of a sample submitted for analysis and inclusion in the data bank pursuant to Code Section 24-4-60 may be divided, if possible, labeled as provided for the original sample, and securely stored by the bureau in accordance with specific procedures of the bureau to ensure the integrity and confidentiality of the samples. All or part of the remainder of that sample may be used only to create a statistical data base provided no

identifying information on the individual whose sample is being analyzed is included or for retesting by the bureau to validate or update the original analysis. A report of the results of a DNA analysis conducted by the bureau as authorized, including the identifying information, shall be made and maintained at the bureau. Except as specifically provided in this Code section and Code Section 24-4-63, the results of the analysis shall be securely stored and shall remain confidential. (Code 1981, § 24-4-62, enacted by Ga. L. 1992, p. 2034, § 1; Ga. L. 2000, p. 1075, § 3.)

Editor's notes. — Ga. L. 2000, p. 1075, § 6, not codified by the General Assembly, provides: "The provisions of this Act shall not be construed as requiring the Department of Corrections or the Georgia Bureau of Investigation to fully implement this Act prior to funds being appropriated or other-

wise available for such purpose. If funds are not available, the director of the Georgia Bureau of Investigation or the director's designee shall be authorized to designate those offenses for which samples shall be analyzed."

RESEARCH REFERENCES

ALR. — Authentication of blood sample taken from human body for purposes other than determining blood alcohol content, 77 ALR5th 201.

24-4-63. Dissemination of information in data bank to law enforcement officials; comparison of profile; request for search; separate statistical data base authorized; fee for search and comparative analysis.

(a) It shall be the duty of the bureau to receive samples and to analyze, classify, and file the results of DNA identification characteristics of samples submitted pursuant to Code Section 24-4-60 and to make such information available as provided in this Code section. The results of an analysis and comparison of the identification of the characteristics from two or more biological samples shall be made available directly to federal, state, and local law enforcement officers upon a request made in furtherance of an official investigation of any criminal offense. A request may be made by personal contact, mail, or electronic means. The name of the requestor and the purpose for which the information is requested shall be maintained on file with the bureau.

(b) Upon request from a prosecutor or law enforcement agency, the bureau may compare a DNA profile from an analysis of a sample from a suspect in a criminal investigation where the sample was obtained through a search warrant, consent of the suspect, court order, or other lawful means to DNA profiles lawfully collected and maintained by the bureau. The bureau shall not add a DNA profile of any such suspect to any DNA data bank except upon conviction as provided in this article.

(c)(1) Upon his or her request, a copy of the request for search shall be furnished to any person identified and charged with an offense as the

result of a search of information in the data bank. Only when a sample or DNA profile supplied by the requestor satisfactorily matches the requestor's profile in the data bank shall the existence of data in the data bank be confirmed or identifying information from the data bank be disseminated.

(2) The name of the convicted offender whose profile is contained in the data bank may be related to any other data bases which are constructed for law enforcement purposes and may be disseminated only for law enforcement purposes.

(3) Upon a showing by the defendant in a criminal case that access to the DNA data bank is material to the investigation, preparation, or presentation of a defense at trial or in a motion for a new trial, a superior court having proper jurisdiction over such criminal case shall direct the bureau to compare a DNA profile which has been generated by the defendant through an independent test against the data bank, provided that such DNA profile has been generated in accordance with standards for forensic DNA analysis adopted pursuant to 42 U.S.C. Section 14131, as amended.

(d) The bureau shall develop procedures governing the methods of obtaining information from the data bank in accordance with this Code section and procedures for verification of the identity and authority of the requestor. The bureau shall specify the positions in that agency which require regular access to the data bank and samples submitted as a necessary function of the job.

(e) The bureau may create a separate statistical data base comprised of DNA profiles of samples of persons whose identity is unknown. Nothing in this Code section or Code Section 24-4-64 shall prohibit the bureau from sharing or otherwise disseminating the information in the statistical data base with law enforcement or criminal justice agencies within or outside the state.

(f) The bureau may charge a reasonable fee to search and provide a comparative analysis of DNA profiles in the data bank to any authorized law enforcement agency outside of the state. (Code 1981, § 24-4-63, enacted by Ga. L. 1992, p. 2034, § 1; Ga. L. 2000, p. 1075, § 4; Ga. L. 2008, p. 252, § 1/SB 430.)

The 2008 amendment, effective July 1, 2008, added present subsection (b) and redesignated former subsections (b) through (e) as present subsections (c) through (f), respectively.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, “identity” was substituted for “identify” in the first sentence in subsection (d).

Editor's notes. — Ga. L. 2000, p. 1075, § 6, not codified by the General Assembly, provides: “The provisions of this Act shall not be construed as requiring the Department of Corrections or the Georgia Bureau of Investigation to fully implement this Act prior to funds being appropriated or otherwise available for such purpose. If funds are not available, the director of the Georgia

Bureau of Investigation or the director's designee shall be authorized to designate those offenses for which samples shall be analyzed."

Law reviews. — For note, "A Modern Day

Arthur Dimmesdale: Public Notification When Sex Offenders Are Released into the Community," see 12 Ga. St. U. L. Rev. 1187. For note, "Padgett v. Donald: Why Not So Special," see 57 Mercer L. Rev. 673 (2006).

JUDICIAL DECISIONS

Prisoners' right to privacy not violated. —

Although prisoners retain a right to bodily privacy under Ga. Const. 1983, Art. I, Sec. I, Para. I, the extraction of saliva required by O.C.G.A. § 24-4-60 did not violate that right because the statute promotes law enforcement, and is narrowly tailored to promote that purpose by requiring DNA profiling on a limited population of incarcerated felons and forbidding release of DNA profiles except for law enforcement purposes. *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

Match of DNA established probable cause

for search warrant. — Match of defendant's DNA profile to DNA of semen collected at the scene of a crime established probable cause for a search warrant; defendant's argument that the state needed to further prove that the requirements and procedures set forth in O.C.G.A. §§ 24-4-60 through 24-4-65 were followed was without merit, and the trial court's order denying defendant's motion to suppress evidence was affirmed. *Brown v. State*, 270 Ga. App. 176, 605 S.E.2d 885 (2004).

Cited in *Bickley v. State*, 227 Ga. App. 413, 489 S.E.2d 167 (1997); *Fortune v. State*, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

RESEARCH REFERENCES

ALR. — Validity, construction, and operation of state DNA database statutes, 76 ALR5th 239.

24-4-64. Unlawful dissemination or use of information; obtaining sample without authority.

(a) Any person who, without authority, disseminates information contained in the data bank shall be guilty of a misdemeanor. Any person who disseminates, receives, or otherwise uses or attempts to so use information in the data bank, knowing that such dissemination, receipt, or use is for a purpose other than as authorized by law, shall be guilty of a misdemeanor of a high and aggravated nature.

(b) Except as authorized by law, any person who, for purposes of having DNA analysis performed, obtains or attempts to obtain any sample submitted to the Division of Forensic Sciences for analysis shall be guilty of a felony. (Code 1981, § 24-4-64, enacted by Ga. L. 1992, p. 2034, § 1.)

24-4-65. Expungement of profile in data bank upon reversal and dismissal of conviction.

A person whose DNA profile has been included in the data bank pursuant to this article may request that it be expunged on the grounds that the conviction on which the authority for including his or her DNA profile was

based has been reversed and the case dismissed. The bureau shall purge all records and identifiable information in the data bank pertaining to the person and destroy all samples from the person upon receipt of a written request that such data be expunged, pursuant to this Code section, and a certified copy of the court order reversing and dismissing the conviction. (Code 1981, § 24-4-65, enacted by Ga. L. 1992, p. 2034, § 1; Ga. L. 2000, p. 1075, § 5.)

Editor’s notes. — Ga. L. 2000, p. 1075, § 6, not codified by the General Assembly, provides: “The provisions of this Act shall not be construed as requiring the Department of Corrections or the Georgia Bureau of Investigation to fully implement this Act prior to funds being appropriated or other-

wise available for such purpose. If funds are not available, the director of the Georgia Bureau of Investigation or the director’s designee shall be authorized to designate those offenses for which samples shall be analyzed.”

JUDICIAL DECISIONS

Expungement right not violated. — In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, in which the state used evidence comparing DNA on lip balm found at the crime scene with defendant’s blood sample and with

evidence retained from a prior rape prosecution, retention and use of the rape trial evidence did not violate defendant’s right to seek expungement of such evidence under O.C.G.A. § 24-4-65. *Fortune v. State*, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

CHAPTER 5

BEST EVIDENCE RULE

Article 1		Sec.	
General Provisions			
Sec.			incorrectly made or destroyed; when admissible.
24-5-1.	Primary and secondary evidence distinguished.	24-5-25.	Existence of original essential to admissibility of copy; amount of evidence required.
24-5-2.	Showing to admit secondary evidence.	24-5-26.	Reproductions made in regular course of business admissible; when enlargements or facsimiles admitted.
24-5-3.	Exceptions to general rule requiring production of primary evidence.	24-5-27.	Certified copy of deed or other instrument affecting real property admissible without accounting for original.
24-5-4.	Best evidence of writing to be produced or accounted for.	24-5-28.	Certified copy of certain deeds admissible without proof of execution.
24-5-5.	Degrees of secondary evidence.	24-5-29.	Transcript from books of corporation admissible in lieu of books; notice.
Article 2		24-5-30.	Copies of letters testamentary, letters of administration, and letters of guardianship primary evidence.
Copies of Writings		24-5-31.	Authenticated copies of judicial records and probated wills as primary evidence; other copies secondary evidence.
24-5-20.	When exemplifications of public records considered primary evidence; exemplifications transmitted by facsimile.	24-5-32.	Inscriptions proved by copies.
24-5-21.	When secondary evidence admitted; diligence.	24-5-33.	When certified copy of military discharge admissible.
24-5-22.	Certified copy of registered paper where original lost or destroyed.		
24-5-23.	Secondary evidence admissible where records or registry destroyed.		
24-5-24.	Second recording where record book destroyed or lost, or record		

RESEARCH REFERENCES

ALR. — Evidence: admissibility of memorandum of telephone conversation, 94 ALR3d 975.

Admissibility of evidence summaries under Uniform Evidence Rule 1006, 59 ALR4th 971.

Law reviews. — For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998).

ARTICLE 1

GENERAL PROVISIONS

24-5-1. Primary and secondary evidence distinguished.

(a) Primary evidence is such as in itself does not indicate the existence of other and better proof.

(b) Secondary evidence is such as from necessity in some cases is substituted for stronger and better proof. (Orig. Code 1863, § 3684; Code 1868, § 3708; Code 1873, § 3761; Code 1882, § 3761; Civil Code 1895, § 5164; Civil Code 1910, § 5750; Code 1933, § 38-204.)

Law reviews. — For note discussing the possible uses of video tape and its admissibility as evidence, see 5 Ga. St. B.J. 393 (1969).

For comment on *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958), see 21 Ga. B.J. 553 (1959).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PRIMARY EVIDENCE
SECONDARY EVIDENCE
CRIMINAL CONFESSIONS

General Consideration

Cited in *Goodwin v. State*, 49 Ga. App. 223, 174 S.E. 742 (1934); *Smoak v. State*, 58 Ga. App. 299, 198 S.E. 99 (1938); *Cloud v. Maxey*, 195 Ga. 90, 23 S.E.2d 668 (1942); *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946); *Shelnutt v. Phillips*, 113 Ga. App. 321, 147 S.E.2d 803 (1966); *Boswell v. State*, 135 Ga. App. 104, 217 S.E.2d 411 (1975); *Pope v. Kem Mfg. Corp.*, 249 Ga. 868, 295 S.E.2d 290 (1982); *Drayton v. State*, 175 Ga. App. 780, 334 S.E.2d 720 (1985).

Primary Evidence

Certified copy of conviction is primary evidence. — To impeach a witness by a prior conviction, the conviction must be proved by the record of the conviction itself. The certified copy of a conviction is primary evidence, as opposed to secondary evidence, and is the best proof. *Howard v. State*, 204 Ga. App. 743, 420 S.E.2d 594 (1992).

A duplicate original signed by both parties at the same time as the original constituted primary instead of secondary evidence and was admissible without the necessity of first

serving a notice to produce the “original.” *Beard v. Westmoreland*, 90 Ga. App. 632, 84 S.E.2d 93 (1954); *Raulerson v. Jones*, 122 Ga. App. 440, 177 S.E.2d 181 (1970).

Written bill of sale is the best evidence, and parol evidence is inadmissible to show the title to personalty. *Epping v. Mockler*, 55 Ga. 376 (1875).

Evidence of title. — If there be written evidence of title that evidence should be produced. *Morgan v. Jones*, 24 Ga. 155 (1858).

Existence of fact as issue. — When the existence of a fact is the question at issue and not the contents of a writing, then oral and written evidence of the fact may both be primary evidence. *Denson v. State*, 149 Ga. App. 453, 254 S.E.2d 455 (1979).

Familiarity with basis for record. — As a general rule, the testimony of a person who has knowledge of the facts from which books of account are made up is primary evidence as to those facts, and is admissible whether or not the books themselves are put in evidence. *Mayor of Buford v. Medley*, 58 Ga. App. 48, 197 S.E. 494 (1938).

Oral testimony by a police officer that the officer was certified to operate particular

Primary Evidence (Cont'd)

model of intoximeter at the time the officer tested defendant was not barred by the best evidence rule. *Clarke v. State*, 170 Ga. App. 852, 319 S.E.2d 16 (1984).

Claim under best evidence rule waived. — Driver waived the driver's claim that the trial court erred in denying the driver's pretrial motion seeking to exclude an injured party from cross-examining the driver about a traffic citation without producing a certified copy of the guilty plea under the best evidence rule of O.C.G.A. § 24-5-1 when the driver testified on direct that the driver received a traffic citation in connection with the automobile accident with the injured party and that the driver paid a fine on the citation, and the driver did not object when the injured party asked the driver about the citation without introducing a certified copy. *Daniel v. Smith*, 266 Ga. App. 637, 597 S.E.2d 432 (2004).

Secondary Evidence

Photostatic copies are ordinarily secondary evidence. *Montgomery v. State*, 154 Ga. App. 311, 268 S.E.2d 723 (1980).

When it is proved that a genuine original was executed, proof that a document is an exact carbon copy of that original is sufficient to admit the copy into evidence without proving the loss of the original. *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958), for comment, see 21 Ga. B.J. 553 (1959).

Production of photocopy of search warrant was sufficient to evidence valid search when issuing magistrate testified that the magistrate had searched the magistrate's files and had not found the original warrant, and the police officer who executed the warrant similarly found only the photocopy in the officer's file. *Early v. State*, 170 Ga. App. 158, 316 S.E.2d 527 (1984).

An unsigned copy of the existing original contract was properly excluded from evidence. *Brenard Mfg. Co. v. Winn-Wilkes Drug Co.*, 31 Ga. App. 200, 120 S.E. 446 (1923).

Altered copy of contract properly excluded. — When an unaltered original of a contract was available to plaintiff from defendant according to the assertion of plaintiff's president at trial but plaintiff's presi-

dent did not attempt to subpoena the document, the trial court properly exercised the court's discretion in excluding an altered copy of the contract since plaintiff failed to exercise diligence to obtain the original. *Jeff Goolsby Homes Corp. v. Thomas*, 181 Ga. App. 308, 352 S.E.2d 172 (1986).

A press letter book is not original but secondary evidence of the contents of the letters. *Watkins v. Paine*, 57 Ga. 50 (1876).

Witness's notes. — Best evidence of the expert witness's opinion was the witness's own testimony not the worksheet which the witness had prepared in order to assist the witness in presenting the testimony. *Lester v. S.J. Alexander, Inc.*, 127 Ga. App. 470, 193 S.E.2d 860 (1972).

Illegal hearsay distinguished. — There is a distinction between illegal testimony and secondary evidence in that hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced, while the only objection to secondary evidence is that the evidence is received without first laying the preliminary foundation; such evidence stands on a different footing, and if admitted without objection it is nevertheless competent, for by allowing such evidence without objecting at the time it is sought to be introduced the party waives the party's right to have the best evidence of such fact sought to be proved, and cannot subsequently insist that the court should withdraw such secondary evidence from the consideration of the jury. *Rushin v. State*, 63 Ga. App. 646, 11 S.E.2d 844 (1940).

Preliminary proof. — Party must always make the usual preliminary proof for the admission of secondary evidence, or that kind of evidence will not be admitted. *Morgan v. Jones*, 24 Ga. 155 (1858).

Criminal Confessions

General consideration. — Rules governing the admission of primary and secondary evidence to establish a contract have no application to the confession of a crime. In making a confession, all that the accused voluntarily wrote, or said, or signed, which is material to the charge, is competent against the accused because it is the accused's own admission, and against the accused's own

interest. *Cawthon v. State*, 71 Ga. App. 497, 31 S.E.2d 64 (1944).

OPINIONS OF THE ATTORNEY GENERAL

Photostatic copies made from microfilms are admissible as primary evidence. 1945-47 Op. Att’y Gen. p. 286.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 73.
C.J.S. — 32A C.J.S., Evidence, § 1040.
ALR. — Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.
Photographic representation of writing as primary or secondary evidence, 142 ALR 1270; 76 ALR2d 1356.
Proof, in absence of direct testimony by

survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 ALR2d 988.
Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 ALR2d 1055.
Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 ALR3d 405.

24-5-2. Showing to admit secondary evidence.

In order to admit secondary evidence, it shall appear that the primary evidence for some sufficient cause is not accessible to the diligence of the party. This showing shall be made to the court, who shall hear the party himself on the question of diligence and the inaccessibility of the primary evidence. (Orig. Code 1863, § 3690; Code 1868, § 3714; Code 1873, § 3767; Code 1882, § 3767; Civil Code 1895, § 5172; Civil Code 1910, § 5759; Code 1933, § 38-212.)

Law reviews. — For comment on *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958), see 21 Ga. B.J. 553 (1959).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INACCESSIBILITY
DILIGENCE

General Consideration

Accessibility and diligence. — In order to introduce secondary evidence of the contents of a lost paper, it is only necessary to establish a reasonable presumption of the paper’s loss; and this presumption is held to be established when the party shows that in a reasonable degree, the party has exhausted

all the sources of information and means of discovery, which the nature of the cases suggests and which were accessible to the party. *Ellis v. Doe*, 10 Ga. 253 (1851); *Harper v. Scott*, 12 Ga. 125 (1852); *Molyneaux v. Collier*, 13 Ga. 406 (1853); *Bryan v. Walton*, 14 Ga. 185 (1853).
Function of trial court is not to determine

General Consideration (Cont'd)

the worthiness or credibility of secondary evidence, but is only to determine whether what is offered as evidence is the best form accessible to the court. *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Discretion of trial judge. — Question of inaccessibility of primary evidence and diligence of the party is a determination within the discretion of the trial judge and the judge's decision will not be overturned unless that discretion is abused. *Hawes v. Paul*, 41 Ga. 609 (1871); *Florida Coca Cola Bottling Co. v. Ricker*, 136 Ga. 411, 71 S.E. 734 (1911); *Orr v. Dunn*, 145 Ga. 137, 88 S.E. 669 (1916); *Brookman v. Rennolds*, 148 Ga. 721, 98 S.E. 543 (1919); *Bedgood v. State*, 100 Ga. App. 736, 112 S.E.2d 430 (1959); *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Secondary evidence admitted without objection. — Court has a right to charge, and the jury to find, upon secondary evidence, provided the evidence has been introduced without objection. *Goodwyn v. Goodwyn*, 20 Ga. 600 (1856).

Party as witness. — Proof that a paper is lost or destroyed lays a proper foundation for the admission of secondary evidence, and a party is a competent witness to this point. *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

If witnesses are unknown, it is not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. *Sharp v. Autry*, 185 Ga. 160, 194 S.E. 194 (1937).

Parol evidence. — Contents of a lost writing may be established by parol. *Segars v. City of Cornelia*, 60 Ga. App. 457, 4 S.E.2d 60 (1939); *Cummings v. State*, 84 Ga. App. 698, 67 S.E.2d 156 (1951).

Evidence of title to land. — If there is written evidence of title to land, it must be produced in order to prove its contents; and before secondary evidence is competent to show its contents, it must first be shown to the court that the original one existed, that it was properly executed and that it is either lost or destroyed, or for some other sufficient cause is not accessible to the diligence of the party. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947).

Photocopies of claim forms identified as authentic by a witness are properly admissible under Ga. L. 1950, p. 73, § 1 (see O.C.G.A. § 24-5-26) without accounting for the original under former Code 1933, § 38-212 (see O.C.G.A. § 24-5-2). *Strickland v. Foundation Life Ins. Co.*, 129 Ga. App. 614, 200 S.E.2d 306 (1973).

Carbon copies of documents. — When it is proved that a genuine original was executed, proof that a document is an exact carbon copy of that original is sufficient to admit it into evidence without proving the loss of the original. *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958), for comment, see 21 Ga. B.J. 553 (1959).

Trial court did not err in admitting certain copies of a store's receipts of defendant's fraudulent transactions rather than the originals as the store's loss prevention manager testified that although the originals had been maintained at the store, the manager had not been able to locate the receipts in time for trial and that the manager had made the copies of the original receipts, which accurately reflected the original receipts; defendant did not show that the best evidence rule had been violated. *Epps v. State*, 262 Ga. App. 113, 584 S.E.2d 701 (2003).

Admission of W-2 and spouse's memory to prove income of deceased. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the surviving spouse to testify as to that spouse's memory of the deceased spouse's income as the question at issue concerned the prior earnings of the deceased spouse, not the actual contents of prior paychecks. Although W-2 forms and other documentary evidence certainly contained evidence of the past earnings, those documents did not preclude the admission of other evidence to prove the actual fact at issue, namely, the amount of the deceased spouse's income. *DOT v. Baldwin*, 292 Ga. App. 816, 665 S.E.2d 898 (2008).

Copies of affidavit and search warrant at motion to suppress hearing. — While the trial court errs in considering copies of an affidavit and search warrant at a motion to suppress hearing, without requiring the originals to be accounted for, the subsequent inclusion of the originals in the record obviates any technical error which may result.

Williams v. State, 168 Ga. App. 614, 309 S.E.2d 856 (1983).

Certified copy of conviction is not secondary evidence. — To impeach a witness by a prior conviction, the conviction must be proved by the record of the conviction itself. The certified copy of a conviction is primary evidence, as opposed to secondary evidence, and is the best proof. *Howard v. State*, 204 Ga. App. 743, 420 S.E.2d 594 (1992).

Secondary evidence was found admissible in the following cases. — See *Hawes v. Paul*, 41 Ga. 609 (1871) (material evidence); *Sims v. Scheussler*, 2 Ga. App. 466, 58 S.E. 693 (1907) (certified copy of deed); *Sharp v. Autry*, 185 Ga. 160, 194 S.E. 194 (1937) (circumstantial evidence); *Everitt v. Harris*, 67 Ga. App. 64, 19 S.E.2d 545 (1942) (carbon copies); *Saliba v. Saliba*, 202 Ga. 791, 44 S.E.2d 744 (1947) (circumstantial evidence); *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (critical evidence).

State's showing insufficient. — Sentencing court improperly considered defendant's prior state court conviction because the state presented only hearsay, rather than competent evidence, showing that it was unable to obtain a certified copy of the conviction, and there was no evidence regarding whether it used due diligence to obtain such a copy. *Brinkley v. State*, 301 Ga. App. 827, 689 S.E.2d 116 (2009).

Harmless error. — In an identity fraud case, the transcript showed that the state never accounted for the original check when defense counsel objected on the ground that the admission of the original was the best evidence; therefore, it was error for the trial court to admit the photostatic copy pursuant to O.C.G.A. § 24-5-2, but the error was harmless because the state's witnesses provided direct testimony regarding details about the check, and specifically testified regarding defendant's use of the identity fraud victim's driver's license; thus, the check itself was of little or no significance in determining defendant's guilt or innocence of identity fraud, and any error in admitting a photostatic copy of the check into evidence would not have influenced the jury's verdict in any way. *Wilson v. State*, 276 Ga. App. 39, 622 S.E.2d 411 (2005).

Cited in *A.B. & C.R.R. Benefit Ass'n v. South*, 49 Ga. App. 659, 175 S.E. 924 (1934); *Gregg v. Fitzpatrick*, 54 Ga. App. 303, 187

S.E. 730 (1936); *Haden v. Liberty Co.*, 183 Ga. 209, 188 S.E. 29 (1936); *Smoak v. State*, 58 Ga. App. 299, 198 S.E. 99 (1938); *Wilson-Weesner-Wilkinson Co. v. Collier*, 62 Ga. App. 457, 8 S.E.2d 171 (1940); *Goettee v. Carlyle*, 68 Ga. App. 288, 22 S.E.2d 854 (1942); *King v. State*, 83 Ga. App. 175, 63 S.E.2d 292 (1951); *Shelnutt v. Phillips*, 113 Ga. App. 321, 147 S.E.2d 803 (1966); *Rogers v. Johnson*, 116 Ga. App. 295, 157 S.E.2d 48 (1967); *Boswell v. State*, 135 Ga. App. 104, 217 S.E.2d 411 (1975); *DeFreeze v. State*, 136 Ga. App. 10, 220 S.E.2d 17 (1975); *Travelers Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976); *Brooks v. State*, 141 Ga. App. 725, 234 S.E.2d 541 (1977); *Bowman v. State*, 144 Ga. App. 681, 242 S.E.2d 480 (1978); *J.E.M. Enters., Inc. v. Taco Pronto, Inc.*, 145 Ga. App. 573, 244 S.E.2d 253 (1978); *Apgar v. State*, 159 Ga. App. 752, 285 S.E.2d 89 (1981); *Walls v. State*, 161 Ga. App. 235, 291 S.E.2d 15 (1982); *Pope v. Kem Mfg. Corp.*, 249 Ga. 868, 295 S.E.2d 290 (1982); *West v. Chatham County*, 177 Ga. App. 417, 339 S.E.2d 390 (1985); *Webster v. Brown*, 213 Ga. App. 845, 446 S.E.2d 522 (1994); *Abdalla v. DDCB, Inc.*, 216 Ga. App. 617, 455 S.E.2d 598 (1995); *Miller v. Steelmaster Material Handling Corp.*, 223 Ga. App. 532, 478 S.E.2d 601 (1996); *Southeast Reducing Co. v. Wasserman*, 229 Ga. App. 1, 493 S.E.2d 201 (1997); *Harper v. Copelco Capital, Inc.*, 249 Ga. App. 453, 548 S.E.2d 53 (2001); *Emanuel Tractor Sales, Inc. v. DOT*, 257 Ga. App. 360, 571 S.E.2d 150 (2002); *DeGolyer v. Green Tree Servicing, LLC*, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Inaccessibility

Inaccessibility was found in the following cases. — See *Jackson v. Johnson*, 67 Ga. 167 (1881) (administrator's bond in foreign state); *Sims v. Scheussler*, 2 Ga. App. 466, 58 S.E. 693 (1907) (mortgage); *Davis v. State*, 25 Ga. App. 532, 103 S.E. 819, cert. denied, 25 Ga. App. 840 (1920) (telegraph messages); *Beall v. Francis*, 163 Ga. 894, 137 S.E. 251 (1927) (certified copy of marriage contract); *Carpenter v. State*, 140 Ga. App. 368, 231 S.E.2d 97 (1976) (golf membership card); *Knox v. State*, 165 Ga. App. 26, 299 S.E.2d 105 (1983) (laboratory); *General Ins. Servs., Inc. v. Marcola*, 231 Ga. App. 144, 497 S.E.2d 679 (1998) (contract).

Inaccessibility (Cont'd)

Inaccessibility was not found in the following cases. — Florida Coca Cola Bottling Co. v. Ricker, 136 Ga. 411, 71 S.E. 734 (1911) (written assignment sent to another state); Caraker v. Brown, 152 Ga. 677, 111 S.E. 51 (1922) (record of a homestead); Illinois C.R.R. v. Banks, 31 Ga. App. 756, 122 S.E. 85 (1924) (original records).

Patients' dental records. — When, in a dentist's suit to recover income for work performed for a dental clinic, it appeared that the patients' individual records constituted the primary documentary evidence of their visits, charges, and payments and that those records were otherwise available or accessible, the trial court did not err in refusing to admit plaintiff's own purported summary as secondary evidence of that information. White v. Dilworth, 178 Ga. App. 226, 342 S.E.2d 709 (1986).

Records destroyed. — Trial court erred in directing a verdict as to damages after a landlord satisfied the requirement for submitting secondary evidence by establishing

that the primary evidence, the purchase invoices, had been destroyed and that higher secondary evidence from the company was unavailable; the oral evidence as to the wholesale fair market value and as to the dealer's discount, based upon the actual damaged parts, was sufficient secondary evidence to go to a jury. Hodges v. Vara, 268 Ga. App. 815, 603 S.E.2d 327 (2004).

Diligence

Diligence was found. — When absence of letter in court was explained by to whom the letter was sent, as was the receiver's diligence in searching for the letter, and in no other way could this letter be accounted for but that it was "lost," this was good and reasonable cause in inaccessibility. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Diligence was not found. — Copy of a deed taken from the register is not admissible evidence against the grantee, without notice to the grantee to produce the original. Solomon & Son v. Creech, 82 Ga. 445, 9 S.E. 165 (1889).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1066.

C.J.S. — 32A C.J.S., Evidence, §§ 1049, 1050, 1089 et seq., 1094 et seq., 1101 et seq.

ALR. — Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Presumption or circumstantial evidence to establish missing link in chain of title, 67 ALR 1333.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Proof, in absence of direct testimony, of identity of motor vehicle involved in accident, 81 ALR2d 861.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Admissibility of computerized private business records, 7 ALR4th 8.

24-5-3. Exceptions to general rule requiring production of primary evidence.

Cases of necessity or manifest convenience, resting on principles of reason and justice, may be made exceptions to the general rule requiring the production of primary evidence. (Orig. Code 1863, § 3689; Code 1868, § 3713; Code 1873, § 3766; Code 1882, § 3766; Civil Code 1895, § 5171; Civil Code 1910, § 5758; Code 1933, § 38-211.)

JUDICIAL DECISIONS

Purchaser of land. — Equity will grant no relief in favor of one who buys land, when one fails to exercise any diligence for one's protection, and asserts that one blindly relied on the representations of the seller as to matters of which one could have informed oneself. *Browning v. Richardson*, 181 Ga. 413, 182 S.E. 516 (1935).

Transcript of tape recording. — Best evidence rule does not apply to a tape recorded statement and, therefore, a transcript of a tape recorded statement is admissible when the court determines that a reasonable necessity exists for the reading of the transcript rather than experiencing a delay caused by the additional effort of playing the tape before the court. *In re F.L.P.*, 184 Ga. App. 164, 361 S.E.2d 43 (1987).

Records destroyed. — Trial court erred in directing a verdict as to damages when a landlord satisfied the requirement for submitting secondary evidence by establishing that the primary evidence, the purchase invoices, had been destroyed and that higher secondary evidence from the company was unavailable; the oral evidence as to the wholesale fair market value and as to the dealer's discount, based upon the actual damaged parts, was sufficient secondary evidence to go to a jury. *Hodges v. Vara*, 268 Ga. App. 815, 603 S.E.2d 327 (2004).

Cited in *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946); *Brunson v. Bridges*, 130 Ga. App. 102, 202 S.E.2d 553 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 453.

C.J.S. — 32A C.J.S., Evidence, §§ 1040, 1051.

ALR. — Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311.

24-5-4. Best evidence of writing to be produced or accounted for.

(a) The best evidence which exists of a writing sought to be proved shall be produced, unless its absence shall be satisfactorily accounted for.

(b) Written evidence of a writing is considered of higher proof than oral evidence. In all cases where the parties have reduced their contract, agreement, or stipulation to writing and have assented thereto, such writing is the best evidence of the same. (Orig. Code 1863, §§ 3683, 3685; Code 1868, §§ 3707, 3709; Code 1873, §§ 3760, 3762; Code 1882, §§ 3760, 3762; Civil Code 1895, §§ 5162, 5166; Civil Code 1910, §§ 5748, 5752; Code 1933, §§ 38-203, 38-205.)

Cross references. — Parol contracts, § 13-1-6. Statute of frauds, § 13-5-30 et seq. Parol evidence generally, Ch. 6 of this title.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
BEST EVIDENCE RULE INAPPLICABLE
WHAT CONSTITUTES BEST EVIDENCE

General Consideration

Rule restricted to writings and has nothing to do with evidence generally. *Lester v. S.J. Alexander, Inc.*, 127 Ga. App. 470, 193 S.E.2d 860 (1972); *Willingham v. State*, 134 Ga. App. 603, 215 S.E.2d 521 (1975); *Rutledge v. State*, 152 Ga. App. 755, 264 S.E.2d 244 (1979); *Bostic v. State*, 183 Ga. App. 430, 359 S.E.2d 201 (1987).

Contents of writing in issue. — This statute applies only when the contents of a writing are in issue. *Young v. State*, 226 Ga. 553, 176 S.E.2d 52 (1970); *Springer v. State*, 238 Ga. 81, 230 S.E.2d 883 (1976); *Pryor v. State*, 238 Ga. 698, 234 S.E.2d 918, cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006); *Guthrie v. State*, 147 Ga. App. 351, 248 S.E.2d 714 (1978); *Smith v. State*, 147 Ga. App. 549, 249 S.E.2d 353 (1978); *Ferrell v. State*, 149 Ga. App. 405, 254 S.E.2d 404 (1979); *Denson v. State*, 149 Ga. App. 453, 254 S.E.2d 455 (1979) (see O.C.G.A. § 24-5-4).

Preference for original writing. — This is really a preferential rule giving first preference to the original writing. *Lester v. S.J. Alexander, Inc.*, 127 Ga. App. 470, 193 S.E.2d 860 (1972); *Willingham v. State*, 134 Ga. App. 603, 215 S.E.2d 521 (1975).

The rule should be more appropriately called the “original document rule.” *Lester v. S.J. Alexander, Inc.*, 127 Ga. App. 470, 193 S.E.2d 860 (1972); *Pugh v. Jones*, 131 Ga. App. 600, 206 S.E.2d 650 (1974).

Accounting for absence of notes. — There was no violation of this rule by the failure to introduce officer’s notes taken during interviews with defendant when the absence of notes was accounted for and explained. *Dowdy v. State*, 215 Ga. App. 576, 451 S.E.2d 528 (1994).

When, with regard to proof of transmittal of contraband to state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by O.C.G.A. § 24-5-4, the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contra-

band to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy’s handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to O.C.G.A. §§ 24-3-14 and 24-5-26. *Spead v. State*, 187 Ga. App. 359, 370 S.E.2d 213 (1988).

Substitution of oral for written evidence. — Cases which most frequently call for the application of this rule are those which relate to the substitution of oral for written evidence. *Fitzgerald v. Adams*, 9 Ga. 471 (1851).

Inadmissible testimony. — It was error to admit the testimony of witnesses as to the contents of a notebook without establishing the notebook’s existence, admissibility, authentication and without accounting for the absence of the original. *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

In a civil forfeiture proceeding in connection with an action brought under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., a witness’s testimony regarding newspaper and billboard advertising, telephone calls, and credit card charges violated the best evidence rule because the state neither produced documentary evidence to support the statements, nor accounted for the absence of such evidence. *Pabey v. State*, 262 Ga. App. 272, 585 S.E.2d 200 (2003).

Inadmissible evidence. — Cover letter sought to be introduced was a photocopy of an alleged original that had never been produced, that the introducing party had never seen, and that the other party claimed did not exist; thus, without additional foundation, the photocopy was susceptible to a best evidence objection, and a trial court properly denied admission of the letter. *Dixon Dairy Farms, Inc. v. Purina Mills, Inc.*, 267 Ga. App. 738, 601 S.E.2d 152 (2004).

Suspicion of fraud as basis for rule. — Ground of the rule is a suspicion of fraud and, if there is better evidence of the fact which is withheld, a presumption arises that the party has some secret or sinister motive in not producing the better evidence. *United States v. Reyburn*, 31 U.S. (6 Pet.)

352, 8 L. Ed. 424 (1832); *Fitzgerald v. Adams*, 9 Ga. 471 (1851).

Evidence which itself indicates accessibility of other and better proof is inadmissible. *Wise v. State*, 52 Ga. App. 98, 182 S.E. 535 (1935); *Short v. Haney*, 60 Ga. App. 585, 4 S.E.2d 497 (1939).

Rule does not require introduction of chattels into evidence. *Hill v. State*, 221 Ga. 65, 142 S.E.2d 909 (1965), overruled on other grounds, *Henderson v. State*, 251 Ga. 398, 306 S.E.2d 645 (1983); *Adams v. State*, 142 Ga. App. 252, 235 S.E.2d 667 (1977).

Rule may be waived. *Moret v. State*, 246 Ga. 5, 268 S.E.2d 635 (1980).

Defendant waived this rule when, with knowledge that officer's notes taken during interviews with the defendant were accessible, the defendant did not demand that the notes be produced and allowed the introduction of typed notes. *Dowdy v. State*, 215 Ga. App. 576, 451 S.E.2d 528 (1994).

Function of trial court is not to determine the worthiness or credibility of secondary evidence, but is only to determine whether what is offered as evidence is the best form accessible to the court. *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Secondary evidence admitted without objection will support verdict. — Secondary evidence, while not the best evidence, and while inadmissible on proper objection unless it be shown that the primary evidence is unavailable, will nevertheless support a verdict if the evidence is admitted without objection. *Planters Rural Tel. Coop. v. Chance*, 108 Ga. App. 146, 132 S.E.2d 90 (1963).

Other evidence of similar import. — Party cannot complain that evidence is admitted when the party offers other evidence of similar legal import. *Cain v. State*, 113 Ga. App. 477, 148 S.E.2d 508 (1966).

Harmless error. — An error in failing to require production of a warrant is harmless if its only effect was to establish a state of facts the defendant admits to be true. *Cain v. State*, 113 Ga. App. 477, 148 S.E.2d 508 (1966).

When there was no evidence whatsoever accounting for absence of original of document as required by the law, trial court erred in admitting the evidence, however, since there was testimony of witnesses generally as to contents of document and prosecutor

read contents of the document verbatim to defendant in cross-examination, all without objection, error was harmless. *Garrett v. State*, 156 Ga. App. 33, 274 S.E.2d 80 (1980).

Effect of failure to comply with rule. — Failure to comply with the "original document rule" in attachments may cause the affidavit to be stricken. *Pugh v. Jones*, 131 Ga. App. 600, 206 S.E.2d 650 (1974).

Expert's opinion must be based on best evidence. — It is reversible error to allow an expert witness to base an opinion upon what the expert says a chart of an official Navy health record shows when the record itself is not introduced in evidence. *Pressley v. State*, 205 Ga. 197, 53 S.E.2d 106 (1949).

Insurance card testimony admissible. — In light of defendant's own admission at trial that the defendant did not have an insurance card because the defendant paid for insurance in installments, the trial court did not abuse the court's discretion in allowing the officer's testimony without producing the card itself. *Johnson v. State*, 209 Ga. App. 395, 433 S.E.2d 638 (1993).

Cited in *Bryan v. Walton*, 14 Ga. 185 (1853); *Tift v. Jones*, 52 Ga. 538 (1874); *Anderson v. Tribble*, 66 Ga. 584 (1881); *Blackwell v. Houston County*, 168 Ga. 248, 147 S.E. 574 (1929); *Sharp v. Autry*, 185 Ga. 160, 194 S.E. 194 (1937); *Clifton v. State*, 187 Ga. 502, 2 S.E.2d 102 (1939); *Goettee v. Carlyle*, 68 Ga. App. 288, 22 S.E.2d 854 (1942); *Cloud v. Maxey*, 195 Ga. 90, 23 S.E.2d 668 (1942); *West v. West*, 199 Ga. 378, 34 S.E.2d 545 (1945); *Wood v. Phoenix Ins. Co.*, 199 Ga. 461, 34 S.E.2d 688 (1945); *Findley v. Downing Motors, Inc.*, 79 Ga. App. 682, 54 S.E.2d 716 (1949); *Minor v. Fincher*, 206 Ga. 721, 58 S.E.2d 389 (1950); *Draffin v. Massey*, 93 Ga. App. 329, 92 S.E.2d 38 (1956); *Banks v. Harden*, 221 Ga. 505, 145 S.E.2d 563 (1965); *Continental Cas. Co. v. Wilson-Avery, Inc.*, 115 Ga. App. 793, 156 S.E.2d 152 (1967); *Rogers v. Johnson*, 116 Ga. App. 295, 157 S.E.2d 48 (1967); *Levin v. Potts*, 117 Ga. App. 394, 160 S.E.2d 666 (1968); *Lake Spivey Parks v. Jones*, 118 Ga. App. 60, 162 S.E.2d 801 (1968); *Newcomb v. Pattillo*, 119 Ga. App. 495, 167 S.E.2d 665 (1969); *Preferred Risk Mut. Ins. Co. v. Commercial Union Ins. Co.*, 121 Ga. App. 367, 173 S.E.2d 730 (1970); *Winkles v. Brown*, 227 Ga. 33, 178 S.E.2d 865 (1970); *Hawes v. Shuman*, 123 Ga. App. 543, 181 S.E.2d 708

General Consideration (Cont'd)

(1971); *Jones v. State*, 232 Ga. 771, 208 S.E.2d 825 (1974); *Watts v. Six Flags Over Ga., Inc.*, 140 Ga. App. 106, 230 S.E.2d 34 (1976); *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977); *Smith v. Hart*, 243 Ga. 59, 252 S.E.2d 470 (1979); *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669 (1980); *Delaney v. State*, 154 Ga. App. 772, 270 S.E.2d 48 (1980); *Tucker v. Whitehead*, 155 Ga. App. 104, 270 S.E.2d 317 (1980); *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981); *Zimmerman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ga. App. 429, 283 S.E.2d 639 (1981); *Ayers v. Carter*, 159 Ga. App. 680, 285 S.E.2d 55 (1981); *Hammond v. Paul*, 249 Ga. 241, 290 S.E.2d 54 (1982); *Pope v. Kem Mfg. Corp.*, 249 Ga. 868, 295 S.E.2d 290 (1982); *Bennett v. State*, 169 Ga. App. 85, 311 S.E.2d 513 (1983); *Verble v. State*, 172 Ga. App. 321, 323 S.E.2d 239 (1984); *Jones v. State*, 174 Ga. App. 636, 331 S.E.2d 28 (1985); *Vinyard v. State*, 177 Ga. App. 188, 338 S.E.2d 766 (1985); *Johnston v. State*, 178 Ga. App. 219, 342 S.E.2d 706 (1986); *Stoe v. State*, 187 Ga. App. 171, 369 S.E.2d 793 (1988); *Bishop v. Kenny*, 266 Ga. 231, 466 S.E.2d 581 (1996); *Rocha v. State*, 250 Ga. App. 209, 551 S.E.2d 82 (2001); *Emanuel Tractor Sales, Inc. v. DOT*, 257 Ga. App. 360, 571 S.E.2d 150 (2002); *Red Train, Inc. v. Harris*, 262 Ga. App. 846, 586 S.E.2d 738 (2003); *Garrett v. State*, 285 Ga. App. 282, 645 S.E.2d 718 (2007).

Best Evidence Rule Inapplicable

Videotapes. — Best evidence rule applies only to writings and not to videotapes. *Collins v. State*, 232 Ga. App. 651, 502 S.E.2d 498 (1998).

Best evidence rule does not apply to videotapes. *Reese v. State*, 252 Ga. App. 650, 556 S.E.2d 150 (2001).

Best evidence rule does not apply to collateral evidence. *Walls v. State*, 161 Ga. App. 235, 291 S.E.2d 15 (1982).

When essential fact to be proved was neither existence nor contents of quarterly bank statements, which were merely collateral or incidental to issue involved, it was not error to admit photocopies of such statements since plaintiff testified that the plaintiff did not have the originals. *Jones v.*

Sudduth, 162 Ga. App. 602, 292 S.E.2d 448 (1982).

Rule inapplicable when contents of writing not in issue. — See *Jones v. Blackburn*, 75 Ga. App. 791, 44 S.E.2d 555 (1947); *DeKalb County v. Townsend Assocs.*, 243 Ga. 80, 252 S.E.2d 498 (1979); *Wells v. State*, 151 Ga. App. 416, 260 S.E.2d 374 (1979); *Borenstein v. Blumenfeld*, 151 Ga. App. 420, 260 S.E.2d 377 (1979); *Brown v. State*, 177 Ga. App. 284, 339 S.E.2d 332 (1985); *Johnson v. State*, 177 Ga. App. 705, 340 S.E.2d 662 (1986); *Blue Cross of Georgia/Columbus, Inc. v. Whatley*, 180 Ga. App. 93, 348 S.E.2d 459 (1986); *Covington v. State*, 226 Ga. App. 484, 486 S.E.2d 706 (1997).

With regard to a defendant's convictions for aggravated sodomy and kidnapping, the trial court did not err by admitting the testimony of the defendant's relative regarding letters the defendant sent to the relative while the defendant was awaiting trial wherein the defendant asked the relative to testify at trial that the relative had seen the victim and the defendant together the day before the attack at a motel, which was an event that never occurred. Contrary to the defendant's contention that the admission of the relative's testimony violated the best evidence rule, the best evidence rule did not apply since the contents of the writings were not in issue. *Smith v. State*, 294 Ga. App. 692, 670 S.E.2d 191 (2008).

Rule inapplicable when contents or existence not in issue. — Best evidence rule is inapplicable when neither the existence nor the contents of documents is in issue. *Bacon v. Decatur Fed. Sav. & Loan Ass'n*, 169 Ga. App. 538, 313 S.E.2d 727 (1984); *Calloway v. State*, 176 Ga. App. 674, 337 S.E.2d 397 (1985).

Currency is not a "writing" under the best evidence rule. — Photocopy of a \$20 bill used as "buy money" in a drug transaction was admissible under either O.C.G.A. § 24-5-4 or O.C.G.A. § 24-5-26. *Johnson v. State*, 231 Ga. App. 114, 497 S.E.2d 666 (1998).

Existence of fact rather than contents of writing in issue. — When the existence of a fact is the question at issue and not the contents of a writing, then oral and written evidence of the fact may both be primary evidence. *Willingham v. State*, 134 Ga. App. 603, 215 S.E.2d 521 (1975), overruled on

other grounds, *Wilson v. State*, 145 Ga. App. 315, 244 S.E.2d 355 (1978); *Sumners v. State*, 137 Ga. App. 493, 224 S.E.2d 126 (1976); *Gilliland v. State*, 139 Ga. App. 399, 228 S.E.2d 314 (1976), vacated on other grounds, 238 Ga. 542, 233 S.E.2d 801 (1977); *Guthrie v. State*, 147 Ga. App. 351, 248 S.E.2d 714 (1978); *Glennville Wood Preserving Co. v. Riddlespur*, 156 Ga. App. 578, 276 S.E.2d 248 (1980).

Best evidence rule applies only when a writing is introduced to establish the existence or contents of the document, and is not applicable when a party uses the document to prove a fact. *Shivers v. State*, 188 Ga. App. 744, 374 S.E.2d 233 (1988); *Transportation Ins. Co. v. Allstate Ins. Co.*, 208 Ga. App. 837, 432 S.E.2d 259 (1993).

Admission of the oral testimony of a clerk whose computer defendant used to “back out” taxes, that the clerk’s computer showed evidence of backing out, did not violate the best evidence rule, even assuming that a computer screen constituted a writing; at issue was a question of fact, whether defendant used the clerk’s computer to back out taxes, and not the contents or terms of a writing. *Parham v. State*, 275 Ga. App. 528, 621 S.E.2d 532 (2005).

Nonexistence of fact. — When it is sought to show that certain records do not contain a certain thing, the testimony of the keeper of the records, or of any other person who has read the records, that the records do not show the thing in question, is not inadmissible on the ground that the records themselves are the highest and best evidence. *Cary v. State*, 55 Ga. App. 167, 189 S.E. 625 (1937); *Peters v. Adcock*, 196 Ga. 118, 26 S.E.2d 342 (1943).

Existence of fact to which writing is incidental. — Oral testimony of a fact in issue may be primary evidence thereof, although there is written evidence of the same fact, where the essential fact to be proved is neither the existence nor the contents of the writing, but the existence of the independent fact itself, to which the writing is merely collateral or incidental. *Peterson v. Lott*, 200 Ga. 390, 37 S.E.2d 358 (1946); *Burke v. State*, 153 Ga. App. 769, 266 S.E.2d 549 (1980); *Emmett v. Regions Bank*, 238 Ga. App. 455, 518 S.E.2d 472 (1999).

Existence of writing. — Witness may testify that a writing exists since the witness

does not attempt to testify as to the contents of the writing. *Jones v. Blackburn*, 75 Ga. App. 791, 44 S.E.2d 555 (1947).

Existence of notes, checks, letters, and the like. — Parol evidence as to the existence of notes, checks, receipts, books, letters, and the like, or as to their location, size, length, quantity, and other factors, but not undertaking to disclose the material contents thereof, is not subject to the objection that the writings themselves would be higher proof; where such writings are only collaterally in point, and are in no sense the foundation of the action or defense, even their contents may sometimes be shown by parol without accounting for the nonproduction of the papers themselves. *Butts v. Maryland Cas. Co.*, 52 Ga. App. 838, 184 S.E. 774 (1936).

Existence of magazine pictures. — Trial court properly allowed arresting officer to testify regarding the presence of magazine pictures of female nudes in defendant’s home since the pictures were not introduced into evidence. *King v. State*, 209 Ga. App. 529, 433 S.E.2d 722 (1993).

Facts from which books of account are made. — As a general rule, the testimony of a person who has knowledge of the facts from which books of account are made up is primary evidence as to those facts, and is admissible whether or not the books themselves are put in evidence. *Mayor of Buford v. Medley*, 58 Ga. App. 48, 197 S.E. 494 (1938); *Atlantic Coast Line R.R. v. Grimes*, 99 Ga. App. 774, 109 S.E.2d 890 (1959).

Summary of accounting book entries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the investigation, provided the books themselves are accessible to the court and the parties. *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980); *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Showing absence of administration. — Best method of proving that no administration was ever had upon a particular estate is to introduce the evidence of one who has examined the records in the court where

Best Evidence Rule Inapplicable (Cont'd)

letters of administration should have been granted, that no such letters are shown by those records. *Cowan v. Corbett*, 68 Ga. 66 (1881); *Greenfield v. McIntyre*, 112 Ga. 691, 38 S.E. 44 (1901); *Compton v. Fender*, 132 Ga. 483, 64 S.E. 475 (1909).

Accounting for absence. — Hearsay testimony of a deputy about the contents of a missing letter that defendant allegedly wrote and sent to a codefendant was admissible as an incriminating statement by the defendant; the state satisfactorily accounted for the absence of the letter through the codefendant, who testified that the codefendant destroyed the letter after showing the letter to the deputy. *Summerour v. State*, 211 Ga. App. 65, 438 S.E.2d 176 (1993).

Trial court's admission of a photocopy of a letter examined by a documents examiner did not violate the best evidence rule as the original letter was lost and the copy was properly authenticated. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

No error in admission of copy of warranty. *Croxtan v. Leggett Motor Rebuilding*, 168 Ga. App. 258, 308 S.E.2d 640 (1983).

Still photographs taken from videotape were inapplicable to best evidence rule. The snapshots were merely positive enlargements of the frames which the jury could not have easily seen. *Cleveland v. State*, 204 Ga. App. 101, 418 S.E.2d 430 (1992).

Rule was inapplicable in the following cases. — See *International Harvester Co. of Am. v. Morgan*, 19 Ga. App. 716, 92 S.E. 35 (1917) (prior written agreement); *Jenkins v. Lane*, 154 Ga. 454, 115 S.E. 126 (1922) (parol evidence to establish implied trust); *Maynard v. Rawlins*, 45 Ga. App. 91, 163 S.E. 269 (1932) (testimony concerning note admitted by agreement of counsel); *Oliver v. Lane*, 46 Ga. App. 136, 167 S.E. 116 (1932) (parol evidence concerning note); *Cooper v. State*, 180 Ga. 612, 180 S.E. 103 (1935) (oral criminal confession); *Garcia v. State*, 52 Ga. App. 80, 182 S.E. 526 (1935) (testimony derived from records); *Wise v. State*, 52 Ga. App. 98, 182 S.E. 535 (1935) (testimony concerning addresses printed on stolen property); *Butts v. Maryland Cas. Co.*, 52 Ga. App. 838, 184 S.E. 774 (1936) (accord and satisfaction); *Jones v. State*, 182 Ga. 378, 185 S.E. 571 (1936) (certificate of insurance

issued under group policy); *Roberts v. State*, 86 Ga. App. 768, 72 S.E.2d 551 (1952) (parol evidence to impeach); *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga. App. 380, 170 S.E.2d 724 (1969) (testimony concerning records); *Young v. State*, 226 Ga. 553, 176 S.E.2d 52 (1970) (proof to convict); *Denson v. State*, 149 Ga. App. 453, 254 S.E.2d 455 (1979) (testimony concerning ownership and possession of car); *Jones v. Brawner*, 151 Ga. App. 437, 260 S.E.2d 385 (1979) (testimony concerning existence of perpetual care reserve fund); *Causey v. State*, 154 Ga. App. 76, 267 S.E.2d 475 (1980) (transcript of tape recording); *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980) (copy of forged check); *Knox v. State*, 165 Ga. App. 26, 299 S.E.2d 105 (1983) (checks); *Fantasia v. State*, 268 Ga. 512, 491 S.E.2d 318 (1997) (photocopies of original inspection certificates).

In a breach of contract action between a business and an advertiser, the best evidence rule required the advertiser to produce the first affidavit provided by the advertiser's senior director of business affairs, and the trial court erred in considering the affidavit without requiring the affidavit's production. But, given that the second affidavit showed that the parties entered into the contract at issue, the trial court properly considered the affidavit to that effect. *Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 660 S.E.2d 797 (2008).

What Constitutes Best Evidence

Duplicate original of instrument may be admitted into evidence without violation of best evidence rule. *Jones v. Sudduth*, 162 Ga. App. 602, 292 S.E.2d 448 (1982).

Substitution of an exact copy for an original letter was in compliance with the "best evidence" rule. *Moore v. State*, 191 Ga. App. 911, 383 S.E.2d 355, cert. denied, 191 Ga. App. 922, 383 S.E.2d 355 (1989).

Copies satisfactory where originals can be accounted for. — When the original certificates of inspection for breath-testing instruments were accounted for, the admission of photocopies was not an abuse of discretion. *Chastain v. State*, 231 Ga. App. 225, 498 S.E.2d 792 (1998).

A carbon original is admissible as primary evidence. *Millwood v. State*, 166 Ga. App. 292, 304 S.E.2d 103 (1983).

Photostatic copies not best evidence. — Photostatic copies are ordinarily secondary evidence, which may not be admitted over objection without properly accounting for the original. *Cox v. State*, 93 Ga. App. 533, 92 S.E.2d 260 (1956); *Montgomery v. State*, 154 Ga. App. 311, 268 S.E.2d 723 (1980); *Jones v. Sudduth*, 162 Ga. App. 602, 292 S.E.2d 448 (1982); *First Ga. Leasing, Inc. v. First Ga. Bank*, 188 Ga. App. 847, 374 S.E.2d 751, cert. denied, 188 Ga. App. 911, 374 S.E.2d 751 (1988).

Defendant's conviction for driving under the influence to the extent that defendant's blood-alcohol content exceeded the legal limit was reversed as the trial court erroneously admitted a photostatic copy of the Intoxilyzer report over a best evidence objection, the state was unable to explain the absence of the original, the state presented no evidence that the state made any effort to locate the original, and O.C.G.A. § 24-7-20 did not apply. *Lumley v. State*, 280 Ga. App. 82, 633 S.E.2d 413 (2006).

Certified copy of a public record is the best evidence of the records contents. *O'Connor v. United States*, 11 Ga. App. 246, 75 S.E. 110 (1912); *Pressley v. State*, 205 Ga. 197, 53 S.E.2d 106 (1949); *Pugh v. Jones*, 131 Ga. App. 600, 206 S.E.2d 650 (1974).

Deed is the best evidence of the deed's contents. *Hall v. Waller*, 66 Ga. 483 (1881); *McConnell Bros. v. Slappey*, 134 Ga. 95, 67 S.E. 440 (1910); *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947); *Ehrlich v. Mills*, 203 Ga. 600, 48 S.E.2d 107 (1948); *Green v. Wright*, 225 Ga. 25, 165 S.E.2d 843 (1969); *Hembree v. Cotton States Mut. Ins. Co.*, 132 Ga. App. 556, 208 S.E.2d 568 (1974).

Record of a conviction is the best evidence of conviction. *Johnson v. State*, 48 Ga. 116 (1873); *Beach v. State*, 138 Ga. 265, 75 S.E. 139 (1912); *Howard v. State*, 144 Ga. 169, 86 S.E. 540 (1915); *Swain v. State*, 151 Ga. 375, 107 S.E. 40 (1921); *Lovinger v. State*, 39 Ga. App. 116, 146 S.E. 346 (1929); *Corley v. State*, 64 Ga. App. 841, 14 S.E.2d 121 (1941); *Carroll v. Crawford*, 218 Ga. 635, 129 S.E.2d 865 (1963).

When the defendant did not tender the copies of convictions which the defendant desired to have introduced to impeach witnesses, but only made a proffer of the testimony of the clerk's representative, the state's objection based on the failure to produce

the best evidence was properly sustained. The testimony of the deputy clerk as to the content of the records was not only not the best evidence, it was also hearsay. *Lipscomb v. State*, 194 Ga. App. 657, 391 S.E.2d 773 (1990).

Patients' dental records. — When, in a dentist's suit to recover income for work performed for a dental clinic, it appeared that the patients' individual records constituted the primary documentary evidence of their visits, charges, and payments and that those records were otherwise available or accessible, the trial court did not err in refusing to admit plaintiff's own purported summary as secondary evidence of that information. *White v. Dilworth*, 178 Ga. App. 226, 342 S.E.2d 709 (1986).

Reconstruction of recorded statement. — Since the tape recorder malfunctioned for a period of time during the giving of defendant's statement to police, and the interview continued after the recorder had been repaired; since the officers who conducted the interview offered their reconstruction of the interview's unrecorded portions, and testified that they were substantially the same as the recorded parts; and the recorded statement, as thus supplemented, was admitted only after a Jackson-Denno hearing, there was no error. *McGee v. State*, 260 Ga. 178, 391 S.E.2d 400 (1990).

Examples of best evidence are found in the following cases. — See *Fitzgerald v. Adams*, 9 Ga. 471 (1851) (writing as evidence of transaction); *Cook v. North & S.R.R.*, 50 Ga. 211 (1873) (written contract); *White v. Claxton*, 12 Ga. App. 141, 76 S.E. 1040 (1913) (written application for insurance); *Probasco v. Shaw*, 144 Ga. 416, 87 S.E. 466 (1915) (unconditional note); *Smith v. Lawrence*, 23 Ga. App. 795, 99 S.E. 536 (1919) (specific written agreement); *Bowen v. Mobley*, 40 Ga. App. 833, 151 S.E. 667 (1930) (mortgage); *Southern Loan & Inv. Co. v. State*, 68 Ga. App. 75, 22 S.E.2d 108 (1942) (charter and bylaws of company); *Shaw v. Fehn*, 196 Ga. 661, 27 S.E.2d 406 (1943), later appeal, 199 Ga. 747, 35 S.E.2d 253 (1945) (will); *Sikes v. State*, 76 Ga. App. 883, 47 S.E.2d 677 (1948) (record of trial); *Pressley v. State*, 205 Ga. 197, 53 S.E.2d 106 (1949) (verified copy); *Delinski v. Dunn*, 209 Ga. 402, 73 S.E.2d 171 (1952) (record of board of corrections and certified copy of

What Constitutes Best Evidence (Cont'd)

sentence); *Beard v. Westmoreland*, 90 Ga. App. 632, 84 S.E.2d 93 (1954) (duplicate original of property settlement); *Carroll v. Crawford*, 218 Ga. 635, 129 S.E.2d 865 (1963) (indictment); *Cain v. State*, 113 Ga. App. 477, 148 S.E.2d 508 (1966) (search warrant); *Hawes v. Red Oak Hauling Co.*, 116 Ga. App. 302, 157 S.E.2d 38 (1967)

(documents in possession of party); *Consolidated Eng'g Co. v. U.I.R. Contractors*, 136 Ga. App. 923, 222 S.E.2d 692 (1975) (checks and vouchers); *Barrett v. State*, 146 Ga. App. 207, 245 S.E.2d 890 (1978) (duplicate original); *Ferrell v. State*, 149 Ga. App. 405, 254 S.E.2d 404 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653 (1980) (traffic citations).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1062 et. seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1041 et seq., 1050 et seq.

ALR. — Parol evidence to prove title to real property when the title is only collaterally involved, 1 ALR 1143.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Parol-evidence rule: evidence of agreements as to manner or medium of payment of bill or note, or as to credit, setoff, or counterclaim with respect to the same, 71 ALR 548.

Admissibility and weight of testimony based on taste, sight, and smell as to unlawful content of liquor, 78 ALR 439.

Admissibility as against the beneficiary of life or accident insurance of statements or declarations by the insured outside of his application, 86 ALR 146.

Mutilations, alterations, and deletions as affecting admissibility in evidence of public record, 28 ALR2d 1443.

Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 ALR2d 988.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 ALR2d 855.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 ALR2d 903.

Admissibility in evidence of receipt of third person, 80 ALR2d 915.

Proof, in absence of direct testimony, of identity of motor vehicle involved in accident, 81 ALR2d 861.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 ALR2d 681.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

Applicability of parol-evidence rule in favor of or against one not a party to contract of release, 13 ALR3d 313.

Workmen's compensation: use of medical books or treatises as independent evidence, 17 ALR3d 993.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Admissibility of nonexpert opinion testimony as to weather conditions, 56 ALR3d 575.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 ALR3d 598.

Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 ALR3d 405.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 ALR3d 980.

Admissibility of photographs of stolen property, 94 ALR3d 357.

Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft, 94 ALR3d 824.

Admissibility of visual recording of event or matter other than that giving rise to litigation on prosecution, 41 ALR4th 877.

24-5-5. Degrees of secondary evidence.

There are degrees in secondary evidence. The best secondary evidence should always be produced. A duplicate is better than a copy and an examined copy is better than oral evidence. (Orig. Code 1863, § 3691; Code 1868, § 3715; Code 1873, § 3768; Code 1882, § 3768; Civil Code 1895, § 5173; Civil Code 1910, § 5760; Code 1933, § 38-213.)

JUDICIAL DECISIONS

In general. — Rule as to the degree of secondary evidence is that where there is no ground for the presumption that better secondary evidence exists, any proof is received which is admissible by the other rules of law, unless the objecting party can show that better evidence was previously known to the other party, and might have been produced. *Doe v. Biggers*, 6 Ga. 188 (1849).

Copy as evidence. — When an approved copy is in evidence, parol testimony as to its contents is inadmissible. *Shedden v. Heard*, 110 Ga. 461, 35 S.E. 707 (1900). See also *Williams v. Waters*, 36 Ga. 454 (1867).

Deed in hands of nonresident grantee. — Parol evidence of the contents of a deed to land in this state is not admissible under the theory that the original deed is in the hands of nonresident grantees who are not parties

to the suit, and therefore beyond the power of the court, without making preliminary proof that the deed was not duly recorded. *McConnell Bros. v. Slappey*, 134 Ga. 95, 67 S.E. 440 (1910).

Oral testimony. — Trial court did not err in allowing a witness to testify that defendant had signed personal guaranties of defendant's company's prior indebtednesses to plaintiff since the failure to produce the original of such personal guaranties was explained and oral testimony was shown to be the "best" secondary evidence of their existence. *Dedousis v. First Nat'l Bank*, 181 Ga. App. 425, 352 S.E.2d 577 (1986).

Cited in *Haden v. Liberty Co.*, 183 Ga. 209, 188 S.E. 29 (1936); *Smoak v. State*, 58 Ga. App. 299, 198 S.E. 99 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1066.

ALR. — Meaning of "duplicate," 24 ALR 1209.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Admissibility of secondary evidence of in-

criminating document in possession of defendant, 67 ALR 77.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, 76 ALR2d 1356.

ARTICLE 2

COPIES OF WRITINGS

24-5-20. When exemplifications of public records considered primary evidence; exemplifications transmitted by facsimile.

(a) Exemplifications made by public officers of records, documents, papers, or other matters in their respective offices, pursuant to Code Sections 24-7-20 and 24-7-21 or in the manner set out in subsection (b) of this Code section, shall be primary evidence as to all records or other things

required by law to remain in such offices, but only secondary evidence as to such documents as by law properly remain in the possession of the party.

(b) As an alternative to an exemplification made by any public officer of the records, documents, papers, or other matters in the office of such public officer in accordance with Code Sections 24-7-20 and 24-7-21, an exemplification transmitted by facsimile or a copy of an exemplification transmitted by facsimile is admissible if:

(1) The certification by the public officer includes a statement that the certified document is being transmitted by facsimile and the telephone number and location of the facsimile machine transmitting the facsimile; and

(2) Each page of the document shows the telephone number of the transmitting facsimile machine to be identical to the telephone number shown as a part of the certification by the public officer.

This subsection shall not be construed to require public officers to obtain or maintain facsimile equipment. Public officers are authorized to collect the usual cost of providing exemplifications as provided by law and a reasonable fee for the cost of telephone facsimile transmission. Public officers are authorized to maintain a record of facsimile exemplifications, which may but is not required to include the retention of the exemplification as transmitted by facsimile. (Orig. Code 1863, § 3740; Code 1868, § 3764; Code 1873, § 3817; Code 1882, § 3817; Civil Code 1895, § 5212; Civil Code 1910, § 5799; Code 1933, § 38-602; Ga. L. 1993, p. 1078, § 1.)

Cross references. — Records, documents, and papers of public officers generally, Ch. 18, T. 50.

Editor's notes. — This Code section and

Code Section 24-7-20 being so closely allied, and so often construed together by the courts, the notes to one will be found helpful in construing the other.

JUDICIAL DECISIONS

Original records as evidence. — While the use of original records as evidence is disapproved, yet where an original record has been brought into court and admitted to be such, it is admissible in evidence; and hence the original order of the commissioners calling a road bond election, as well as extracts from the original minute book of the commissioners, being admittedly originals, were not inadmissible, in the instant case, although the better method of proof would have been by properly exemplified copies. *Moody v. Board of Comm'rs*, 29 Ga. App. 21, 113 S.E. 103 (1922).

Original record admissible. — Notwithstanding the statutory rules as to the proof of official and court records by certified or

exemplified copies, and as to such exemplifications being primary evidence, it is also the rule that, when the record of a court in which a case is being tried is material evidence in a case it may be proved by the production of the record itself, and a certified copy is not necessary. *Woods v. Travelers Ins. Co.*, 53 Ga. App. 429, 186 S.E. 467 (1936); *Harrison v. State*, 120 Ga. App. 812, 172 S.E.2d 328 (1969).

Original record not admissible. — City court did not err in excluding from evidence the original papers of foreclosure proceedings in a justice's court. Original records of one court ordinarily are not admissible in evidence in a different court, but certified copies of such papers constitute primary

evidence. *Hall v. Treadaway*, 12 Ga. App. 492, 77 S.E. 878 (1913).

Admission of hearsay. — Like O.C.G.A. § 24-7-20, O.C.G.A. § 24-5-20 does not address hearsay concerns. Consequently, that Code section does not require the admission of hearsay merely because the hearsay has been recorded in a court record certified by facsimile. *McKinley v. State*, 303 Ga. App. 203, 692 S.E.2d 787 (2010).

Bonds. — Bond being an office paper of the court, a certified copy or an exemplification of the bond, is primary evidence. *Blount v. Bowne*, 82 Ga. 346, 9 S.E. 164 (1889); *Richardson v. Whitworth*, 103 Ga. 741, 30 S.E. 573 (1898).

Books of minutes of municipality. — Book of minutes of a municipal corporation may be proved to be such by any witness who knows the fact, there being no objection that a certified copy would be the primary evidence. *Robinson v. State*, 82 Ga. 535, 9 S.E. 528 (1889).

Original minute book of county commissioners is not primary evidence. *Daniel v. State*, 114 Ga. 533, 40 S.E. 805 (1902).

Homestead papers. — An exemplification, or certified copy of the plat of homestead and schedule of personalty, certified by the clerk of the superior court of the county where those papers are recorded, is only secondary evidence under former Code 1933, §§ 38-601 and 38-602 (see O.C.G.A. §§ 24-5-20 and 24-7-20). *Brown v. Driggers*, 60 Ga. 114 (1878). The original papers are the primary evidence. *Pritchett v. Davis*, 101 Ga. 236, 28 S.E. 666, 65 Am. St. R. 398 (1897).

Railroad lease. — Lease of a certain railroad being a paper which was required to be kept on file in the proper office of the executive department, a certified copy of the lease was primary evidence. *Branan v. Nashville, C. & S. L. Ry.*, 119 Ga. 738, 46 S.E. 882 (1904).

Search warrants. — Law does not apply to search warrants. *DePalma v. State*, 228 Ga. 272, 185 S.E.2d 53 (1971).

Schedule of creditors. — An original triplicate of the schedule of creditors and their claims, required to be filed by a bankrupt in the court of bankruptcy under the Bankruptcy Act, is an office paper, and a certified

copy thereof is primary evidence. *Harvard v. Davis*, 145 Ga. 580, 89 S.E. 740 (1916).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. *Hunter v. Hardnett*, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991).

Traffic citations stamped “FTA” were inadmissible hearsay. — Trial court erred in admitting the state’s exhibits, which were copies of two traffic citations stamped “FTA,” pursuant to O.C.G.A. § 24-5-20 without any determination that the exhibits fell within an exception to the rule prohibiting the use of hearsay because the state introduced the exhibits to prove the truth of the statement of the unidentified person who stamped “FTA” on the citations that the defendant failed to appear for the defendant’s court date, and despite defendant’s objection to the documents as hearsay, the state argued only the issue of authentication and never identified any exception to the rule prohibiting hearsay that would authorize admitting the documents; the state failed to lay the required foundation for the application of the business records exception, O.C.G.A. § 24-3-14(b), because the state did not call any witness to provide the required foundation. *McKinley v. State*, 303 Ga. App. 203, 692 S.E.2d 787 (2010).

Cited in *Eady v. Slaton*, 182 Ga. 322, 185 S.E. 351 (1936); *Lilly v. Crisp County Sch. Sys.*, 117 Ga. App. 868, 162 S.E.2d 456 (1968); *Elliott v. Leavitt*, 122 Ga. App. 622, 178 S.E.2d 268 (1970); *Beets v. Padgett*, 125 Ga. App. 551, 188 S.E.2d 265 (1972); *Locklear v. Morgan*, 129 Ga. App. 763, 201 S.E.2d 163 (1973); *Wheelless v. State*, 135 Ga. App. 406, 218 S.E.2d 88 (1975); *Rutledge v. Colonial Fin. Serv., Inc.*, 170 Ga. App. 317, 316 S.E.2d 867 (1984).

RESEARCH REFERENCES

C.J.S. — 32 C.J.S., Evidence, § 883 et seq.
32A C.J.S., Evidence, § 1028.

24-5-21. When secondary evidence admitted; diligence.

If a paper shall have been lost or destroyed, proof of the fact to the court shall admit secondary evidence. The question of diligence is one for the sound discretion of the court. (Orig. Code 1863, § 3755; Code 1868, § 3779; Code 1873, § 3832; Code 1882, § 3832; Civil Code 1895, § 5240; Civil Code 1910, § 5829; Code 1933, § 38-702.)

JUDICIAL DECISIONS

In general. — To admit secondary evidence as by law provided, it is necessary to prove that there has been an original and that the original is lost. *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958).

While this statute leaves the question of diligence to the sound discretion of the court, before secondary evidence can be admitted, the party will be required to show that the party has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case suggests and which were accessible to the party. *Pendley v. Murphy*, 112 Ga. App. 33, 143 S.E.2d 674 (1965) (see O.C.G.A. § 24-5-21).

Applicability. — O.C.G.A. § 24-5-21 applies to writings, not videotapes. *Bowen v. State*, 237 Ga. App. 597, 516 S.E.2d 311 (1999).

O.C.G.A. § 24-5-21 applies both to secondary documentary evidence and to parol testimony. *Croxton v. Leggett Motor Rebuilding*, 168 Ga. App. 258, 308 S.E.2d 640 (1983).

Foundation for secondary evidence. — An affidavit by a party that an original paper, of which one desires to make proof by secondary evidence, is lost or mislaid, and after diligent search that one cannot find it, is a substantial compliance. *Smith v. Atwood*, 14 Ga. 402 (1854).

Proof of diligence. — While upon proof that a paper is lost, secondary evidence as to the paper's contents is admissible, the mere statement of a party that a paper "is lost" is nothing but a conclusion of the witness, and, in the absence of testimony as to any search

for the missing paper, or other facts to support the witness's conclusion, such secondary evidence, on timely objection, should be rejected. *Underdonk & Pitts v. Jester*, 17 Ga. App. 419, 87 S.E. 680 (1916).

Since, during the giving of defendant's statement to police the tape recorder malfunctioned for a period of time, and the interview continued after the recorder had been repaired; since the officers who conducted the interview offered their reconstruction of the interview's unrecorded portions, and testified that the statements were substantially the same as the recorded parts, and the recorded statement, as thus supplemented, was admitted only after a Jackson-Denno hearing, there was no error. *McGee v. State*, 260 Ga. 178, 391 S.E.2d 400 (1990).

Insufficient evidence of diligence. — Admission in evidence of testimony as to the contents of a lost document was error since there was not sufficient evidence of the diligence of the defendants to show its nonavailability. *Pendley v. Murphy*, 112 Ga. App. 33, 143 S.E.2d 674 (1965).

Accounting for absence of best evidence. — Hearsay testimony of a deputy about the contents of a missing letter that defendant allegedly wrote and sent to the codefendant was admissible as an incriminating statement by the defendant; the state satisfactorily accounted for the absence of the letter through the codefendant, who testified that the codefendant destroyed the letter after showing the letter to the deputy. *Summerour v. State*, 211 Ga. App. 65, 438 S.E.2d 176 (1993).

In a consumer's suit against a car dealer for breach of a written warranty, regarding the sale of a used car which the dealer's salesman falsely represented had not been in a wreck, it was not error for the trial court to grant a directed verdict to the dealer because, while the consumer testified that the dealer sold the consumer a written warranty for the vehicle, the consumer did not produce the warranty or account for the warranty's absence, rendering the testimony inadmissible under the best evidence rule. *Mitchell v. Backus Cadillac-Pontiac, Inc.*, 274 Ga. App. 330, 618 S.E.2d 87 (2005).

Duplicate original of instrument admissible into evidence without violation of the best evidence rule. *Georgia Farm Bureau Mut. Ins. Co. v. Latimore*, 151 Ga. App. 786, 261 S.E.2d 735 (1979).

Copy of contract admissible. — Since the original copy of a contract was admittedly destroyed by the defendant, and testimony was introduced that the plaintiff and the third party to the contract formally executed the original, though there is no evidence that the defendant ever signed the contract, and there was evidence to the effect that the defendant followed the provisions of the contract until the parties had a falling out, evidence was sufficient to infer that defendant had received the benefits of such contract and to admit the copy into evidence over the defendant's objection. *Silvey v. Wynn*, 102 Ga. App. 283, 115 S.E.2d 774 (1960).

Copy need not be exact. — It is not necessary that a copy sought to be proved shall be identical with the original, but it may be either a literal or a substantial copy, provided other rules as to the admission of secondary evidence are satisfied. *Georgia Farm Bureau Mut. Ins. Co. v. Latimore*, 151 Ga. App. 786, 261 S.E.2d 735 (1979).

Carbon copy inadmissible. — When a carbon copy of a letter was offered in evidence without any proof of the execution, mailing, or receipt of an original and the copy contained a signature only in type, the copy was prejudicial and the court erred in admitting the copy. *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958).

Exact carbon copy admissible. — If it is proved that a genuine original was executed, proof that a proffered document is an exact carbon copy of that original is sufficient to

admit in evidence the carbon copy without proving loss of the original. *Mitchell v. United States*, 214 Ga. 473, 105 S.E.2d 337 (1958).

Carbonless copies held admissible. — In light of a landowner's testimony that the original cancelled checks and bank statements showing evidence of payment from 1986 for the land in question were unavailable, the trial court could not be said to have abused the court's discretion in allowing the landowner to introduce two "carbonless copies" of checks showing payment. *Murray v. Stone*, 283 Ga. 6, 655 S.E.2d 821 (2008).

Record. — Mere failure of the record, as appears in the writ book, to show the existence of a portion of the record of a lost paper is not conclusive of the nonexistence of the paper, but the existence and the contents of such lost portion of a record may be established by parol. *Benton v. Maddox*, 52 Ga. App. 813, 184 S.E. 788 (1936).

Letters. — When letters which would be admissible in evidence are lost or destroyed, their contents are provable by parol after proof of loss or destruction. *Marietta Sav. Bank v. Janes*, 66 Ga. 286 (1881); *Knox v. Harrell*, 26 Ga. App. 772, 107 S.E. 594, cert. denied, 26 Ga. App. 801 (1921).

Trial court's admission of a photocopy of a letter examined by a documents examiner did not violate the best evidence rule as the original letter was lost and the copy was properly authenticated. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

Last person who had custody of letter must make a complete and proper showing with respect to the alleged nonexistence or inaccessibility or loss of the letter; merely asserting the loss, without showing diligence in attempting to provide the item, will not do. *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Memorandum of terms of settlement. — When a memorandum of the terms of a settlement was reduced to writing, and handed to defendant's agent, parol evidence as to the memorandum's contents is admissible when such agent testified that the agent never had such memorandum, or if the agent ever had the memorandum in the agent's possession, the memorandum was lost or mislaid even though no notice to produce was served either on the defendant or the agent. *Carr v. Smith*, 58 Ga. 361 (1877).

Deed. — If a party wishes to introduce a copy deed in evidence, it will be a sufficient compliance with the rule to swear that the original deed in the party's belief is lost or destroyed, and the deed is not in the party's custody, power, or control. *Ratteree v. Nelson*, 10 Ga. 439 (1851); *Drew v. Drew*, 146 Ga. 479, 91 S.E. 541 (1917).

Original of exhibit inadvertently removed from attorney's office. — When witness testified that original of exhibit was prepared by the witness, and that the exhibit was an exact copy of the original, and when plaintiff's attorney stated in plaintiff's place that the original had been given to the attorney and several copies made, and also stated that through inadvertence the original went out of the attorney's office as an exhibit to the complaint and could not be located, the trial judge did not abuse judicial discretion in admitting the exhibit. *Palmer v. Wilkins*, 163 Ga. App. 104, 294 S.E.2d 355 (1982).

Original document, not disclosed during discovery, excluded. — When the defendant introduced evidence to show that a contract had been altered, and when the plaintiff then tendered the original of the contract, which contained blank spaces, the original was properly excluded by the trial court on the basis that the plaintiff had not disclosed the original's existence during discovery. *White v. Lance H. Herndon, Inc.*, 203 Ga. App. 580, 417 S.E.2d 383, cert. denied, 203 Ga. App. 908, 417 S.E.2d 383 (1982).

Contents of a journal. — Trial court did not err in ruling that the best evidence rule, O.C.G.A. § 24-5-21, precluded defendant's wife from testifying about the contents of the victim's journal because the victim testified that the victim threw the journal away; there was no harm in the trial court's refusal to allow further testimony about the contents of the journal as the victim testified that the victim did not include the sexual assaults in the journal, and the wife's testimony about

the journal's contents was consistent with the victim's testimony. *Eley v. State*, 266 Ga. App. 45, 596 S.E.2d 660 (2004).

Function of trial court is not to determine the worthiness or credibility of secondary evidence, but is only to determine whether what is offered as evidence is the best form accessible to the court. *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Discretion of court. — Exercise of such discretion mentioned in this statute will not be controlled, unless the discretion is abused. *Cowart v. Fender*, 137 Ga. 586, 73 S.E. 822, 1913A Ann. Cas. 932 (1912); *Metropolitan Life Ins. Co. v. Vickery*, 49 Ga. App. 727, 176 S.E. 815 (1934); *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (see O.C.G.A. § 24-5-21).

It was abuse of discretion to exclude testimony which should have qualified as secondary evidence and which comprised defendant's most critical defense to the only direct evidence against the defendant. *Mulkey v. State*, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

Cited in *A.B. & C.R.R. Benefit Ass'n v. South*, 49 Ga. App. 659, 175 S.E. 924 (1934); *Goettee v. Carlyle*, 68 Ga. App. 288, 22 S.E.2d 854 (1942); *Pugh v. Moore*, 207 Ga. 453, 62 S.E.2d 153 (1950); *Rider v. State*, 114 Ga. App. 347, 151 S.E.2d 238 (1966); *Pitman v. Dixie Ornamental Iron Co.*, 122 Ga. App. 404, 177 S.E.2d 167 (1970); *Apgar v. State*, 159 Ga. App. 752, 285 S.E.2d 89 (1981); *Jones v. Sudduth*, 162 Ga. App. 602, 292 S.E.2d 448 (1982); *Pope v. Kem Mfg. Corp.*, 249 Ga. 868, 295 S.E.2d 290 (1982); *Rosshirt v. Cincinnati Ins. Co.*, 176 Ga. App. 537, 336 S.E.2d 612 (1985); *Abdalla v. DDCB, Inc.*, 216 Ga. App. 617, 455 S.E.2d 598 (1995); *Miller v. Steelmaster Material Handling Corp.*, 223 Ga. App. 532, 478 S.E.2d 601 (1996); *Southeast Reducing Co. v. Wasserman*, 229 Ga. App. 1, 493 S.E.2d 201 (1997).

RESEARCH REFERENCES

ALR. — Release or assignment of interest by witness as removing disqualification to testify in action by or against estate of decedent, 28 ALR 6.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 ALR3d 1322.

24-5-22. Certified copy of registered paper where original lost or destroyed.

(a) If the properly registered original of any paper is lost or destroyed, a certified copy from the registry shall be deemed good secondary evidence.

(b) The official entry of the proper officer on a paper shall be sufficient evidence of its registry. (Orig. Code 1863, §§ 3742, 3743; Code 1868, §§ 3766, 3767; Code 1873, §§ 3819, 3820; Code 1882, §§ 3819, 3820; Civil Code 1895, §§ 5218, 5219; Civil Code 1910, §§ 5805, 5806; Code 1933, §§ 38-608, 38-609.)

JUDICIAL DECISIONS

Lost records. — While the contents of lost papers in a case on file in the clerk's office of the court may be established by copies of the papers as they appear of record in the writ book required to be kept by the clerk of the court, this method of proof is cumulative only; parol evidence is also admissible to establish the contents of the lost papers. *Benton v. Maddox*, 52 Ga. App. 813, 184 S.E. 788 (1936).

Other records in writ book. — On the trial of an issue to establish lost papers in a case on file in the office of the clerk of the court where it appears from parol evidence introduced to establish copies of the lost papers that there was a return of service by the officer, but where from the evidence, which

consists of the copies of the proceedings as contained in the writ book on file in the office of the clerk of the court, there appears no return of service upon the papers, evidence consisting of the records in other cases recorded in the same writ book immediately before and immediately after the record in the present case, in which there appears no record of a return of service, and evidence of the original papers in such cases which contain a return of service, are admissible. *Benton v. Maddox*, 52 Ga. App. 813, 184 S.E. 788 (1936).

Cited in *Gregg v. Fitzpatrick*, 54 Ga. App. 303, 187 S.E. 730 (1936); *Harrison v. Durham*, 210 Ga. 187, 78 S.E.2d 482 (1953).

OPINIONS OF THE ATTORNEY GENERAL

Indictment. — Clerk's certification that the indictment is lost is not sufficient re-

placement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61.

RESEARCH REFERENCES

ALR. — Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

24-5-23. Secondary evidence admissible where records or registry destroyed.

(a) When a record has been burned or otherwise destroyed, its contents may be proved by secondary evidence which does not disclose the existence of other and better evidence.

(b) If the registry has also been destroyed before a copy of an original paper has been made and certified, any secondary evidence shall be

admissible to prove the original and its registry which does not disclose the existence of other and better evidence.

(c) If the original is found to have been recorded and it does not appear whether it was done on proper probate, the court shall presume, until the contrary appears, that the same was done on proper probate. (Ga. L. 1855-56, p. 138, § 2; Ga. L. 1858, p. 53, § 1; Code 1863, §§ 3741, 3744, 3745; Code 1868, §§ 3765, 3768, 3769; Code 1873, §§ 3818, 3821, 3822; Code 1882, §§ 3818, 3821, 3822; Civil Code 1895, §§ 5217, 5220, 5221; Civil Code 1910, §§ 5804, 5807, 5808; Code 1933, §§ 38-607, 38-610, 38-611.)

JUDICIAL DECISIONS

Contents of lost writing may be established by parol. *Segars v. City of Cornelia*, 60 Ga. App. 457, 4 S.E.2d 60 (1939).

Original photographic line-up lost. — Admission of a photocopy of an original photographic lineup did not violate the best evidence rule since the original photographic copy was missing from the state's file and the photocopies were clear enough to be easily recognizable. *Pinson v. State*, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Recorded instruments. — Law applies to those deeds and instruments that are, by law, authorized and required to be recorded. *Gill v. Strozier*, 32 Ga. 688 (1861).

Deed on record. — Deed should be held to be legally and properly on record by due proof of signing, sealing, and delivery, until the contrary appears. *Walls v. Smith*, 19 Ga. 8 (1855).

Attesting witnesses not necessary. —

When a deed has been recorded and lost and the record has been destroyed, a copy of the original may be proved by the person who made the deed, and the attesting witnesses need not be called for that purpose. *Fletcher v. Horne*, 75 Ga. 134 (1885).

Exemplified copy of will. — An exemplified copy of a will from the ordinary's office is presumptive proof that it was properly probated, otherwise it could not have been recorded. *Thursby v. Myers*, 57 Ga. 155 (1876).

Presumption in favor of proper probate is raised when the records have been burnt. *Oliver v. Persons*, 30 Ga. 391, 76 Am. Dec. 657 (1860).

Cited in *Towler v. Carithers*, 4 Ga. App. 517, 61 S.E. 1132 (1908); *Haden v. Liberty Co.*, 183 Ga. 209, 188 S.E. 29 (1936); *Smoak v. State*, 58 Ga. App. 299, 198 S.E. 99 (1938).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1093.

ALR. — Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Degree or quantum of evidence necessary to establish a lost instrument and its contents, 148 ALR 400.

Sufficiency of certificate of acknowledgment, 25 ALR2d 1124.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 ALR3d 1322.

24-5-24. Second recording where record book destroyed or lost, or record incorrectly made or destroyed; when admissible.

(a) Whenever the book containing the record of any deed, will, execution, or other paper, the record of which is provided for by law, is destroyed or lost, or when the record of such paper shall have been incorrectly made or destroyed, the person whose duty it is to record the paper shall, upon

receiving the fees provided for such cases, record the paper together with the certificate or certificates of former record thereof.

(b) In case of the loss or inaccessibility of such original paper, such records, or certified copies thereof, shall be admitted as evidence in all cases where the original record, if had, would be admissible. (Ga. L. 1882-83, p. 96, §§ 1, 2; Civil Code 1895, §§ 5229, 5230; Civil Code 1910, §§ 5816, 5817; Code 1933, §§ 38-620, 38-621.)

Cross references. — For similar provision regarding deeds, see § 44-2-12.

OPINIONS OF THE ATTORNEY GENERAL

Correction of records. — Clerk may not correct a misnomer in a marriage record but, when the record shall have been incorrectly made, the clerk may rerecord the certificate just as the certificate is, with the additional recording of the affidavits attached to the certificate, and cross-index the original record and the new one. 1945-47 Op. Att’y Gen. p. 86.

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, §§ 1093, 1098 et seq.

24-5-25. Existence of original essential to admissibility of copy; amount of evidence required.

The existence of a genuine original is essential to the admissibility of a copy. The amount of evidence to show such existence must vary with the circumstances of each case. Where no direct issue is made upon the fact, slight evidence shall be sufficient. (Orig. Code 1863, § 3692; Code 1868, § 3716; Code 1873, § 3769; Code 1882, § 3769; Civil Code 1895, § 5174; Penal Code 1895, § 996; Civil Code 1910, § 5761; Penal Code 1910, § 1022; Code 1933, § 38-214.)

JUDICIAL DECISIONS

In general. — Existence of a genuine original is essential to the admissibility of a copy and therefore whether there was any primary evidence relating to the existence of a genuine original deed becomes a material question. *Latham v. Fowler*, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946).

Standard is one of moral certainty. — Best evidence rule requires that the court be satisfied that the better evidence has not been willfully destroyed nor voluntarily withheld, but the rule does not exact that the loss

or destruction of the document should be proven beyond all possibility of a mistake; it only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant. *Fowler v. Latham*, 201 Ga. 68, 38 S.E.2d 732 (1946).

Execution as well as existence of written contract must be proved before a copy can be used as evidence. *Bigelow v. Young*, 30 Ga. 121 (1860); *Durham v. Holeman*, 30 Ga. 619 (1860).

Unauthorized execution. — Evidence that a contract was executed by the treasurer of an insurance company, without proof of the treasurer's authority so to do, is insufficient to show that the original contract was the act of the company and does not satisfy the law. *Brown v. Bass*, 132 Ga. 41, 63 S.E. 788 (1909).

Formality of execution. — When the witnesses, if any, are unknown, it is not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. *Sharp v. Autry*, 185 Ga. 160, 194 S.E. 194 (1937).

Execution may be proved by circumstances where no direct evidence of the execution of a written instrument is attainable. *Sharp v. Autry*, 185 Ga. 160, 194 S.E. 194 (1937).

Indefinite statement. — Evidence of a statement by a defendant that the defendant knew such a deed as alleged by the plaintiffs was in existence in which the father and his children were grantees, is not sufficient to establish the deed, because such as an admission is too indefinite to properly identify and establish the existence of any particular deed. *Latham v. Fowler*, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946).

Response to notice to produce. — When a party to a cause serves on the opposite party, who is presumably in possession of a once existing material writing, a notice to produce such writing, and the party served responds that the writing is lost, or fails to produce the writing at the trial, secondary evidence as to the contents of the original writing becomes admissible. *Middlebrooks v. Cabaniss*, 193 Ga. 764, 20 S.E.2d 10 (1942).

Testimony concerning record books. — Testimony of a claimant that the claimant had recently examined the books of a bank in another state was insufficient to show the authenticity of such books as a foundation for the admission of secondary evidence of their contents, it not appearing that the books were found in the custody of any trustee or officer of court in charge of such insolvent bank, or in the possession of any person whose duty it was to keep and preserve the books. *McDonald v. Redding Lumber Co.*, 43 Ga. App. 656, 159 S.E. 888 (1931).

Title to land. — If there is written evidence of title to land, that evidence must be

produced in order to prove its contents and before secondary evidence is competent to show its contents, it must first be shown to the court that the original once existed, that the original was properly executed and that the original is either lost or destroyed, or for some other sufficient cause is not accessible to the diligence of the party. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947).

Deed. — When in a suit for land the right of the plaintiffs is predicated upon an alleged lost and unrecorded deed, proof of the existence of a genuine original must be established before secondary evidence relating thereto is admissible. *Latham v. Fowler*, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946).

Typewritten copy of deed. — Certified copy of a petition filed by the plaintiffs' father (holder of life estate under the alleged deed) to sell for reinvestment and attaching a typewritten copy of what purported to be the alleged unrecorded deed does not establish that in fact a genuine deed has been executed. *Latham v. Fowler*, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946).

Proof of handwriting not required. — If an original deed remains in existence in possession of the grantee, proof of the handwriting would be prima facie evidence that the deed was sealed and delivered; but when the deed is lost, positive proof of the handwriting is not to be expected or required, and the grantee must depend on other proof. *Fowler v. Latham*, 201 Ga. 68, 38 S.E.2d 732 (1946).

Copies of duplicate originals. — Copies of duplicate originals are admissible under O.C.G.A. § 24-5-26, without accounting for the original. *Ellerbee v. State*, 215 Ga. App. 102, 449 S.E.2d 874 (1994).

Photostatic copies of bill payments and original bills excluded. — Bills from a court reporter for depositions and from company for the company's efforts to locate indemnitee, the photostatic copies of checks issued in payment of these bills, and the photostatic copy of check issued in payment of the claim were properly excluded under the best evidence rule. *Commercial Union Ins. Co. v. Smith*, 179 Ga. App. 734, 347 S.E.2d 701 (1986).

Evidence inadmissible. — In a civil forfeiture proceeding in connection with an ac-

tion brought under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., a witness's testimony regarding newspaper and billboard advertising, telephone calls, and credit card charges violated the best evidence rule because the state neither produced documentary evidence to support the statements, nor accounted for the absence of such evidence.

Pabey v. State, 262 Ga. App. 272, 585 S.E.2d 200 (2003).

Cited in *A.B. & C.R.R. Benefit Ass'n v. South*, 49 Ga. App. 659, 175 S.E. 924 (1934); *Gregory v. J.T. Gregory & Son*, 176 Ga. App. 788, 338 S.E.2d 7 (1985); *Dedousis v. First Nat'l Bank*, 181 Ga. App. 425, 352 S.E.2d 577 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1067 et seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1100, 1102, 1103.

ALR. — Photographic representation of writing as primary or secondary evidence, 142 ALR 1270; 76 ALR2d 1356.

Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 ALR2d 1156.

24-5-26. Reproductions made in regular course of business admissible; when enlargements or facsimiles admitted.

Any photostatic, microphotographic, photographic, or optical image reproduction of any original writing or record made in the regular course of business to preserve the writing or record shall be admissible in evidence in any proceeding in any court of this state and in any proceeding before any board, bureau, department, commission, or agency of the state, in lieu of and without accounting for the original of such writing or record, if such reproduction accurately reproduces or forms a durable medium for reproducing the original. Any enlargement or facsimile of such reproduction shall likewise be admissible if the original of the reproduction is in existence and available for inspection under direction of the court or the agency conducting the proceeding. (Ga. L. 1950, p. 73, § 1; Ga. L. 1991, p. 787, § 1; Ga. L. 1993, p. 1078, § 2.)

Cross references. — Primary evidentiary value of photostatic copies of records produced from microfilm and print-out copies of computer records, § 50-18-96.

Law reviews. — For article, "The Admis-

sibility of Computer-Generated Evidence in Georgia," see 18 Ga. St. B.J. 137 (1982).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 140 (1993).

JUDICIAL DECISIONS

In general. — Statute simply permits photostatic, microphotographic, and photographic reproductions of original writings or records made in the regular course of business to be admitted in evidence without accounting for the original. *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99

S.E.2d 370 (1957); *Ricketts v. Liberty Mut. Ins. Co.*, 127 Ga. App. 483, 194 S.E.2d 311 (1972) (see O.C.G.A. § 24-5-26).

Construction with § 24-7-7. — Provisions of Ga. L. 1950, p. 73, § 1 (see O.C.G.A. § 24-5-26), permitting the introduction of photostatic copies of original writings or

records made in the regular course of business to be introduced as original evidence in a case do not have any bearing upon former Code 1933, § 38-709 (see O.C.G.A. § 24-7-7). Ga. L. 1950, p. 73 applies to situations where the contents of the document are sought to be introduced because the document itself has a bearing upon the issues sought to be proved, the test of admissibility being relevancy and materiality, while documents containing signatures introduced under the provisions of former Code 1933, § 38-709 do not necessarily have any bearing upon the issue being tried, and their sole purpose is to establish a criterion by which the genuineness or forgery of the signature on some other document relevant to the cause may be established. *Mitchell v. State*, 89 Ga. App. 80, 78 S.E.2d 563 (1953).

Copies of affidavits. — Affidavits introduced in evidence that were reproductions of the original affidavits were admissible notwithstanding objection based on the best evidence rule. *Adams v. State*, 217 Ga. App. 706, 459 S.E.2d 182 (1995).

Copy of currency. — Since the police department routinely made copies of currency used in drug buys, the photocopy of a \$20 bill used as “buy money” in a drug transaction was admissible under either O.C.G.A. § 24-5-26 or O.C.G.A. § 24-5-4. *Johnson v. State*, 231 Ga. App. 114, 497 S.E.2d 666 (1998).

Duplicate originals. — Papers which are executed simultaneously with the original, by the same stroke of the pen or the typewriter, are admissible as primary evidence without accounting for the original because the papers are considered duplicate originals. *Strickland v. Foundation Life Ins. Co.*, 129 Ga. App. 614, 200 S.E.2d 306 (1973).

Copies of duplicate originals are admissible without accounting for the original. *Strickland v. Foundation Life Ins. Co.*, 129 Ga. App. 614, 200 S.E.2d 306 (1973).

Accounting for original where photocopy was used. — Photocopy may not be admitted in evidence without accounting for the original, except where there is proof that copy is identical to original. *Lester v. Groves*, 162 Ga. App. 590, 291 S.E.2d 785 (1982).

Showing that photocopy was made in regular course of business. — When the party offering photostatic reproductions as evidence makes no attempt to establish that the

photocopies were made in the regular course of business and fails to properly account for the absence of the original, it is not error to refuse to admit the photocopies. *State v. Mincey*, 167 Ga. App. 850, 308 S.E.2d 18 (1983).

Photocopy of insurance application form. — Court does not err in refusing to admit a photocopy of an insurance application form offered as evidence by the defendant, where the defendant was in possession of the original and had made no attempt to establish that the photocopy had been made in the regular course of business. *Nationwide Mut. Fire Ins. Co. v. Rhee*, 160 Ga. App. 468, 287 S.E.2d 257 (1981).

Photostatic copies of claim forms identified as authentic by a witness are properly admissible. *Strickland v. Foundation Life Ins. Co.*, 129 Ga. App. 614, 200 S.E.2d 306 (1973).

Where the original, cancelled checks were returned by the payor bank to the bank's home office in another state, the photostatic copies of the issued checks were admissible under O.C.G.A. § 24-5-26. *Commercial Union Ins. Co. v. Smith*, 179 Ga. App. 734, 347 S.E.2d 701 (1986).

Photostatic copy of bank account signature card. — When the original of the bank account signature card was on file in the bank and the custodian of the bank's records brought with the custodian a photostatic copy, which was a copy routinely made in the normal course of business, the photostatic copy was admissible. *Hawkins v. State*, 167 Ga. App. 143, 305 S.E.2d 797 (1983).

Photostatic copy of check drawn on a New York bank and returned for insufficient funds was properly identified as a bank record since the original was accounted for as having been returned to the defendant. *Hamilton v. State*, 118 Ga. App. 842, 165 S.E.2d 884 (1968).

Where, with regard to proof of transmittal of contraband to state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by O.C.G.A. § 24-5-4, the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail

receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to O.C.G.A. §§ 24-3-14 and 24-5-26. *Spead v. State*, 187 Ga. App. 359, 370 S.E.2d 213 (1988).

Certifications from manufacturer as to accuracy of radar device were admissible under business records rule although officer testifying did not have personal knowledge of correctness of record and did not make entries personally, and the person who made entries did not testify. *Wiggins v. State*, 249 Ga. 302, 290 S.E.2d 427 (1982).

Reproduction admissible despite testifying witness's lack of personal knowledge. — Trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to O.C.G.A. §§ 24-3-14 and 24-5-26, despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the card, as the card itself showed that the card was created and transmitted at the time of the defendant's arrest, and was handled in the gathering agency's regular and routine course of business. *Tubbs v. State*, 283 Ga. App. 578, 642 S.E.2d 205 (2007).

Copy of particular magazine issue. — As copies of magazines of the same issue are

usually duplicates of the original, there was no error in admitting another copy of the same issue used by an investigating officer where the officer testified it was identical. *Verble v. State*, 172 Ga. App. 321, 323 S.E.2d 239 (1984).

Cited in *Cox v. State*, 93 Ga. App. 533, 92 S.E.2d 260 (1956); *Martin v. Baldwin*, 215 Ga. 293, 110 S.E.2d 344 (1959); *Smith v. Smith*, 224 Ga. 442, 162 S.E.2d 379 (1968); *Pitman v. Dixie Ornamental Iron Co.*, 122 Ga. App. 404, 177 S.E.2d 167 (1970); *Photographic Bus. & Prod. News v. Commercial Color Corp.*, 122 Ga. App. 825, 178 S.E.2d 922 (1970); *Geiger v. State*, 129 Ga. App. 488, 199 S.E.2d 861 (1973); *Harrison v. Lawhorne*, 130 Ga. App. 314, 203 S.E.2d 292 (1973); *Williams v. Murray*, 239 Ga. 276, 236 S.E.2d 624 (1977); *National Bank v. Hill*, 148 Ga. App. 688, 252 S.E.2d 192 (1979); *Gray v. Cousins Mtg. & Equity Invs.*, 150 Ga. App. 296, 257 S.E.2d 365 (1979); *Benson v. State*, 150 Ga. App. 569, 258 S.E.2d 156 (1979); *Camilla Cotton Oil Co. v. Mills Mgt. Sources, Inc.*, 152 Ga. App. 823, 264 S.E.2d 294 (1979); *Ayers v. Carter*, 159 Ga. App. 680, 285 S.E.2d 55 (1981); *National Bank v. Hill*, 161 Ga. App. 499, 288 S.E.2d 365 (1982); *Walls v. State*, 161 Ga. App. 235, 291 S.E.2d 15 (1982); *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982); *Howard v. State*, 173 Ga. App. 346, 326 S.E.2d 546 (1985); *Hendrix v. State*, 186 Ga. App. 665, 368 S.E.2d 181 (1988); *Williamson v. State*, 194 Ga. App. 439, 390 S.E.2d 658 (1990); *Harper v. Copelco Capital, Inc.*, 249 Ga. App. 453, 548 S.E.2d 53 (2001).

OPINIONS OF THE ATTORNEY GENERAL

Photostatic copies made from microfilms are admissible as primary evidence. 1945-47 Op. Att'y Gen. p. 286.

Microfilm copies of scholarship agreements and notes would be admissible in evidence. 1972 Op. Att'y Gen. No. 72-142.

Microfilms of records would probably be admissible into evidence. 1973 Op. Att'y Gen. No. 73-91.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Admissibility of Computerized Business Records, 14 POF2d 173.

Foundation for Offering Business Records in Evidence, 34 POF2d 509.

Routine Business Practice, 35 POF2d 589.
Recovery and Reconstruction of Electronic Mail as Evidence, 41 POF3d 1.

Establishing A Foundation to Admit Computer-Generated Evidence as Demon-

strative or Substantive Evidence, 57 POF3d 455.

C.J.S. — 23 C.J.S., Criminal Law, § 1131 et seq. 32 C.J.S., Evidence, §§ 949, 954 et seq.

U.L.A. — Uniform Photographic Copies of Business and Public Records as Evidence Act (U.L.A.) § 1.

ALR. — Use of photograph, plan, map, cast, model, etc., as evidence as affected by marking or legends thereon, 108 ALR 1415.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 51 ALR2d 1051.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, 76 ALR2d 1356.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 ALR3d 303.

Admissibility of video tape film in evidence in criminal trial, 60 ALR3d 333; 41 ALR4th 812; 41 ALR4th 877.

Admissibility of computerized private business records, 7 ALR4th 8.

24-5-27. Certified copy of deed or other instrument affecting real property admissible without accounting for original.

A certified copy of a deed or any other instrument affecting real property which has been properly recorded in the office of the clerk of the superior court of the county or counties in which said property is situated shall be admissible in evidence under the same rules which would apply to the original without the necessity of accounting for the original instrument. (Ga. L. 1965, p. 250, § 1.)

Cross references. — Evidentiary value of recorded deeds generally, § 44-2-23.

JUDICIAL DECISIONS

In general. — Best evidence rule does not prevent the introduction of certified copies of exhibits, deeds on file in the clerk of court's office, and notes where the contents of the writing are not in issue. DeKalb County v. Townsend Assocs., 243 Ga. 80, 252 S.E.2d 498 (1979).

Cited in West v. Housing Auth., 237 Ga. 200, 227 S.E.2d 328 (1976); Pannell v. Moore, 237 Ga. 761, 229 S.E.2d 603 (1976); Fletcher v. Fletcher, 242 Ga. 158, 249 S.E.2d 530 (1978); Alexander v. Weems, 157 Ga. App. 507, 277 S.E.2d 793 (1981).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 773.

ALR. — Sheriff's deed as making a prima

facie case for one seeking to recover land thereunder, 108 ALR 667.

24-5-28. Certified copy of certain deeds admissible without proof of execution.

A certified copy of a deed more than 30 years old, where the deed has been recorded more than 30 years and possession has been consistent with the deed, shall be admissible in evidence without proof of execution. (Ga. L. 1952, p. 169, § 1.)

Cross references. — Evidentiary value of recorded deeds generally, § 44-2-23.

JUDICIAL DECISIONS

Cited in *Pannell v. Moore*, 237 Ga. 761, 229 S.E.2d 603 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1203, 1229. **C.J.S.** — 32A C.J.S., Evidence, § 993.

24-5-29. Transcript from books of corporation admissible in lieu of books; notice.

(a) When any portion of the contents of the books or records of any incorporated company located in this state is material and competent evidence in any civil cause, the party desiring to use the same in evidence, upon procuring a correct transcript from such books, certified under the hand of the chief officer in charge of the office where the books are located, that the extract is a true and complete transcript of all that appears upon the books in the office relative to that subject matter, may use the extract in evidence, in lieu of the books themselves, provided that he first serves the opposite party with a copy of the extract 20 days before court and with notice that the same will be offered in evidence.

(b) Nothing in this Code section shall be construed to impair or diminish the right of either party to compel the production of books and papers, by notice, where in the hands of the opposite party, or by subpoena for the production of evidence, where in the hands of third persons. (Ga. L. 1873, p. 35, § 1; Code 1873, § 3830; Code 1882, § 3830; Civil Code 1895, § 5236; Civil Code 1910, § 5823; Code 1933, § 38-626.)

JUDICIAL DECISIONS

For a discussion of the admissibility of summaries of business records, see *Tyner v. Sheriff*, 164 Ga. App. 360, 297 S.E.2d 114 (1982).

Cited in *Thrailkill v. State*, 103 Ga. App.

189, 118 S.E.2d 837 (1961); *Village Creations, Ltd. v. Crawfordville Enters., Inc.*, 232 Ga. 131, 206 S.E.2d 3 (1974); *Bowen v. Ken-Mar Constr. Co.*, 152 Ga. App. 568, 263 S.E.2d 463 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1250.

C.J.S. — 32 C.J.S., Evidence, §§ 924, 939, 940.

ALR. — Use as evidence against officers,

employees, or stockholders of corporation of illegally seized documents or other articles belonging to corporation, 78 ALR 343.

Verification and authentication of slips, tickets, bills, invoices, etc., made in regular

course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts," 21 ALR2d 773.

Form, particularity, and manner of desig-

nation required in subpoena duces tecum for production of corporate books, records, and documents, 23 ALR2d 862.

24-5-30. Copies of letters testamentary, letters of administration, and letters of guardianship primary evidence.

Copies of letters testamentary, letters of administration, and letters of guardianship shall be primary evidence of the fact of administration and guardianship to the same extent as the original letters, provided that such copy letters shall have been duly certified from the proper record of the proper officer. (Ga. L. 1878-79, p. 151, § 1; Code 1882, § 3817a; Civil Code 1895, § 5213; Civil Code 1910, § 5800; Code 1933, § 38-603.)

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1037.

ALR. — Judgment or order in connection with appointment of executor or administrator as res judicata, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 ALR 594.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

24-5-31. Authenticated copies of judicial records and probated wills as primary evidence; other copies secondary evidence.

Copies of records of judicial proceedings and wills admitted to probate shall be admitted as primary evidence, when properly authenticated. In all other cases a copy shall be secondary evidence. (Orig. Code 1863, § 3686; Code 1868, § 3710; Code 1873, § 3763; Code 1882, § 3763; Civil Code 1895, § 5167; Civil Code 1910, § 5753; Code 1933, § 38-206.)

Cross references. — Evidentiary value of certified copies of wills proved and recorded in probate court, § 53-3-5. Use of photo-

static copies of wills in lieu of original in judicial proceedings, §§ 53-3-20, 53-3-21.

JUDICIAL DECISIONS

Original records admissible. — While the use of the record as evidence is disapproved, yet where an original record has been brought into court and admitted to be such, it is admissible in evidence. A certified copy would not be higher or better evidence than the original. *Moody v. Board of Comm'rs*, 29 Ga. App. 21, 113 S.E. 103 (1922); *Mason v. State*, 197 Ga. App. 534, 398 S.E.2d 822 (1990).

Original records inadmissible. — Original minutes of a superior court are not admissi-

ble in the trial of an action in a city court, over the objection that such minutes are not primary evidence. *Traylor v. Epps*, 11 Ga. App. 497, 75 S.E. 828 (1912).

Duplicate original. — When more than one copy of a document is executed at the same time, any copy thereof is a duplicate original, and it is primary evidence of the agreement instead of secondary evidence. *Raulerson v. Jones*, 122 Ga. App. 440, 177 S.E.2d 181 (1970).

Unsigned order of court. — An exempli-

fication of an unsigned order of a court for the sale of lands is admissible. *Smith & Co. v. Ross*, 108 Ga. 198, 33 S.E. 953 (1899).

Prior court order not given judicial notice. — While the trial court errs in giving a prior court order “judicial notice” and binding effect, it is clear that the court may consider a prior court order as evidence. *Genins v. Boyd*, 166 Ga. App. 843, 305 S.E.2d 391 (1983).

Certified copies. — When a division in kind is made between heirs and distributees of a decedent, a certified copy of the return of the commissioners, and of the order of the court approving the return, are admissible in evidence in an action involving title to the land covered by the award. *Bell v. Cone*, 208 Ga. 467, 67 S.E.2d 558 (1951).

In a deprivation proceeding, the trial court properly admitted documents from a parent’s criminal case under O.C.G.A. § 24-5-31. The court found that the documents were attached to a negotiated plea and had been certified. In *the Interest of A. R.*, 296 Ga. App. 62, 673 S.E.2d 586 (2009).

Juvenile court proceedings. — Plans for family reunification prepared by the county Department of Family and Children Services as copies of records of judicial proceedings were admissible as primary evidence in a proceeding to terminate parental rights. In *re C.W.D.*, 232 Ga. App. 200, 501 S.E.2d 232 (1998).

Exemplified copy of will from the judge’s office is presumptive proof that the will was properly probated as otherwise the will could not have been recorded. *Davis v. Tyson*, 60 Ga. App. 714, 4 S.E.2d 704 (1939).

Indictment and record of trial. — Highest and best evidence of a writing or of a judicial proceeding, including an indictment and the trial thereupon, are the indictment and the record of the trial. *Sikes v. State*, 76 Ga. App. 883, 47 S.E.2d 677 (1948).

Evidence held inadmissible. — Since the defendant did not tender the copies of the convictions which the defendant desired to have introduced to impeach witnesses, but only made a proffer of the testimony of the clerk’s representative, the state’s objection based on the failure to produce the best evidence was properly sustained. The testimony of the deputy clerk as to the content of the records was not only not the best evidence, it was also hearsay. *Lipscomb v. State*, 194 Ga. App. 657, 391 S.E.2d 773 (1990).

Sentencing court improperly considered defendant’s prior state court conviction based on an uncertified copy of the indictment, a document titled “State’s Version of the Offense,” and a computer print-out showing that a guilty plea had been entered because the state presented only hearsay, rather than competent evidence, showing that it was unable to obtain a certified copy of the conviction, and there was no evidence regarding whether it used due diligence to obtain such a copy. *Brinkley v. State*, 301 Ga. App. 827, 689 S.E.2d 116 (2009).

Cited in *Corley v. State*, 64 Ga. App. 841, 14 S.E.2d 121 (1941); *Locklear v. Morgan*, 129 Ga. App. 763, 201 S.E.2d 163 (1973); *Ramsey v. State*, 218 Ga. App. 692, 462 S.E.2d 806 (1995); *Bass v. Pearson*, 219 Ga. App. 488, 466 S.E.2d 17 (1995); *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

RESEARCH REFERENCES

ALR. — Photostatic or other method of recording instrument, 57 ALR 159.

Necessity and manner of authenticating paper purporting to be act of private corporation, 65 ALR 329.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts of events to which the evidence relates, 124 ALR 433.

Photographic representation of writing as primary or secondary evidence, 142 ALR 1270; 76 ALR2d 1356.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Admissibility, on issue of testamentary capacity, of previously executed wills, 89 ALR2d 177.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 ALR3d 980.

24-5-32. Inscriptions proved by copies.

Inscriptions on walls, monuments, and other fixed objects may be proved by copies established as such. (Orig. Code 1863, § 3688; Code 1868, § 3712; Code 1873, § 3765; Code 1882, § 3765; Civil Code 1895, § 5170; Civil Code 1910, § 5757; Code 1933, § 38-210.)

24-5-33. When certified copy of military discharge admissible.

A certified copy of any discharge from the military service of the United States, when the original is lost or destroyed, shall be admitted in evidence in any of the courts of this state without further proof of the original. (Ga. L. 1921, p. 184, § 3; Code 1933, § 38-613.)

RESEARCH REFERENCES

ALR. — Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 ALR2d 606.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

CHAPTER 6

PAROL EVIDENCE RULE

Sec.		Sec.	
24-6-1.	Parol evidence contradicting writing inadmissible generally.		contract; proof of subsequent agreement; change of time or place of performance.
24-6-2.	Proof of unwritten portions of contract admissible where not inconsistent.	24-6-7.	Proof of mistake in deed or written contract.
24-6-3.	Contemporaneous writings explaining each other; parol evidence explaining ambiguities.	24-6-8.	Original or subsequent voidness of writing.
24-6-4.	Circumstances surrounding execution of contracts.	24-6-9.	Explanation or denial of receipts.
24-6-5.	Known usage.	24-6-10.	Explanation of blank endorsements.
24-6-6.	Rebuttal of equity; discharge of		

Law reviews. — For article, “An Analysis of Georgia’s Proposed Rules of Evidence,” see 26 Ga. St. B.J. 173 (1990).

24-6-1. Parol evidence contradicting writing inadmissible generally.

Parol contemporaneous evidence is generally inadmissible to contradict or vary the terms of a valid written instrument. (Orig. Code 1863, § 3723; Code 1868, § 3747; Code 1873, § 3800; Code 1882, § 3800; Civil Code 1895, § 5201; Civil Code 1910, § 5788; Code 1933, § 38-501.)

Law reviews. — For article, “The Parol Evidence Rule in Georgia,” see 17 Ga. B.J. 49 (1954). For article discussing the advantages of contract rescission as a remedy for fraud, with respect to the parol evidence rule and the statute of frauds, in light of *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975). For article discussing parol evidence

in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978). For article, “Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault,” see 34 Emory L.J. 93 (1985). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EVIDENCE INADMISSIBLE

- 1. IN GENERAL
- 2. NOTES
- 3. DEEDS
- 4. OTHER AGREEMENTS

EVIDENCE ADMISSIBLE

- 1. IN GENERAL

2. NOTES
3. DEEDS
4. OTHER AGREEMENTS

General Consideration

Purpose of the rule that the terms of a valid written agreement which is complete and the terms of which are not ambiguous cannot be contradicted, added to, altered, or varied by parol agreements is to establish the finality of written contracts. *Stonecypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Parol evidence rule is matter of substantive law and no amount of oral testimony contradicting the legal consequence of a written instrument can avail to destroy or weaken that legal consequence. *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20 (1944); *Almon v. R.H. Macy & Co.*, 106 Ga. App. 123, 126 S.E.2d 641 (1962).

Parol evidence cannot add to, take from, or vary writing itself. *Buice Grading & Pipeline, Inc. v. Bales*, 187 Ga. App. 263, 370 S.E.2d 26 (1988); *Price v. Age, Ltd.*, 194 Ga. App. 141, 390 S.E.2d 242 (1990).

Statute should not be relaxed. *Howard & Soule v. Stephens*, 52 Ga. 448 (1874) (see O.C.G.A. § 24-6-1).

Test for admissibility of oral agreement. — Test to determine whether an oral agreement is one which the law will permit to be plead and proved is whether the oral agreement constitutes a part of the written contract or whether, instead, it is a separate and distinct, oral contract which is not inconsistent with the written contract. If the latter, it admits of pleading and proof. *S. & S. Bldrs., Inc. v. Equitable Inv. Corp.*, 219 Ga. 557, 134 S.E.2d 777 (1964); *Diamondhead Corp. v. Robinson*, 144 Ga. App. 60, 240 S.E.2d 572 (1977).

Court will not ignore clear language of written contract between the parties to enforce an alleged oral contract in contradiction thereto. *Johnson v. Ford Motor Credit Co.*, 142 Ga. App. 547, 236 S.E.2d 527 (1977).

Oral agreement that contradicts written agreement inadmissible. — Evidence that attorney verbally agreed to keep fees at the low end of the range specified in the attorney's written agreement with plaintiff and to

complete project within two weeks was inadmissible since it contradicted the parties written agreement. *Schluter v. Perrie, Buker, Stagg & Jones*, 230 Ga. App. 776, 498 S.E.2d 543 (1998).

All previous negotiations are merged in the subsequent written contract. *Freeman v. Bass*, 34 Ga. 355, 89 Am. Dec. 255 (1866); *Roberts v. Investors' Sav. Co.*, 154 Ga. 45, 113 S.E. 398 (1922); *Wynn v. First Nat'l Bank*, 176 Ga. 218, 167 S.E. 513 (1933); *Allison v. United Small-Loan Corp.*, 54 Ga. App. 820, 189 S.E. 263 (1936); *Thompson v. Riggs*, 193 Ga. 632, 19 S.E.2d 299 (1942); *Heisley v. Allied Am. Mut. Fire Ins. Co.*, 71 Ga. App. 107, 30 S.E.2d 285 (1944); *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20 (1944); *Thompson v. Arrington*, 209 Ga. 343, 72 S.E.2d 293 (1952); *Simmons v. Wooten*, 241 Ga. 518, 246 S.E.2d 639 (1978).

Evidence admitted without objection. — Parol evidence as to the terms of the agreement, and as to statements of the defendant made previously to the execution of the paper, is ineffectual to vary the terms of the written instrument, even though admitted without objection. *Cleghorn v. Shields*, 165 Ga. 362, 141 S.E. 55 (1927).

Determination of timeliness of objection to parol evidence is unnecessary, since parol evidence, by its nature, is incompetent and without probative value to alter the terms or conditions of a written contract. *Lyon v. Patterson*, 138 Ga. App. 816, 227 S.E.2d 423 (1976).

Uncertainty in contract. — There can be no admission of parol evidence unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represent the true intention of the parties. *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945).

Violation of parol agreement not fraud. — Making and violating a contemporaneous parol agreement if inconsistent with the writing would not be such fraud as would permit a varying of the written instrument, even if plead as fraud, no sufficient reason appearing why the agreement was not incor-

porated in the writing. *Bowen v. Swift & Co.*, 52 Ga. App. 793, 184 S.E. 625 (1936).

Invoices. — An invoice for goods delivered on open account is not “a valid written instrument” as that term is used in O.C.G.A. § 24-6-1. *Wheeler v. IDN-Armstrong’s, Inc.*, 288 Ga. App. 253, 653 S.E.2d 835 (2007).

Jury question. — It is for the jury to decide whether an independent collateral oral agreement was made, and, if so, whether it was part of the inducement to the written agreement. *Diamondhead Corp. v. Robinson*, 144 Ga. App. 60, 240 S.E.2d 572 (1977).

Attempt to invoke rule on appeal. — When a party who is entitled to the benefit of the rule prohibiting the admission of parol evidence to vary or contradict a writing waives the benefit thereof by allowing such evidence to be received without objection and without any effort to have the evidence stricken and disregarded by the trial judge or the jury, the party cannot, after the trial has terminated and the case has been decided against the party, invoke the parol evidence rule in order to obtain a reversal of such verdict and judgment in the appellate court. *Southern Envelope Co. v. Adamson Printing Co.*, 51 Ga. App. 475, 180 S.E. 770 (1935); *Commercial Credit Co. v. Lewis*, 59 Ga. App. 144, 200 S.E. 566 (1938).

Cited in *LaGrange Female College v. Cary*, 168 Ga. 291, 147 S.E. 390 (1929); *Deen v. Bank of Hazlehurst*, 39 Ga. App. 633, 147 S.E. 909 (1929); *McClure v. F & M Bank*, 39 Ga. App. 753, 148 S.E. 341 (1929); *Keating v. Woods-Young Co.*, 42 Ga. App. 63, 155 S.E. 206 (1930); *Philips v. Philips*, 174 Ga. 413, 162 S.E. 672 (1932); *Rudder v. Belle Isle*, 46 Ga. App. 336, 167 S.E. 753 (1933); *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934); *Elliott v. Marshall*, 179 Ga. 639, 176 S.E. 770 (1934); *Carver v. Leach*, 53 Ga. App. 112, 185 S.E. 155 (1936); *Allen v. Dickey*, 54 Ga. App. 451, 188 S.E. 273 (1936); *Holliman v. Attaway*, 54 Ga. App. 464, 188 S.E. 292 (1936); *E. Frederics, Inc. v. Felton Beauty Supply Co.*, 58 Ga. App. 320, 198 S.E. 324 (1938); *Thomas v. Moore*, 58 Ga. App. 541, 199 S.E. 320 (1938); *Garvin v. Worthington Pump & Mach. Corp.*, 62 Ga. App. 240, 8 S.E.2d 589 (1940); *Empire Mtg. & Inv. Corp. v. Donaldson*, 64 Ga. App. 197, 12 S.E.2d 489 (1940); *Guffin v. Kelly*, 191 Ga. 880, 14

S.E.2d 50 (1941); *Brown v. Ragsdale Motor Co.*, 65 Ga. App. 727, 16 S.E.2d 176 (1941); *Lively v. Munday*, 201 Ga. 409, 40 S.E.2d 62 (1946); *Marsh v. Baird*, 203 Ga. 819, 48 S.E.2d 529 (1948); *A.E. Speer, Inc. v. McCorvey*, 77 Ga. App. 715, 49 S.E.2d 677 (1948); *Manry v. Selph*, 77 Ga. App. 808, 50 S.E.2d 27 (1948); *Price v. Price*, 205 Ga. 623, 54 S.E.2d 578 (1949); *Findley v. Downing Motors, Inc.*, 79 Ga. App. 682, 54 S.E.2d 716 (1949); *Touchstone v. Louis Friedlander & Sons*, 81 Ga. App. 489, 59 S.E.2d 281 (1950); *Millender v. Looper*, 82 Ga. App. 563, 61 S.E.2d 573 (1950); *Taylor v. Estes*, 85 Ga. App. 716, 70 S.E.2d 82 (1952); *Dixie Belle Mills, Inc. v. Specialty Mach. Co.*, 217 Ga. 104, 120 S.E.2d 771 (1961); *Gulbenkian v. Patcraft Mills, Inc.*, 104 Ga. App. 102, 121 S.E.2d 179 (1961); *F.N. Roberts Corp. v. Tom O’Ryan Adv. Co.*, 106 Ga. App. 626, 127 S.E.2d 720 (1962); *Mion Chem. Brick Corp. v. Daniel Constr. Co.*, 111 Ga. App. 369, 141 S.E.2d 839 (1965); *Shatterly v. Brand-Vaughn Lumber Co.*, 220 Ga. 822, 142 S.E.2d 227 (1965); *Parker v. Anderson*, 221 Ga. 796, 147 S.E.2d 305 (1966); *Victory Motors of Savannah, Inc. v. Chrysler Motors Corp.*, 357 F.2d 429 (5th Cir. 1966); *Ryder v. Schreeder*, 224 Ga. 382, 162 S.E.2d 375 (1968); *Lake Spivey Parks v. Jones*, 118 Ga. App. 60, 162 S.E.2d 801 (1968); *Carden v. LaGrone*, 225 Ga. 365, 169 S.E.2d 168 (1969); *Jordan v. Ridgill*, 120 Ga. App. 63, 169 S.E.2d 675 (1969); *F.C. Brooks & Sons v. Shell Oil Co.*, 226 Ga. 435, 175 S.E.2d 557 (1970); *Dodson v. Phagan*, 227 Ga. 480, 181 S.E.2d 366 (1971); *Clarke v. Fanning*, 127 Ga. App. 86, 192 S.E.2d 565 (1972); *Stone Mt. Scenic R.R., Inc. v. Stone Mt. Mem. Ass’n*, 230 Ga. 800, 199 S.E.2d 216 (1973); *Lowry v. Norris Lake Shores Dev. Corp.*, 231 Ga. 549, 203 S.E.2d 171 (1974); *Jolly v. Egerton*, 132 Ga. App. 243, 207 S.E.2d 634 (1974); *McBrayer v. National City Bank*, 493 F.2d 463 (5th Cir. 1974); *McDonald v. Parker*, 134 Ga. App. 577, 215 S.E.2d 334 (1975); *Ansley v. Forest Servs., Inc.*, 135 Ga. App. 745, 218 S.E.2d 914 (1975); *McGraw v. Trusco Leasing, Inc.*, 137 Ga. App. 328, 223 S.E.2d 731 (1976); *Freeman v. Nelson*, 138 Ga. App. 697, 227 S.E.2d 475 (1976); *Jones v. Hamilton Mtg. Corp.*, 139 Ga. App. 239, 228 S.E.2d 170 (1976); *Stuckey v. Kahn*, 140 Ga. App. 602, 231 S.E.2d 565 (1976); *Sheppard v. Post*, 142 Ga. App. 646, 236 S.E.2d 680

General Consideration (Cont'd)

(1977); Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622 (1977); In re Smith, 436 F. Supp. 469 (N.D. Ga. 1977); Randall v. Cruce, 145 Ga. App. 861, 245 S.E.2d 28 (1978); Area v. Cagle, 148 Ga. App. 769, 252 S.E.2d 655 (1979); Atlanta Nat'l Real Estate Trust v. Tally, 243 Ga. 247, 253 S.E.2d 692 (1979); Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813, 256 S.E.2d 785 (1979); Knight v. Munday, 152 Ga. App. 406, 263 S.E.2d 188 (1979); American Century Mtg. Investors v. Bankamerica Realty Investors, 246 Ga. 39, 268 S.E.2d 609 (1980); First Presbyterian Church v. Price, 248 Ga. 38, 280 S.E.2d 830 (1981); Cramer v. Coastal States Life Ins. Co., 162 Ga. App. 519, 292 S.E.2d 112 (1982); Citizens Bank v. Bowen, 169 Ga. App. 896, 315 S.E.2d 437 (1984); Jordan v. Smith, 596 F. Supp. 1295 (N.D. Ga. 1984); Lozier v. Leonard, 173 Ga. App. 697, 327 S.E.2d 815 (1985); Miley v. Fireman's Fund Ins. Co., 176 Ga. App. 527, 336 S.E.2d 583 (1985); Rockwell Int'l Corp. v. Riddick, 633 F. Supp. 276 (N.D. Ga. 1986); Rigg v. New World Pictures, Inc., 183 Ga. App. 446, 359 S.E.2d 207 (1987); Hayes Constr. Co. v. Thompson, 184 Ga. App. 482, 361 S.E.2d 865 (1987); McClintock v. Wellington Trade, Inc., 187 Ga. App. 898, 371 S.E.2d 893 (1988); Wages v. Mount Harmony Mem. Gardens, Inc., 189 Ga. App. 99, 375 S.E.2d 57 (1988); Medders v. Commodore Fin. Servs. Corp., 190 Ga. App. 618, 379 S.E.2d 561 (1989); Gigandet v. Lighting Galleries, Inc., 191 Ga. App. 536, 382 S.E.2d 600 (1989); Archer Motor Co. v. International Bus. Inv., Inc., 193 Ga. App. 86, 386 S.E.2d 918 (1989); Carrollton Car Ctr., Inc. v. Citizens & S. Nat'l Bank, 202 Ga. App. 429, 414 S.E.2d 674 (1992); Choice Hotels Int'l, Inc. v. Ocmulgee Fields, Inc., 222 Ga. App. 185, 474 S.E.2d 56 (1996); Braswell v. Bank of Early, 229 Ga. App. 445, 494 S.E.2d 277 (1997); Scott v. Battle, 249 Ga. App. 618, 548 S.E.2d 124 (2001); Nobel Lodging, Inc. v. Holiday Hospitality Franchising, Inc., 249 Ga. App. 497, 548 S.E.2d 481 (2001); Sharple v. Airtouch Cellular of Ga., Inc., 250 Ga. App. 216, 551 S.E.2d 87 (2001); Livoti v. Aycock, 263 Ga. App. 897, 590 S.E.2d 159 (2003); Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003); Capital Color Printing, Inc. v. Ahern,

291 Ga. App. 101, 661 S.E.2d 578 (2008).

Evidence Inadmissible**1. In General**

Prior and contemporaneous statements or agreements cannot be shown to vary, contradict, or change the terms of a valid written contract purporting on the contract's face to contain all the terms of an agreement between the parties. Campbell v. Alkahest Lyceum Sys., 10 Ga. App. 839, 74 S.E. 443 (1912); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398 (1922); Eaves v. Georgian Co., 47 Ga. App. 37, 169 S.E. 519 (1933); Hardin v. Atlanta Gas Light Co., 71 Ga. App. 63, 30 S.E.2d 121 (1944); Owensby v. Byrd, 75 Ga. App. 729, 44 S.E.2d 452 (1947); Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938 (N.D. Ga. 1975); Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765 (1976); Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977).

When the contract is complete on the contract's face and the evidence offered to explain the ambiguity contradicts the terms of the written instrument, parol evidence should not be admitted. American Cyanamid Co. v. Ring, 248 Ga. 673, 286 S.E.2d 1 (1982).

In absence of fraud, accident, or mistake, parol evidence is not admissible to vary an unambiguous written agreement. Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255 (1866); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398 (1922); Holloway v. Brown, 171 Ga. 481, 155 S.E. 917 (1930); Long v. Sullivan, 52 Ga. App. 318, 183 S.E. 71 (1935); Albany Fed. Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20 (1944); Gilleland v. Welch, 199 Ga. 341, 34 S.E.2d 517 (1945); McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945); Smith v. Standard Oil Co., 227 Ga. 268, 180 S.E.2d 691 (1971); Vulcan Materials Co. v. Douglas, 131 Ga. App. 21, 205 S.E.2d 84 (1974); Wilson v. Sheppard, 136 Ga. App. 475, 221 S.E.2d 671 (1975); C.P.D. Chem. Co. v. National Car Rental Sys., 148 Ga. App. 756, 252 S.E.2d 665 (1979).

With respect to an unambiguous promissory note, in the absence of fraud, accident, or mistake, parol evidence cannot be considered to alter or vary the terms of a promissory note. Citizens & S. Trust Co. v. Johnson,

201 Ga. App. 464, 411 S.E.2d 543 (1991).

Parol evidence inadmissible even to establish fraud. — Parol evidence is not admissible to vary the terms of a binding written agreement, even to establish fraud. *Cosby v. A.M. Smyre Mfg. Co.*, 158 Ga. App. 587, 281 S.E.2d 332 (1981).

Oral representations made as inducements to the contract are inadmissible to add to, take from, or vary a written contract. *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978).

Different consideration. — As a general rule the consideration of a contract is open to inquiry as between the original parties, but if the consideration be so stated in the contract as to make it one of its terms or conditions, as when the consideration consists of mutual promises expressed in the contract, a different consideration, whether variant or additional, cannot be shown by parol. *Lynchburg Shoe Co. v. Daniel*, 23 Ga. App. 186, 98 S.E. 107 (1919); *Georgia Cas. Co. v. Dixie Trust & Sec. Co.*, 23 Ga. App. 447, 98 S.E. 414 (1919); *Ramsey-Fender Motor Co. v. Chapman*, 46 Ga. App. 385, 168 S.E. 92 (1932); *Phillips v. Phillips*, 46 Ga. App. 838, 169 S.E. 537 (1933).

Party cannot engraft new condition under guise of inquiring into consideration. — Although it is permissible to inquire into consideration when the principles of justice require it, one of the parties to a contract cannot, under the guise of inquiring into consideration, engraft upon the contract a new condition which imposes an additional affirmative obligation upon the other party. *Hanover Ins. Co. v. Nelson Conveyor & Mach. Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981).

Inquiry into consideration to vary terms of contract. — When in some instances parol evidence that the real consideration of a contract is different from the one actually recited in the instrument is admissible for the purpose of proving that the true consideration has failed, it is never allowable, under the guise of inquiring into the consideration, to vary or contradict by parol the substance and meaning of the written terms of the contract itself. *Lynchburg Shoe Co. v. Daniel*, 23 Ga. App. 186, 98 S.E. 107 (1919); *Middlebrooks v. Dunlap-Huckabee Auto Co.*, 44 Ga. App. 543, 162 S.E. 153 (1932);

Phillips v. Phillips, 46 Ga. App. 838, 169 S.E. 537 (1933); *Tyre v. Price*, 52 Ga. App. 526, 183 S.E. 843 (1936); *Redfearn v. Citizens & S. Nat'l Bank*, 122 Ga. App. 282, 176 S.E.2d 627 (1970); *Zorn v. Robertson*, 237 Ga. 395, 228 S.E.2d 804 (1976).

Proof of different contract. — An entirely different contract from that evidenced by a writing cannot be pleaded or proved by parol as a substitute for that embodied in such writing. *Branan v. Warfield & Lee*, 3 Ga. App. 586, 60 S.E. 325 (1908).

2. Notes

In absence of fraud, accident, or mistake, parol evidence is not admissible to vary or contradict express terms of a promissory note. *Tyson v. Henson*, 159 Ga. App. 684, 285 S.E.2d 27 (1981).

Showing note to be conditional. — In an action upon an unconditional promissory note, evidence of a contemporaneous parol agreement that the note was not to be paid except upon the happening of a certain event is inadmissible in the absence of evidence tending to show that the agreement was omitted from the note by accident, fraud, or mistake. *Probasco v. Shaw*, 144 Ga. 416, 87 S.E. 466 (1915); *Cairo Banking Co. v. Hall*, 42 Ga. App. 785, 157 S.E. 346 (1931); *Jewell v. Norrell*, 66 Ga. App. 11, 16 S.E.2d 797 (1941); *Mooney v. Boyd*, 86 Ga. App. 369, 71 S.E.2d 685 (1952); *Knight v. William Summerlin Co.*, 119 Ga. App. 575, 168 S.E.2d 179 (1969); *Smith v. Standard Oil Co.*, 227 Ga. 268, 180 S.E.2d 691 (1971); *First Nat'l Bank v. Harrison*, 408 F. Supp. 137 (N.D. Ga. 1975), *aff'd*, 529 F.2d 1350 (5th Cir. 1976); *Hyman v. Horwitz*, 148 Ga. App. 647, 252 S.E.2d 74 (1978).

Showing a want or failure of consideration. — When the consideration underlying a note is at issue, the maker of the note has the right to show by parol a want or failure of consideration. *Beasley v. Paul*, 223 Ga. App. 706, 478 S.E.2d 899 (1996).

Variance in time of payment. — Parol evidence is inadmissible to vary the terms of payment or the date of the maturity of a promissory note, or to engraft upon the note a provision for an extension of time. *Crooker v. Hamilton*, 3 Ga. App. 190, 59 S.E. 722 (1907); *Wilder v. Federal Land Bank*, 176 Ga. 813, 169 S.E. 13 (1933).

Evidence Inadmissible (Cont'd)**2. Notes (Cont'd)****Showing that note would not be enforced.**

— An unconditional promise to pay could not be defeated by proof of a contemporaneous oral agreement that it would never be enforced. *Pulliam v. Merchants & Miners State Bank*, 33 Ga. App. 68, 125 S.E. 509 (1924); *Cohan v. Flanders*, 315 F. Supp. 1046 (S.D. Ga. 1970).

Note not to be paid in money. — A note in which it is stipulated that a certain sum will be paid means that this sum will be paid in money, and the maker will not be heard to plead or prove that there was a parol agreement by which the note was to be satisfied with something else than money. *Kerr v. Holder*, 13 Ga. App. 9, 78 S.E. 682 (1913); *Cole v. Bank of Bowersville*, 31 Ga. App. 435, 120 S.E. 790 (1923).

Express warranty. — When a promissory note is given for purchase money, which is unambiguous and unconditional, and contains no warranty of soundness, no express warranty can be added to the note by parol. *Fleming v. Satterfield*, 4 Ga. App. 351, 61 S.E. 518 (1908).

Additional warranty. — A purchaser of an article, who gives a note for the price of the article, and therein accepts a limited warranty, and stipulates not to exact anything beyond, will not be allowed to prove by parol another representation or warranty of the seller, unless upon the ground of fraud. *Commercial Credit Co. v. Lewis*, 59 Ga. App. 144, 200 S.E. 566 (1938).

Obligation conditioned on additional security. — “Parol contemporaneous evidence is inadmissible generally to contradict or vary the terms of a valid written instrument,” thus, when an unconditional promissory note was signed by two persons, while it was permissible for one of them to show that one was a mere surety, it was not permissible to alter the unconditional character of the obligation by setting up a prior or contemporaneous parol agreement to the effect that the obligation was conditional upon the payees taking a mortgage upon personalty from the principal debtor as additional security. *Bowen v. Mobley*, 40 Ga. App. 833, 151 S.E. 667 (1930).

Claim only in rem. — In a suit on promissory note secured by a deed to land, it is

not permissible for the maker to set up by way of plea and answer that by executing the two instruments together the payee agreed to look solely to the land for repayment of the debt due, and the maker of the note was not to be under any personal obligation, and no personal judgment could be procured against the maker, but only a judgment in rem against the property could be had for such an interpretation would be to vary by parol the plain terms of a written instrument by which the maker agreed to pay a stated sum on a certain day. *Skeffington v. Rowland*, 52 Ga. App. 619, 184 S.E. 330 (1936).

Existence of prior cause of action. — In a suit by a payee against the maker of a promissory note reciting that the note was given “for value received,” a contemporaneous parol agreement cannot be engrafted thereon by the defendant by testimony to the effect that while the defendant, at the time of executing the note, actually received from the plaintiff the principal sum thereof, yet the defendant had a prior cause of action against the plaintiff and the note was to be set up against the demand of the defendant against the plaintiff in this case, and so understood at the time of the execution and delivery of the note. *Dunson & Bros. Co. v. Smith Seed Co.*, 26 Ga. App. 585, 106 S.E. 914 (1921).

Memorandum written at bottom of note.

— Parol evidence is inadmissible to vary or contradict an unambiguous contract in writing so as to include a memorandum written upon the bottom of one note showing the note to be collateral; and this memorandum cannot by parol be included in (nor can this stipulation in itself include) another note of a prior date when in such prior note no such words appear. *Buffington v. Bank of College Park*, 157 Ga. 570, 122 S.E. 50 (1924).

3. Deeds

Additional conditions. — When expressed only by way of recital, parol evidence is admissible to show that the true consideration of the deed is in fact different from the one stated merely by way of recital. However, one of the parties to a deed cannot, under the guise of inquiring into the deed's consideration, engraft upon the instrument a new condition or covenant which imposes an additional affirmative obligation upon

the other party. *Awtrey v. Awtrey*, 225 Ga. 666, 171 S.E.2d 126 (1969).

Answer at variance with deed. — Allegations of the defendant's answer, setting up an understanding at variance with the terms of the deed executed by the plaintiff to the defendant, should have been stricken. *Groover v. Simmons*, 152 Ga. 423, 110 S.E. 179 (1921).

House not included in deed. — When there is a conveyance of land by deed, containing no reservations as to the buildings, a parol understanding that the vendor retains the ownership of the houses, with the right to enter and remove the houses, is certainly inconsistent with the deed and ought to be excluded from evidence. *Simpson v. Tate*, 226 Ga. 558, 176 S.E.2d 62 (1970).

Obligation to sell adjoining tract. — When one of the parties to a contract involving a purchase and sale of land executes and delivers to the other a deed conveying a described tract of land for a named sum of money, a contemporaneous oral agreement obligating the grantee in the deed to purchase, at the option of the grantor and during the grantor's lifetime, an adjoining tract of land for an additional sum of money, will not be enforced, if it appears that the deed and the oral agreement constitute parts of the same contract, and the terms of the oral agreement add to and vary those of the written instrument. *Stonecypher v. Georgia Power Co.*, 183 Ga. 498, 189 S.E. 13 (1936).

Showing deed to be mortgage. — Father, by a deed absolute, conveyed land to his son, who mortgaged it for a large sum. Thereafter, with the consent of his father, he sold and assigned in writing the equity of redemption. Under the law, the father could not show by parol a subsequent rescission of the transfer, and that the original deed from himself to his son was intended only as a mortgage, and thereby establish a right in himself to redeem the land. *New England Mtg. Sec. Co. v. Tarver*, 60 F. 660 (5th Cir. 1894).

Failure to make improvements. — In a suit based on a written contract given for the purchase money of described cemetery lots, the court did not err in sustaining demurrer to defense asserting failure of plaintiff to make certain improvements in the cemetery which prior to or contemporaneously with

the execution of the contract it had verbally agreed to make. *Slaten v. College Park Cem. Co.*, 185 Ga. 27, 193 S.E. 872 (1937).

Administrator denying sale at auction. — An administrator cannot dispute the truth of a solemn recital contained in a deed that the property was exposed for sale, that the highest bid was a stated sum and that the administrator held the property therefor. The administrator may deny receipt of the proceeds, but the administrator cannot deny the sale at public auction for a stated sum. *Gammage v. Perry*, 29 Ga. App. 427, 116 S.E. 126 (1923).

4. Other Agreements

Specific performance. — Parol evidence rule is applicable in a suit for specific performance to deny another parol proof of an antecedent, inconsistent parol agreement. *Thompson v. Arrington*, 209 Ga. 343, 72 S.E.2d 293 (1952).

Exclusion of specific performance in land purchase contract. — When there is no language excluding specific performance as a remedy in a land purchase contract, the contract being unambiguous on this point, proffered evidence to the contrary, which purports to show that the parties intended liquidated damages to be the sole remedy, violates the parol evidence rule and is properly disregarded by the trial judge. *Laseter v. Brown*, 251 Ga. 179, 304 S.E.2d 72 (1983).

Merger of prior negotiations. — Contract of sale merges prior negotiations and all oral understandings and the court cannot rewrite the agreement to suit one of the parties. *Worthington Pump & Mach. Corp. v. Briarcliff*, 67 Ga. App. 71, 19 S.E.2d 574 (1942); *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975).

Showing sale to be conditional. — When a special agent makes a contract of sale in writing, evidence of prior conversations is inadmissible for the purpose of showing that the sale, on the sale's face absolute was in fact conditional. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S.E. 980 (1903).

Oral understanding concerning contractual phrase. — When a timber release contains a general descriptive phrase, the meaning of which was presumably well known to both the contracting parties, any attempt to prove that at the time of the execution of the

Evidence Inadmissible (Cont'd)**4. Other Agreements** (Cont'd)

contract the parties had an oral understanding as to the meaning of such phrase would clearly violate the statute of frauds, as well as the parol evidence rule. *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947).

Material contractual term. — Statement in a complete conditional sales contract that one of the parties “has this day purchased” from the other party certain described personal property, for which one agrees to pay a stated amount of money, is a material contractual term and not a mere recital of the consideration of the contract, and may not be contradicted by parol evidence. *Wade v. Ballard*, 69 Ga. App. 669, 26 S.E.2d 542 (1943).

Employment contract. — Parol “lifetime” employment contract between the parties upon which the plaintiff relied, even if certain and definite enough to be enforceable, is superseded by the inconsistent, valid, complete, unambiguous, written employment contracts covering the same subject matter and providing for termination of employment by written notice. *Vulcan Materials Co. v. Douglas*, 131 Ga. App. 21, 205 S.E.2d 84 (1974).

Sales contract. — Parol evidence was inadmissible to establish that a seller had breached a written contract for the sale of certain carpet-making technology because such evidence would contradict the express disclaimers of the parties’ written contract. *Textile Rubber & Chem. Co. v. Thermo-Flex Techs., Inc.*, 301 Ga. App. 491, 687 S.E.2d 919 (2009).

Endorser. — When the contract was not one by which the plaintiff was merely secured against loss which might result from the plaintiff becoming an endorser for the defendant, any testimony which sought to show that such was the understanding of the parties at the time the contract was entered into was inadmissible since the testimony sought to vary the express terms of the written contract by proof of a contemporaneous parol agreement. *Macon Baseball Ass’n v. Pennington*, 45 Ga. App. 611, 166 S.E. 35 (1932).

Guarantor. — After parties sign a bond as guarantors, the parties cannot set up, by way of defense to a suit thereon, that the instru-

ment was executed by reason of a contemporaneous parol understanding with the principal debtor that they were not to be bound, and for a purpose wholly at variance with the instrument’s plain tenor and import, as this would in effect be merely adding to and varying the terms of a written contract, by parol evidence. *Christopher v. Georgian Co.*, 22 Ga. App. 707, 97 S.E. 97 (1918).

Real estate bond. — Rule that negotiations in parol, occurring prior to or contemporaneously with the execution of a written contract, are considered as merged therein, and evidence as to parol terms which vary or contradict the terms of the written instrument should be excluded is ordinarily applied in a suit on the contract itself, but it also applies in suit against surety on real estate bond, as the alleged default under the bond sued on was in respect to the relation between the parties as fixed and governed by the real estate sales contract, especially in respect to the broker’s right to commissions under the contract of sale. *Pfeffer v. General Cas. Co. of Am.*, 87 Ga. App. 173, 73 S.E.2d 234 (1952).

Real estate entire agreement clause. — Provision in parties’ contracts that there would be no verbal agreements of any kind between the parties was absolute, and as such, the provision barred the enforcement of a prior verbal agreement that, in fulfillment of its written contractual obligation to convey “lakefront” lots to the plaintiffs, contractor would provide plaintiffs with a permanent easement ensuring their littoral rights. *Great Am. Bldrs., Inc. v. Howard*, 207 Ga. App. 236, 427 S.E.2d 588 (1993).

Replevy bond. — When a defendant, on whose property a distress warrant was levied, gave a replevy bond for condemnation money, the security could not defend on the ground that the defendant signed on condition that the bond was only a forthcoming bond. *Daniels v. Smith*, 144 Ga. 561, 87 S.E. 774 (1916).

Partnership agreement to dissolve. — When one partner buys out another’s interest, and assumes all the liabilities of the firm, and the terms of sale are in writing, parol evidence is not admissible to show that the purchaser agreed to pay an account of the vendor for board, though a memorandum of that account was on the partnership books and the board was due to a third member of

the partnership. *Delaney v. Anderson*, 54 Ga. 586 (1875).

Prior indebtedness. — In the absence of fraud, accident, or mistake, writing signed by parties and treated by the parties as an account stated would be presumed to contain or represent the entire agreement between the parties with reference to the indebtedness then existing between the parties by reason of contract of employment in question, and it was error for the court to admit testimony tending to contradict or vary the terms of the account stated. *Bullard v. Western Waterproofing Co.*, 63 Ga. App. 547, 11 S.E.2d 713 (1940).

Conveyance of right of way. — A written contract of conveyance of a right of way to a railroad company, duly executed and delivered by an owner of land, cannot be varied by oral testimony to the effect that the owner executed and delivered the contract upon agreement by the agent of the railroad company that the company would so construct the railroad as not to interfere with use of this land, on either side of the right of way, for pasturage purposes. *Poole v. Elberton & E. Ry.*, 19 Ga. App. 631, 91 S.E. 1052 (1917).

Present transfer or discharge. — Parol evidence rule forbids any attempt to prove that the promises stated in a writing do not accurately represent the agreement of the parties; and words, not merely reciting that a transfer or discharge had been made as consideration as an existing fact, but purporting to make a present transfer or present discharge, have also been held contractual in their nature and within the rule. *Wade v. Ballard*, 69 Ga. App. 669, 26 S.E.2d 542 (1943).

Understandings between spouses not incorporated in divorce decree. — Negotiations and oral agreements between husband and wife, preceding divorce, as to alimony or child support, are, by presumption of law, merged in the final judgment in the divorce suit. Understandings between the husband and wife which are not incorporated into the divorce decree are not binding. *Cabaniss v. Cabaniss*, 251 Ga. 177, 304 S.E.2d 65 (1983).

Parol evidence rule prevented establishment of a trust based on communications that occurred prior to the agreements. — With respect to a Chapter 11 bankruptcy in which the debtor, a business that served as an intermediary for clients desiring to effect

exchanges of real property qualifying for tax-deferred treatment under 26 U.S.C. § 1031, held funds in bank accounts that resulted from certain real estate sales, two real estate exchange investors were not entitled to turnover of proceeds from sales of their real estate, as opposed to having their claims payable on the same basis as the other unpaid exchangers, because the written agreements between the investors and the debtor specifically and unequivocally defined the circumstances under which the debtor acquired cash proceeds and the use and disposition of them, but did not create an express trust under O.C.G.A. § 53-12-20. The parol evidence rule, O.C.G.A. § 24-6-1, prevented the investors from trying to establish a trust based on communications that occurred prior to the agreements, which contained merger clauses. *McCamy v. Kerr* (In re Real Estate Exch. Servs.), No. 08-85871-PWB, 2009 Bankr. LEXIS 3731 (Bankr. N.D. Ga. Oct. 9, 2009).

Evidence Admissible

1. In General

When writing incomplete. — Before parol evidence can be received to show a collateral agreement, it must appear, either from the contract itself or from the attendant circumstances, that the contract is incomplete, and that what is sought to be shown as a collateral agreement does not in any way conflict with or contradict what is contained in the writing. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S.E. 485, 81 Am. St. R. 28 (1900); *McCommons v. Williams*, 131 Ga. 313, 62 S.E. 230 (1908); *Napier v. Strong*, 19 Ga. App. 401, 91 S.E. 579, cert. denied, 19 Ga. App. 828, 92 S.E. 558 (1917); *Roberts v. Investors' Sav. Co.*, 154 Ga. 45, 113 S.E. 398 (1922); *Bowen v. Swift & Co.*, 52 Ga. App. 793, 184 S.E. 625 (1936); *Shubert v. Speir*, 201 Ga. 20, 38 S.E.2d 835 (1946); *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975).

If the writing appears on its face to be an incomplete contract and if the parol evidence offered is consistent with and not contradictory of the terms of the written instrument, then the parol evidence is admissible to complete the agreement between the parties. *Thomas v. Clark*, 178 Ga. App. 823, 344 S.E.2d 754 (1986).

Evidence Admissible (Cont'd)**1. In General (Cont'd)****Invoices as valid written instrument. —**

On an action on an open account, the trial court did not violate the parol evidence rule by admitting evidence that explained a "paid" notation on invoices. An invoice for goods delivered on open account was not "a valid written instrument" as that term was used in O.C.G.A. § 24-6-1; furthermore, O.C.G.A. § 24-6-9 specifically provided that receipts for money were always only prima facie evidence of payment and could be denied or explained by parol. *Wheeler v. IDN-Armstrong's, Inc.*, 288 Ga. App. 253, 653 S.E.2d 835 (2007).

Construction of contract or explanation of ambiguities. — Parol evidence may be used to explain ambiguities, or aid on the construction of a contract, although it is clearly inadmissible to vary the terms of the written instrument. *State Farm Fire & Cas. Co. v. Fordham*, 148 Ga. App. 48, 250 S.E.2d 843 (1978); *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 263 S.E.2d 138 (1980).

Conflicting documents should be read consistently if possible. — Courts may not use extrinsic evidence to vary the terms of or otherwise render ambiguous a written contract. However, when two releases both concern the allocation of liability between the parties and were executed on the same day, the court should read the releases together and consider them as a single contract in determining whether an ambiguity exists. But if one release violates public policy, the court may not consider extrinsic evidence altering or contradicting the unambiguous language of the valid release. *Watson v. Union Camp Corp.*, 861 F. Supp. 1086 (S.D. Ga. 1994).

Existence of fraud. — Parol evidence is admissible to show that what appears to be a valid written contract is void because the complaining party was induced to execute the contract by the fraud of the other. *Johnson v. Sherrer*, 197 Ga. 392, 29 S.E.2d 581 (1944); *Hinson v. Hinson*, 221 Ga. 291, 144 S.E.2d 381 (1965); *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

Contracts. — Rule that parol agreements shall not be received to change or add to terms of written contract does not apply where alleged contract was procured by

fraud; and stipulation in contract that provisions thereof constitute sole and entire agreement between parties and that no modification thereof shall be binding on either party unless in writing and signed by seller can have no bearing in a case where fraud to induce the contract is at issue. *Spires v. Relco, Inc.*, 165 Ga. App. 4, 299 S.E.2d 58 (1983).

In a dispute over installment contract to purchase land, evidence of alleged oral agreement between the parties, which the buyer partially performed and the seller accepted the benefits of, was not violative of the parol evidence rule and helped to prove the existence of the oral agreement as the buyer alleged. *Hernandez v. Carnes*, 290 Ga. App. 730, 659 S.E.2d 925 (2008).

Rebuttal of fraud. — Parol evidence rule has no application when the defendant introduces testimony for the purpose of rebutting one of the elements of fraud, not for altering the instrument. *Friendly Fin. Co. v. Stover*, 109 Ga. App. 21, 134 S.E.2d 837 (1964).

Lack of valid agreement. — Parol evidence may be used to show no valid agreement ever existed. *Citizens & S. Nat'l Bank v. Williams*, 147 Ga. App. 205, 249 S.E.2d 289 (1978).

Lack of consideration. — While it is never allowable, under the guise of inquiring into the consideration of a valid written contract, to vary or contradict the terms or conditions of the instrument, it is permissible to show by parol evidence which does not vary or contradict the terms and conditions of the writing that it was never a contract for want of consideration. *Miller v. Whitesburg Banking Co.*, 58 Ga. App. 84, 197 S.E. 906 (1938).

Oral contract as inducement for written contract. — Collateral oral agreement, not inconsistent with a written contract, is not necessarily merged into the written contract, and one contract may be the consideration for another contract and may induce the execution of the other contract; such independent oral contract may be proved and enforced. *Diamondhead Corp. v. Robinson*, 144 Ga. App. 60, 240 S.E.2d 572 (1977).

Verbal agreement independent of written contract. — When a verbal agreement is an independent and complete contract within itself and forms no part of the written contract, it does not come within the operation

of the parol evidence rule. *Diamondhead Corp. v. Robinson*, 144 Ga. App. 60, 240 S.E.2d 572 (1977).

Subsequent agreement. — Rule is not violated by proof of a new and distinct subsequent agreement in the nature of a novation. *Wimberly v. Tanner*, 34 Ga. App. 313, 129 S.E. 306 (1925); *Mutual Furn. Co. v. Moore*, 60 Ga. App. 655, 4 S.E.2d 711 (1939); *Long Tobacco Harvesting Co. v. Brannen*, 98 Ga. App. 142, 105 S.E.2d 390 (1958), later appeal, 99 Ga. App. 541, 109 S.E.2d 90 (1959).

Evidence of nondelivery. — It is no contradiction of a written agreement, which does not of itself purport to have been delivered, to assert its nondelivery, and therefore parol evidence is admissible to disprove the fact of delivery. *Nalley Land & Inv. Co. v. Merchants' & Planters' Bank*, 178 Ga. 818, 174 S.E. 618 (1934), later appeal, 187 Ga. 142, 199 S.E. 815 (1938) (decided under former § 2283 of the Civil Code of 1910).

Implication or rebuttal of trust. — Parol evidence rule does not prevent the introduction of evidence to show the nature of the transaction or the circumstances or conduct of the parties, either to imply or rebut a trust, although the effect is to alter or vary a written instrument. *Hodges v. Hodges*, 221 Ga. 587, 146 S.E.2d 313 (1965).

Identification of real party in interest. — Parol evidence is admissible when not a variance with a written contract to identify the real party in interest. *Contractors Mgt. Corp. v. McDowell-Kelley, Inc.*, 136 Ga. App. 116, 220 S.E.2d 473 (1975).

Proof of signature. — Although under O.C.G.A. §§ 13-2-2(1) and 24-6-1, parol evidence was inadmissible to add to, take from, or vary a written contract, it was properly admitted to show that a promisor who died signing a guaranty had actually signed the guaranty. A store employee testified that the employee witnessed the store owner sign the guaranty. *John Deere Co. v. Haralson*, 278 Ga. 192, 599 S.E.2d 164 (2004).

Lack of malice. — When evidence is not offered for the purpose of altering the substantive rights of the parties under a written sales contract, but for the purpose of establishing that one party did not act maliciously and oppressively, and if the evidence is probative on that issue, it should be admitted.

Oden & Sims Used Cars, Inc. v. McMullen, 153 Ga. App. 127, 264 S.E.2d 580 (1980).

Division of consideration. — While proof of parol contemporaneous agreements is generally inadmissible to add to, take from, or vary a written contract, the allegations of the petition setting forth the division to be made of the consideration to be paid to the co-obligees under the contract do not come within the inhibition of the parol evidence rule since such alleged facts do not add to, take from, or vary the terms of the written instrument, but merely set forth the respective interests of the obligees. *Bernstein v. Fagelson*, 38 Ga. App. 294, 143 S.E. 237 (1928).

Waiver of stipulation of contract. — While parol evidence is inadmissible to add to, take from, or vary a written contract, the parol evidence rule has no application to a case if waiver of a stipulation of the contract is being asserted. *Henry v. Hemingway*, 159 Ga. App. 375, 283 S.E.2d 341 (1981).

2. Notes

Contract partly in parol. — Parol evidence is admissible not only when a promissory note is obtained by fraud, but when the note is not the entire contract between the parties, and when the contract is partly in parol and partly in writing. *Crooker v. Hamilton*, 3 Ga. App. 190, 59 S.E. 722 (1907).

Inquiry into consideration. — When a promissory note recited no consideration except in the words “for value received,” the real consideration of the note may be inquired into as far as may be necessary to the defense pleaded. *Dunson & Bros. Co. v. Smith Seed Co.*, 26 Ga. App. 585, 106 S.E. 914 (1921).

Failure of consideration. — In a suit on an unconditional promise to pay, although the consideration may not be expressed in the instrument, it is ordinarily permissible for the defendant to plead, and to prove by parol, that the consideration supporting the promise has failed either in whole or in part. *Tyre v. Price*, 52 Ga. App. 526, 183 S.E. 843 (1936).

Note placed as collateral. — When there was evidence of a parol agreement on the part of the payee of the collateral note that a note should be held as collateral, which was itself a fact not affecting the contents of the writing, and which, if credible, tended to

Evidence Admissible (Cont'd)**2. Notes** (Cont'd)

show that the note had been placed as collateral, the fact as to the pledge, being entirely independent from the contents of the note, could properly be shown by parol. *Buffington v. Bank of College Park*, 157 Ga. 570, 122 S.E. 50 (1924).

When the alleged oral agreement was entered into subsequent to the execution of the promissory note. O.C.G.A. § 24-6-1 does not stand as a barrier to the agreement's enforcement. *South Atl. Prod. Credit Ass'n v. Gibbs*, 257 Ga. 521, 361 S.E.2d 167 (1987).

3. Deeds

Creation of trust. — Deed absolute in form may be shown by parol evidence to have been made in trust for the benefit of the grantor if the maker remains in possession of the land. *Hall v. Turner*, 198 Ga. 763, 32 S.E.2d 829 (1945).

Clerical error. — In view of the particular statement in a deed that the tract conveyed was bounded on the east and south by lands of named owners, parol evidence was admissible for the purpose of applying the description to the intended subject matter and to show that the statement as to the district number was a clerical error. *Smith v. Federal Land Bank*, 181 Ga. 1, 181 S.E. 149 (1935).

4. Other Agreements

Receipt in full. — Receipt for money in full of all demands is always open to contradiction or explanation. *Walters v. Odom*, 53 Ga. 286 (1874).

Implied trust. — While an express trust must be created by writing and cannot be proved by parol, implied trusts may be established by parol evidence, although the effect of such evidence is to alter or vary a written instrument, and although the defendant sets up and insists upon the statute of frauds. *Hall v. Turner*, 198 Ga. 763, 32 S.E.2d 829 (1945).

Implied warranty. — In an action to recover the purchase price of defective goods, testimony that defendant told plaintiff the goods would give satisfactory service and that defendant would give a one-year warranty with reference to the service was admissible to show the alleged breach of an

implied contract and the trial court did not err in failing to charge the general rule concerning parol evidence. *Cloud v. Stewart*, 92 Ga. App. 247, 88 S.E.2d 323 (1955).

Surety induced by false representation. — Plea to the effect that a surety was induced to sign by a false representation that a surety whose name appeared as such had already signed the contract of suretyship is not an effort to vary the terms of a written contract. *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

Assignment of salary as cover for usurious loan. — Parol evidence is admissible to show that a purported assignment of salary is but a cover for a usurious loan, notwithstanding its recitals to the contrary. *Hinton v. Mack Purchasing Co.*, 41 Ga. App. 823, 155 S.E. 78 (1930).

Variance in deposit slip. — When husband had withdrawn money from wife's account, in subsequent suit by wife against the bank to recover money, evidence offered by the defendant bank, to the effect that while the deposit slip showed the money deposited to the separate account of the wife, such money was in fact placed to the credit of a joint business enterprise of the husband and wife, and thereafter drawn out on checks against this account by the plaintiff and her husband, was admissible in support of the defense urged by the defendant bank. *Greeson v. Farmers' & Merchants' Bank*, 50 Ga. App. 566, 179 S.E. 191 (1935).

Bill of sale. — Court erred in admitting parol evidence that a "bill of sale" was not intended to transfer ownership of a boat, the bill being executed on the regular required Coast Guard form, and all language therein relating to a sale and conveyance, the other provisions merely relating to the method of payment. *Peterson v. Lexington Ins. Co.*, 753 F.2d 1016 (11th Cir. 1985).

Conversations supplementing recertification documents for lease. — When a public housing lease required information about family size and income annually, but the lease did not indicate that completion of the recertification documents was a condition precedent to renewal of the lease, the recertification document was not an agreement and was not merged with the lease so as to make admission of conversations supplementing the information contained in the recertification documents a violation of the

parol evidence rule. Decatur Hous. Auth. v. Christian, 182 Ga. App. 270, 355 S.E.2d 764 (1987).

Collective bargaining agreement. — In action by retired employees to prevent the corporation from modifying their health insurance benefits, the fact that both parties offered reasonable interpretations of a collective bargaining agreement that gave full effect to one clause and qualified the other was sufficient to establish that the contract was ambiguous and that the trial court should have considered extrinsic evidence. *Stewart v. KHD Deutz of Am., Corp.*, 980 F.2d 698 (11th Cir. 1993), cert. denied, 519 U.S. 930, 117 S. Ct. 300, 136 L. Ed. 2d 218 (1996).

Not admissible if contract unambiguous. — Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of

the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence, pursuant to O.C.G.A. §§ 13-2-2(1), 24-3-1(b), 24-6-1, and 24-6-2; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. *Zaglin v. Atlanta Army Navy Store, Inc.*, 275 Ga. App. 855, 622 S.E.2d 73 (2005).

Life insurance beneficiary designation form. — Trial court erred by granting summary judgment to a child in a suit brought by a sibling seeking a determination that the sibling was the sole beneficiary of their parent's life insurance policy as the sibling sufficiently alleged fraud and/or forgery with regard to a second beneficiary designation form allegedly signed by the parent. As such, the trial court should have permitted the sibling to introduce two affidavits that supported the sibling's allegations that the second beneficiary designation form was void. *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, § 329 et seq. 29A Am. Jur. 2d, Evidence, § 1104.

C.J.S. — 32A C.J.S., Evidence, §§ 1125 et seq., 1130 et seq., 1148 et seq., 1207, 1211, 1212, 1216, 1241 et seq., 1247, 1249 et seq., 1250, 1270, 1271.

ALR. — Parol evidence to prove title to real property when the title is only collaterally involved, 1 ALR 1143.

Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 11 ALR 637; 22 ALR 527; 35 ALR 1120; 54 ALR 999; 92 ALR 721.

Parol evidence rule as applied to lease, 25 ALR 787; 88 ALR 1380; 151 ALR 279.

Parol evidence rule as applied to escrow agreement, 49 ALR 1529.

Parol evidence in relation to assumption of mortgage debt by grantee of mortgaged property, 50 ALR 1220; 143 ALR 548.

Parol evidence rule as applicable to agreement for improvement or alterations by vendor of real property, 68 ALR 245.

Parol evidence rule as applied to letters or other informal writings not purporting to be the agreement itself, 68 ALR 1251.

Admissibility of parol evidence of contents of lost certificate of protest, 75 ALR 134.

Parol evidence rule as affecting extrinsic evidence to show or to negative usury, 82 ALR 1199; 104 ALR 1261.

Admissibility of parol or extrinsic evidence to show promise of employment or other consideration not embodied in written release of claim for bodily injury or death, 92 ALR 248.

Admissibility of parol or extrinsic evidence to alter or supplement written records of local legislative bodies, 98 ALR 1229.

"Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 ALR 625.

Exception to rule of admissibility of parol evidence to show that deed absolute on its

face was intended as a mortgage, 111 ALR 448.

Duty of federal courts to follow decisions of state courts as to the so-called "parol evidence rule"; and conflict of laws as to that rule, 141 ALR 1043.

Application and effect of parol evidence rule as determinable upon the pleading, 10 ALR2d 720.

Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 ALR2d 1227.

Parol evidence to show duration of written contract for support or maintenance, 14 ALR2d 897.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Parol evidence rule as applied to deposit of funds in name of depositor and another, 33 ALR2d 569.

Parol evidence rule as applied to written guaranty, 33 ALR2d 960.

Applicability of parol evidence to written listing agreement of real estate broker, 38 ALR2d 542.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificate of deposit, or similar instruments, 42 ALR2d 600.

Admissibility of parol evidence of election officials to impeach election returns, 46 ALR2d 1385.

Admissibility of parol evidence as to proceedings at meetings of stockholders or di-

rectors of private corporations or associations, 48 ALR2d 1259.

Parol evidence to show that lease of personality, absolute on its face, is conditional sale, 57 ALR2d 1076.

Applicability of parol evidence rule to agreement between stockbroker and customer, 60 ALR2d 1135.

Admissibility of parol evidence with respect to reservations or exceptions upon conveyance of real property, 61 ALR2d 1390.

Admissibility of parol evidence as to limitation on cost structure in builder's action on written cost-plus-fee construction contract, 84 ALR2d 1324.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations, 94 ALR2d 570.

Applicability of parol evidence rule in favor of or against one not a party to contract of release, 13 ALR3d 313.

Parol exception of fixtures from conveyance or lease, 29 ALR3d 1441.

Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 ALR3d 249.

Admissibility of evidence to establish oral antenuptial agreement, 81 ALR3d 453.

Liability in tort for interference with physician's contract or relationship with hospital, 7 ALR4th 572.

24-6-2. Proof of unwritten portions of contract admissible where not inconsistent.

If the writing does not purport to contain all the stipulations of the contract, parol evidence shall be admissible to prove other portions thereof not inconsistent with the writing; so collateral undertakings between parties of the same part among themselves would not properly be looked for in the writing. (Orig. Code 1863, § 3726; Code 1868, § 3750; Code 1873, § 3803; Code 1882, § 3803; Civil Code 1895, § 5204; Civil Code 1910, § 5791; Code 1933, § 38-504.)

JUDICIAL DECISIONS

Requirements for application. — To bring a case within the rule admitting parol evidence to complete an entire agreement of

which a writing is only a part, two things are essential. First, the writing must appear on inspection to be an incomplete contract; and

second, the parol evidence must be consistent with and not contradictory of the written instrument. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S.E. 485, 81 Am. St. R. 28 (1900); *McCreary v. Acton*, 29 Ga. App. 162, 114 S.E. 230 (1922). See also *Rauschenberg v. Peebles*, 30 Ga. App. 384, 118 S.E. 409 (1923); *Bowen v. Swift & Co.*, 52 Ga. App. 793, 184 S.E. 625 (1936); *Harden v. Orr*, 219 Ga. 54, 131 S.E.2d 545 (1963).

Writing must have essential elements of contract. — While it is true that parol evidence as to all attendant and surrounding facts and circumstances may be admitted to explain ambiguities in a written contract and that if it appears from the contract itself that it was not intended that the instrument should embrace the entire agreement, parol evidence is admissible to set up collateral agreements not inconsistent with the terms of the writing, in order for these principles of law to have application, the instrument relied on must embrace within itself the essential elements of a contract. *Jones v. Knight Mercantile Co.*, 51 Ga. App. 57, 179 S.E. 569 (1935).

Mere unsigned slip of paper, although in the handwriting of the president of the plaintiff corporation, containing only the words "Contract price, \$2,950 — J.A. Glass, carpenter, San Verner, plumber and elect," wholly failed to disclose the subject matter of the alleged contract, did not purport to bind anyone with reference thereto, and cannot be construed as such an instrument as, when aided by parol, would constitute a binding agreement. *Jones v. Knight Mercantile Co.*, 51 Ga. App. 57, 179 S.E. 569 (1935).

Contracts within the statute of frauds. — Parol evidence rule does not apply to contracts covered by the statute of frauds. *Douglass v. Bunn*, 110 Ga. 159, 35 S.E. 339 (1900); *Shinall Bros. v. Skelton*, 28 Ga. App. 527, 112 S.E. 163 (1922).

Provision of O.C.G.A. § 24-6-2 that if a writing does not purport to be entire agreement between parties, parol evidence is admissible to prove other portions thereof not inconsistent with the writing, is inapplicable to a contract of guaranty, because such contracts are required to be entirely in writing under O.C.G.A. § 13-5-30(2), statute of frauds. *Builder's Supply Corp. v. Taylor*, 164 Ga. App. 127, 296 S.E.2d 417 (1982).

In action to recover on contract of guar-

anty, parol evidence was not admissible to prove identity of principal debtor, the identity not having been provided by subject written agreement. *Builder's Supply Corp. v. Taylor*, 164 Ga. App. 127, 296 S.E.2d 417 (1982).

Contract, partly oral and partly written, for a period of one year is valid and enforceable. *Empire Box, Inc. v. Moore*, 87 Ga. App. 57, 73 S.E.2d 63 (1952).

Collateral agreement which is inducement for written agreement. — Distinct, collateral oral agreement that is consistent with and usually forms part of the consideration or inducement for the second written agreement, may be established by parol evidence. *Diamondhead Corp. v. Robinson*, 144 Ga. App. 60, 240 S.E.2d 572 (1977).

When the evidence showed the existence of a separate and independent collateral agreement, the renewal of which, for three consecutive years, induced appellee to renew a written agreement with appellant and that appellant honored this agreement, appellant could not now keep the agreement from evidence under the sanction of the parol evidence rule. *Diamondhead Corp. v. Robinson*, 144 Ga. App. 60, 240 S.E.2d 572 (1977).

Filling blanks. — Parol evidence is admissible to fill blanks in the writing not inconsistent with the writing itself. *Westbrook v. Griffin*, 24 Ga. App. 808, 102 S.E. 453 (1920).

When, in a special contract in writing between a common carrier and a shipper of livestock, the amount of freight is left blank, the blank may be filled by parol evidence showing the actual amount contracted for and paid by the shipper. *Georgia R.R. & Banking Co. v. Reid*, 91 Ga. 377, 17 S.E. 934 (1893).

Subscription for stock. — Parol evidence rule applies to a written subscription for stock. *Hendrix v. Academy of Music*, 73 Ga. 437 (1884).

Receipt given by attorney. — Parol evidence rule applies to a receipt given by an attorney for a note placed in the attorney's hands for collection. *Barclay v. Hopkins*, 59 Ga. 562 (1877).

Contract excluding other representations. — If a written contract of sale stated that the writing was "made under inducements and representations herein expressed and no

others," it could not be proved by parol that plaintiff's agent made any other representation or warranty. *Shinall Bros. v. Skelton*, 28 Ga. App. 527, 112 S.E. 163 (1922).

Unambiguous maturity date not waived. — O.C.G.A. § 24-6-2 permits parol evidence of collateral undertakings between the parties only when the writing does not purport to contain all the stipulations of the contract and only when such evidence is not inconsistent with the writing. In this case, defendant's testimony that the maturity date was waived by parol agreement is directly inconsistent with the certain and unambiguous maturity date stipulated in the written note. Moreover, the general rule prohibiting parol evidence may not be avoided on the theory of a confidential or fiduciary relationship between the parties. *Barton v. Marubeni Am. Corp.*, 204 Ga. App. 346, 419 S.E.2d 342 (1992).

Letter reciting writer's understanding of oral contract. — Letter written by vice-president of corporation reciting the vice-president's understanding of the oral contract of employment between president of corporation and recipient of letter, since it did not purport to be the contract itself, did not prevent the use of parol evidence to show what the full contract was. *Marston v. Downing Co.*, 73 F.2d 94 (5th Cir. 1934).

When written part may be varied. — When a contract is entire, part of which is in writing and part in parol, the written part cannot be varied by parol evidence in the absence of fraud, accident, or mistake. *Rauschenberg v. Peeples*, 30 Ga. App. 384, 118 S.E. 409 (1923).

Contract held complete on its face. — See *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945) (timber lease).

Effect of part performance. — Acceptance of the benefits and part performance of the contract by plaintiff would preclude the defendant from attacking the alleged oral portion of a contract which appeared to be an explanation of the entire contract rather than conflicting with any written provisions. *Consumers Fin. Corp. v. Lamb*, 217 Ga. 359, 122 S.E.2d 101 (1961).

Admitting contract in answer. — When the defendants admitted in their answer that the written order and notes constituted the entire contract, the defendants were precluded from offering evidence of any other con-

tract. *Shinall Bros. v. Skelton*, 28 Ga. App. 527, 112 S.E. 163 (1922).

Assignment of note to secure assignor's debts to bank. — For application of O.C.G.A. § 24-6-2 to situation where debts secured by assignment of note included only assignor's debts on notes signed by assignor as maker or also to notes on which assignor might be liable as an endorser or accommodation party, see *National City Bank v. Busbin*, 175 Ga. App. 103, 332 S.E.2d 678 (1985).

Promissory note held complete. — If the promissory note constituted an unconditional promise to pay, defendants were prohibited from proving lender's alleged oral promise which, if proven, would clearly have contradicted the terms of the note requiring payment. *Devin Lamplighter, Ltd. v. American Gen. Fin., Inc.*, 206 Ga. App. 747, 426 S.E.2d 645 (1992).

Written part may not be varied. — Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence, pursuant to O.C.G.A. §§ 13-2-2(1), 24-3-1(b), 24-6-1, and 24-6-2; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. *Zaglin v. Atlanta Army Navy Store, Inc.*, 275 Ga. App. 855, 622 S.E.2d 73 (2005).

Cited in *Finney v. Cadwallader*, 55 Ga. 75 (1875); *Claffin & Co. v. Duncan, Johnston & Co.*, 74 Ga. 348 (1884); *Napier v. Strong*, 19 Ga. App. 401, 91 S.E. 579 (1917); *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934); *Shubert v. Speir*, 201 Ga. 20, 38 S.E.2d 835 (1946); *Craig v. Augusta Roofing & Metal Works, Inc.*, 78 Ga. App. 514, 51 S.E.2d 565 (1949); *Davis v. Hunter & Co.*, 79 Ga. App. 624, 54 S.E.2d 725 (1949); *Millender v. Looper*, 82 Ga. App. 563, 61 S.E.2d 573 (1950); *Jones v.*

Ely, 95 Ga. App. 4, 96 S.E.2d 536 (1957); S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777 (1964); Reynolds v. Long, 115 Ga. App. 182, 154 S.E.2d 299 (1967); McTerry v. Free For All Missionary Baptist Church No. 1, 129 Ga. App. 724, 200 S.E.2d 915 (1973); Ansley v. Forest Servs., Inc., 135 Ga. App. 745, 218 S.E.2d 914

(1975); Building Assocs. v. Crider, 141 Ga. App. 825, 234 S.E.2d 666 (1977); First Presbyterian Church v. Price, 248 Ga. 38, 280 S.E.2d 830 (1981); Wages v. Mount Harmony Mem. Gardens, Inc., 189 Ga. App. 99, 375 S.E.2d 57 (1988); Choice Hotels Int'l, Inc. v. Ocmulgee Fields, Inc., 222 Ga. App. 185, 474 S.E.2d 56 (1996).

RESEARCH REFERENCES

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C.J.S. — 32A C.J.S., Evidence, §§ 1176, 1195, 1196, 1219, 1243, 1244, 1245, 1255 et seq., 1269.

ALR. — Competency of parol evidence to show a money consideration additional to that stipulated in a written contract, 12 ALR 354.

Competency of parol evidence to vary, contradict, or add to terms of ticket or token issued by carrier for transportation or accommodation of passenger, 62 ALR 655.

Parol evidence rule: tests for determining whether entire agreement is embodied in the writing (rule of integration), 70 ALR 752.

Admissibility of parol or extrinsic evidence to show promise of employment or other consideration not embodied in written release of claim for bodily injury or death, 92 ALR 248.

Admissibility of parol or extrinsic evidence to alter or supplement written records of local legislative bodies, 98 ALR 1229.

“Contractual” consideration as regards parol evidence rule, 100 ALR 17.

Parol evidence rule as applied to rights or

liabilities of coparties to contract as between themselves or their privies, 129 ALR 673.

Election by beneficiary to take under or against will as predicable upon initiation of, or participation in, court proceedings, 166 ALR 316.

Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 ALR2d 78.

Parol evidence to show duration of written contract for support or maintenance, 14 ALR2d 897.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Admissibility of oral agreement as to specific time for performance where written contract is silent, 85 ALR2d 1269.

Admissibility of oral agreement respecting duration of employment or agency where written contract is silent, 85 ALR2d 1331.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

24-6-3. Contemporaneous writings explaining each other; parol evidence explaining ambiguities.

(a) All contemporaneous writings shall be admissible to explain each other.

(b) Parol evidence shall be admissible to explain all ambiguities, both latent and patent. (Orig. Code 1863, § 3724; Code 1868, § 3748; Code 1873, § 3801; Code 1882, § 3801; Civil Code 1895, § 5202; Civil Code 1910, § 5789; Code 1933, § 38-502.)

Law reviews. — For article, “Supplementing Written Agreements: Restating the Parol

Evidence Rule in Terms of Credibility and Relative Fault,” see 34 Emory L.J. 93 (1985).

For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WRITINGS EXPLAINING EACH OTHER

General Consideration

One writing purports to contain the entire understanding. — Contemporaneous writings should be considered even if one of the writings purports to contain the entire understanding of the parties in the transaction contemplated and even if the writings are not cross-referenced. *Duke v. KHD Deutz of Am. Corp.*, 221 Ga. App. 452, 471 S.E.2d 537 (1996).

Affidavits admissible. — Summary judgment was proper and parol evidence was admissible to show the meaning of a separation agreement when a former wife's affidavits established that four certificates of deposit were purchased with the proceeds from the sale of her premarital property and were her separate property and decedent husband's redemption of one of the CD's was in contravention of their separation agreement. *Bradley v. Frank*, 264 Ga. App. 772, 592 S.E.2d 138 (2003).

Admissibility of parol evidence of site plan to show nonexistence of use restriction. — In a land use restriction action, a trial court erred by failing to consider a 1997 site plan, which allowed the parties to seek to amend the use of the land at issue and future development of the land; therefore, the trial court erred in enjoining a developer from constructing condominium towers since no such use restriction existed. *CPI Phipps, LLC v. 100 Park Ave. Partners, L.P.*, 288 Ga. App. 614, 654 S.E.2d 690 (2007), cert. denied, 2008 Ga. LEXIS 286 (Ga. 2008).

Cited in *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930); *E. Fredericks, Inc. v. Felton Beauty Supply Co.*, 58 Ga. App. 320, 198 S.E. 324 (1938); *Craig v. Augusta Roofing & Metal Works, Inc.*, 78 Ga. App. 514, 51 S.E.2d 565 (1949); *Taylor v. Estes*, 85 Ga. App. 716, 70 S.E.2d 82 (1952); *S. & S. Bldrs., Inc. v. Equitable Inv. Corp.*, 219 Ga. 557, 134 S.E.2d 777 (1964); *C & A Land Co. v. General Mechanical Corp.*, 117

Ga. App. 378, 160 S.E.2d 606 (1968); *Bank Bldg. & Equip. Corp. v. Georgia State Bank*, 132 Ga. App. 762, 209 S.E.2d 82 (1974); *McBrayer v. National City Bank*, 493 F.2d 463 (5th Cir. 1974); *Morris v. Padgett*, 233 Ga. 750, 213 S.E.2d 647 (1975); *Sportsman Camping Ctrs. of Am., Inc. v. Bagwell*, 140 Ga. App. 312, 231 S.E.2d 118 (1976); *Peachtree Mtg. Corp. v. Northside Realty Assocs.*, 140 Ga. App. 541, 231 S.E.2d 350 (1976); *Manuel v. Manuel*, 239 Ga. 685, 238 S.E.2d 328 (1977); *In re Smith*, 436 F. Supp. 469 (N.D. Ga. 1977); *Buckner v. Mallett*, 245 Ga. 245, 264 S.E.2d 182 (1980); *Westmoreland v. Beutell*, 153 Ga. App. 558, 266 S.E.2d 260 (1980); *Hodsdon v. Whitworth*, 153 Ga. App. 783, 266 S.E.2d 561 (1980); *Chambley v. Georgia Steel, Inc.*, 617 F.2d 144 (5th Cir. 1980); *Ameritrust Co. v. White*, 73 F.3d 1553 (11th Cir. 1996); *Quintanilla v. Rathur*, 227 Ga. App. 788, 490 S.E.2d 471 (1997); *Al-Madinah Petro., Inc. v. Manjee*, 239 Ga. App. 628, 521 S.E.2d 681 (1999); *Sofran Peachtree City, L.L.C. v. Peachtree City Holdings, L.L.C.*, 250 Ga. App. 46, 550 S.E.2d 429 (2001); *Nguyen v. Talisman Roswell, L.L.C.*, 262 Ga. App. 480, 585 S.E.2d 911 (2003).

Writings Explaining Each Other

Contract is not necessarily contained in a single paper, and law provides that all contemporaneous writings shall be admissible to explain each other. *Manry v. Hendricks*, 66 Ga. App. 442, 18 S.E.2d 97 (1941).

Legal effect of two writings. — If it takes both writings to make the real contract of the parties, the legal effect is the same as if one paper held the contents of the note and the contemporaneous writing. *Jewell v. Norrell*, 66 Ga. App. 11, 16 S.E.2d 797 (1941).

Terms of contract cannot be varied by parol. — When a written contract is expressly entered into on terms and conditions

expressed and stated in two papers which constituted but one entire written contract, a party cannot change such terms and conditions in the written contract and set up terms and conditions by parol which are contrary to the written terms. *Jewell v. Norrell*, 66 Ga. App. 11, 16 S.E.2d 797 (1941).

“Contemporaneous” means, literally, according to Webster, “living, existing, or occurring at the same time,” but numerous authorities could be cited to the effect that the word does not connote perfect or absolute coincidence in point of time. One thing is contemporaneous with a given transaction when it is so related in point of time as reasonably to be said to be a part of such transaction. *Manry v. Hendricks*, 66 Ga. App. 442, 18 S.E.2d 97 (1941).

Letters to explain note. — When a promissory note did not express within itself the entire contract between the parties, but the remainder thereof was contained in letters written by the parties in connection with the making of the note, such letters were admissible in evidence in a suit between the maker and one who took the note after maturity. *Marietta Sav. Bank v. Janes*, 66 Ga. 286 (1881).

Documents properly construed together. — Trial court correctly evaluated an asset purchase agreement between a buyer and the owners of a dialysis center, including a doctor’s spouse, a covenant not to compete, and a medical director agreement between a doctor and a buyer, all signed the same day, together under O.C.G.A. § 24-6-3 as related to the sale of a business as the doctor was integral to the continued success of the center, and the doctor’s execution of the medical director agreement was integral to the execution of the asset purchase agreement. *Martinez v. DaVita, Inc.*, 266 Ga. App. 723, 598 S.E.2d 334 (2004).

In a breach of contract action arising from a guaranty agreement between a guarantor and a retail space owner, the trial court properly granted summary judgment in the owner’s favor as the court properly construed contemporaneous written agreements, which were executed on the same date, at the same time, and at the same location, despite a misnomer contained therein, as such did not render the agreement unenforceable. Thus, it was not erroneous for the court to correct an obvious

error in the agreement, specifically, the failure to substitute one entity’s name for another as the parties intended, and interpret the guaranty accordingly. *C.L.D.F., Inc. v. Aramore, LLC*, 290 Ga. App. 271, 659 S.E.2d 695 (2008), cert. denied, 2008 Ga. LEXIS 668 (Ga. 2008).

Description of property in separate writing. — When at the time of making a written contract for the sale of coal, the parties also executed a contemporaneous writing as to the kind of coal to be furnished, both writings should be considered together to determine the true intent of the parties. *National Rosin Oil & Size Co. v. South Atl. Coal Co.*, 23 Ga. App. 87, 97 S.E. 559 (1918).

Note, warranty deed, and agreement concerning a real estate transaction were all dated on the same day; therefore, the note and deed could be considered to establish the missing property description in the agreement. *Owenby v. Holley*, 256 Ga. App. 13, 567 S.E.2d 351 (2002).

Deed construed with petition. — Deed by a wife to her husband was construed together with a petition that she be allowed to execute the deed. *McCreary v. Gewinner*, 103 Ga. 528, 29 S.E. 960 (1898).

Use restriction in easement not applicable to deeds. — As there were no restrictions on use in warranty deeds that a property owner conveyed to a city, a restrictive use that was in a contemporaneously-executed easement could not be imposed on the deeds pursuant to O.C.G.A. § 24-6-3(a). *White House Inn & Suites, Inc. v. City of Warm Springs*, 285 Ga. 322, 676 S.E.2d 178 (2009).

Pleading contemporaneous writings. — It is not intimated in law that in order for contemporaneous writings to be admitted in evidence, even though the writings may govern and control the contract, the writings must be pleaded in the plaintiff’s petition. *International Harvester Co. of Am. v. Morgan*, 19 Ga. App. 716, 92 S.E. 35 (1917).

Contemporaneous writings need not be cross-referenced. — If all the necessary terms of an agreement are contained in signed contemporaneous writings, the statutory requirements and purpose of the statute of frauds have been met whether or not the writings are cross-referenced. *Baker v. Jellibbeans, Inc.*, 252 Ga. 458, 314 S.E.2d 874 (1984); *Harris v. Distinctive Bldrs., Inc.*, 249 Ga. App. 686, 549 S.E.2d 496 (2001).

Writings Explaining Each Other (Cont'd)

Parol evidence is admissible to explain an ambiguity in a writing. *Chero-Cola Bottling Co. v. Southern Express Co.*, 29 Ga. App. 656, 116 S.E. 325 (1923); *Commercial Credit Co. v. Lewis*, 59 Ga. App. 144, 200 S.E. 566 (1938); *Hanson v. Stern*, 102 Ga. App. 341, 116 S.E.2d 237 (1960); *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975); *Fruin-Colnon Corp. v. Air Door, Inc.*, 157 Ga. App. 804, 278 S.E.2d 708 (1981).

Parol evidence is admissible to explain an ambiguity in a written contract, although such evidence is inadmissible to add to, take from, or vary the writing itself. *Andrews v. Skinner*, 158 Ga. App. 229, 279 S.E.2d 523 (1981).

If parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary the written instrument. *Andrews v. Skinner*, 158 Ga. App. 229, 279 S.E.2d 523 (1981).

Language clear and unambiguous may not be contradicted by parol evidence of custom, surrounding circumstances, or intent. *Daniel & Daniel, Inc. v. Cosmopolitan Co.*, 146 Ga. App. 200, 245 S.E.2d 885 (1978).

When the words and phrases are not technical nor in any sense ambiguous, a witness cannot, as an expert or otherwise, give the witness's opinion of the meaning of the instrument. *Chero-Cola Bottling Co. v. Southern Express Co.*, 29 Ga. App. 656, 116 S.E. 325 (1923).

Parol evidence inadmissible in unambiguous contract. — Rule that the construction put upon the contract by the parties before or after the contract's execution may be considered in arriving at the contract's true meaning does not apply to an unambiguous contract. *Alexander Film Co. v. Brittain*, 63 Ga. App. 384, 11 S.E.2d 66 (1940).

If the provisions of a deed to land are plain and unambiguous, parol evidence is not admissible for the purpose of showing an intent at variance with the plain terms of the deed. *Rowland v. Sumner*, 201 Ga. 317, 39 S.E.2d 655 (1946).

In the absence of fraud, parol evidence is not admissible to overcome the express unambiguous language of a contract. *Wilson v. Sheppard*, 136 Ga. App. 475, 221 S.E.2d 671 (1975).

Parol evidence cannot be employed to add to, take from, or vary the terms of the written instrument. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975); *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 263 S.E.2d 138 (1980).

When the contract is complete on the contract's face and the evidence offered to explain the ambiguity contradicts the terms of the written instrument, parol evidence should not be admitted. *American Cyanamid Co. v. Ring*, 248 Ga. 673, 286 S.E.2d 1 (1982).

"Ambiguity" defined. — "Ambiguity" is defined as duplicity, indistinctness, an uncertainty of meaning or expression. *Novelty Hat Mfg. Co. v. Wiseberg*, 126 Ga. 800, 55 S.E. 923 (1906); *Wood v. Phoenix Ins. Co.*, 199 Ga. 461, 34 S.E.2d 688 (1945).

"Ambiguity" also signifies doubtful or uncertain nature; wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful purport; open to various interpretations. *Novelty Hat Mfg. Co. v. Wiseberg*, 126 Ga. 800, 55 S.E. 923 (1906).

Ambiguity refers to words or phrases of duplicitous, indistinct, or uncertain meanings which may fairly be understood in more ways than one. *Contractors Mgt. Corp. v. McDowell-Kelley, Inc.*, 136 Ga. App. 116, 220 S.E.2d 473 (1975).

Intent of parties. — If a written contract is ambiguous as to the intention of the parties, evidence, otherwise competent, of acts and transactions between the parties, tending to show the construction the parties themselves put upon the agreement when the agreement was executed, whether occurring prior to or subsequently to the execution of the contract, is admissible. *Armistead v. McGuire*, 46 Ga. 232 (1872); *Georgia Iron & Coal Co. v. Ocean Accident & Guarantee Corp.*, 133 Ga. 326, 65 S.E. 775 (1909).

Even if the instrument is ambiguous, the testimony of one party as to that party's intent, undisclosed to the other, is not competent. *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

If the language of the contract defining

what interest the petitioners were buying is ambiguous, the court does not err in admitting testimony of the petitioners of what the petitioners thought the petitioners were buying. *Manning v. Carroll*, 204 Ga. 100, 48 S.E.2d 737 (1948), later appeal, 206 Ga. 158, 56 S.E.2d 278 (1949).

Through the proper admission of parol evidence, the intent of the parties can be determined and any ambiguity present can be resolved by the jury in the trial. *Wright v. Piedmont Eng'r & Constr. Corp.*, 106 Ga. App. 401, 126 S.E.2d 865 (1962).

If a release is ambiguous on the question of whether a plaintiff released a defendant from claims arising out of defendant's relationship with a corporation, parol evidence may be introduced on the issue of the parties' intent. *Southern Stone Co. v. Singer*, 665 F.2d 698 (5th Cir. 1982).

Trial court was authorized to construe the commercial lease and the shareholder buyout agreements between a lessor and a lessee together as multiple documents executed during the course of a single transaction; in so doing, the court's finding that the agreement was linked to the lease's 10-year term upheld the contract as a whole, reflected the parties' intent as expressed in the testimony and documentary evidence offered at trial, and was supported by all the attendant and surrounding circumstances proved in this case. *Allen v. Harkness Stone Co.*, 271 Ga. App. 397, 609 S.E.2d 647 (2004).

Contract of goods over \$50.00. — Law applies to a contract of goods over \$50.00, even in view of the statute of frauds. *Wilson v. Coleman & Ray*, 81 Ga. 297, 6 S.E. 693 (1888).

Contract with contradictory terms. — When a contract embodied in two separate written instruments, simultaneously executed and delivered, contains contradictory and ambiguous terms, parol evidence is admissible to explain the contradiction and remove the ambiguity. *Cable Co. v. McFeeley*, 7 Ga. App. 435, 66 S.E. 1103 (1910).

Where the clause of sales contract referring to the amount of the purchase price is rendered ambiguous by contradictory statements as to the amount, the trial judge does not err in permitting defendant purchaser to testify, in explanation of the ambiguity,

that at the time the defendant entered into the contract, the defendant had a conversation with the seller's agent and that it was distinctly understood that the items of insurance, carrying charges, and interest were included. *Wood v. Phoenix Ins. Co.*, 199 Ga. 461, 34 S.E.2d 688 (1945).

If a written contract incorporates an ambiguous condition, parol evidence is admissible to aid in the construction of the condition. *Columbia Nitrogen Corp. v. Dean's Power Oil Co.*, 136 Ga. App. 879, 222 S.E.2d 602 (1975).

Effect of "whole agreement" clause in contract. — If a contract is in fact ambiguous as to some matters, a stipulation in the contract to the effect that the contract expresses "the whole agreement" and that there is no agreement or modification of any kind in connection therewith that is not expressly set forth therein, will not prevent explanation in the usual manner. *Wood v. Phoenix Ins. Co.*, 199 Ga. 461, 34 S.E.2d 688 (1945); *Baker v. Jellibeans, Inc.*, 252 Ga. 458, 314 S.E.2d 874 (1984).

Abbreviations. — When a writing is obscure or ambiguous, by reason of an unfamiliar abbreviation, what it means is for the jury and to arrive at the meaning, clear and intelligible expressions in the instrument may be compared with facts otherwise proved. *Holland v. Long & Bro.*, 57 Ga. 36 (1876).

Letters "O.K." being ambiguous, their meaning may be explained by parol evidence. *Penn Tobacco Co. v. Leman & Co.*, 109 Ga. 428, 34 S.E. 679 (1899).

Capacity of signer. — When there is a written contract, not under seal and not containing a so-called integration or "entire agreement" clause, parol is admissible to show the capacity in which one signed such agreement. *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977).

Descriptions in instruments. — If, for want of fullness of statement, the writing be indefinite or uncertain, parol evidence is admissible, not to vary, add to, or take from the writing, but to explain and so illuminate the writing as to make the real intention of the parties apparent. So parol evidence is admissible to explain ambiguous descriptive terms in a written instrument and to apply the same to their subject matter. *Georgia Iron & Coal Co. v. Ocean Accident & Guar-*

Writings Explaining Each Other (Cont'd)

antee Corp., 133 Ga. 326, 65 S.E. 775 (1909). See also *Walnut Creek Milling Co. v. Smith Bros. Co.*, 178 Ga. 341, 173 S.E. 95, answer conformed to, 49 Ga. App. 116, 174 S.E. 255 (1934).

When a grant was issued to a name and there was no such person, this made a case of latent ambiguity, and aliunde evidence was admissible to show who was the person meant. *Bowen v. Slaughter*, 24 Ga. 338, 71 Am. Dec. 135 (1858).

It is admissible to apply, by parol testimony, the description given in an instrument so as to ascertain the particular person or persons intended to be embraced in that description. Indeed, parol evidence is admissible to explain all such ambiguities. *Houston v. Bryan*, 78 Ga. 181, 1 S.E. 252, 6 Am. St. R. 252 (1887).

Parol evidence was admissible to show that contract for sale of "Snoflour" contemplated a grade of flour equal to another brand with which the vendee was familiar. *Walnut Creek Milling Co. v. Smith Bros. Co.*, 178 Ga. 341, 173 S.E. 95, answer conformed to, 49 Ga. App. 116, 174 S.E. 255 (1934).

Description in lease. — If a lease contains a general descriptive phrase, the meaning of which was presumably well known to both the contracting parties, parol evidence is admissible for the purpose of applying the description to the subject matter, but any attempt to prove that at the time of the execution of the contract the parties had an oral understanding as to the meaning of such phrase would clearly violate the statute of frauds, as well as the parol evidence rule. *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947).

Descriptions in real property transactions.

— If there is a discrepancy as to a party's name in a plat and grant, this is a patent ambiguity and explainable by parol evidence. *Ferrell v. Hurst*, 68 Ga. 132 (1881).

If the description in a deed is ambiguous but sufficient to furnish a key to the boundary, extrinsic evidence may be used to correctly apply the description to the true boundary intended by the parties. *Miller v. Rackley*, 199 Ga. 370, 34 S.E.2d 438 (1945).

When the descriptive averments contained in a deed are sufficient to furnish a key whereby the land which the grantor

intended to convey may be ascertained, parol evidence which does not add to, enlarge, or in any way change the description is admissible for the purpose of identifying the conveyed land. *Gainsville M.R.R. v. Tyner*, 204 Ga. 535, 50 S.E.2d 108 (1948). See also *Haygood v. Duncan*, 204 Ga. 540, 50 S.E.2d 214 (1948).

If a property description in a written contract is ambiguous, in that it can be interpreted as referring to more than one piece of property, parol evidence is admissible to explain the ambiguity and the contract is not rendered unenforceable for vagueness. *Tuggle v. Wilson*, 248 Ga. 335, 282 S.E.2d 110 (1981).

Claim of title in deed. — Any ambiguities in a deed may be explained by parol, if the evidence can be applied to elucidate the claim of title. *Daniels v. Cagle*, 180 Ga. 853, 181 S.E. 178 (1935).

Receipts. — Parol evidence was admissible to show whether the parties intended the receipt given to the defendant by the assignee of the leased contract, to be a settlement of all future liability of the defendants for rent, or was only meant as a discharge of whatever the assignee could claim by the transfer to them, and was not to affect the rights of the lessor under a reassignment of the lease to the lessor. *Bell v. Boyd & Brumby*, 53 Ga. 643 (1875).

Whether a receipt of a promissory note amounts to the payment of a preexisting debt depends upon the intention of the parties. If such intention can be gathered with certainty from the papers themselves, resort need not be had to the attending circumstances. If the papers are ambiguous, parol evidence is admissible to establish intent. *Hall's Self-Feeding Cotton Gin Co. v. Black*, 71 Ga. 450 (1883).

Receipt in full given by the administrator de bonis non with the will annexed, to the administratrix of the deceased executor, was open to explanation in view of the parol evidence rule. *Watts v. Baker*, 78 Ga. 622, 3 S.E. 773 (1887).

Release. — Parol evidence is admissible to explain ambiguous language in a release. In determining the existence of an ambiguity in a release, reference is permitted only to the face of the document. *Southern Stone Co. v. Singer*, 665 F.2d 698 (5th Cir. 1982).

Bill of sale. — Court erred in admitting parol evidence that a "bill of sale" was not

intended to transfer ownership of a boat, the bill being executed on the regular required Coast Guard form, and all language therein relating to a sale and conveyance, the other provisions merely relating to the method of payment. *Peterson v. Lexington Ins. Co.*, 753 F.2d 1016 (11th Cir. 1985).

Construction of insurance policy is for the court, generally. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

Auctioneer's memorandum of sale. — Rule as to the admissibility of parol evidence to explain a patent ambiguity in a deed to land applies with equal force to an auctioneer's memorandum of the sale of land. *Mohr v. Dillon*, 80 Ga. 572, 5 S.E. 770 (1888); *Wilson v. Coleman & Ray*, 81 Ga. 297, 6 S.E. 693 (1888).

Submission to award. — Ambiguities in a submission to award which describes the subject matter of controversy are explainable by parol evidence. *Riley v. Hicks*, 81 Ga. 265, 7 S.E. 173 (1888).

Whether lease included in contract. — Parol evidence was admissible to explain an ambiguity as to whether the lease of a building was also included in the terms of the contract sued on. *Vaughn v. Castleberry*, 24 Ga. App. 496, 101 S.E. 299 (1919).

A lease ambiguous as to time may be explained by parol. *Carmichael v. Brown*, 97 Ga. 486, 25 S.E. 357 (1895).

If the date of an entry is uncertain because of illegibility of the handwriting, this would constitute an ambiguity, and make a jury question. *Bolton v. Keys*, 38 Ga. App. 573, 144 S.E. 406 (1928).

Particular phrases. — Expression, "value received," is a patent ambiguity, and the expression may be explained, and failure of consideration shown by parol. *Pitts v. Allen*, 72 Ga. 69 (1883); *Waller v. Martin-Senour Co.*, 45 Ga. App. 808, 166 S.E. 53 (1932); *Building Assocs. v. Crider*, 141 Ga. App. 825, 234 S.E.2d 666 (1977).

One clause in a written contract providing for the payment of a certain sum "as hereafter agreed," parol evidence was admissible to explain the ambiguity, and to show not only the date but the conditions, if any, on which such payment was to be made. *Morrison v. Dickey*, 119 Ga. 698, 46 S.E. 863 (1904). See also *Morrison v. Dickey*, 122 Ga. 417, 50 S.E. 178 (1905).

Term "good cotton" was subject to parol explanation to show the term's meaning as used in the contract. *Ford & Co. v. Lawson*, 133 Ga. 237, 65 S.E. 444 (1909).

Determining meaning of ambiguous language. — If the language of an instrument in writing is ambiguous and may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the court will hear evidence as to the facts and surroundings, and decree according to the truth of the matter. *Irwin v. Young*, 212 Ga. 1, 90 S.E.2d 22 (1955).

Unpriced, unexecuted damages provision. — In a claim for damages resulting from delays in the performance of a construction contract, parol evidence was relevant to construe the intent of the parties to incorporate and be bound by an unexecuted contract form containing an unpriced damages provision. *Atlanta Economic Dev. Corp. v. Ruby-Collins, Inc.*, 206 Ga. App. 434, 425 S.E.2d 673 (1992).

Parol evidence inadmissible for guaranty. — Lessor was not entitled to recover on an equipment lease guaranty because the guaranty was unenforceable since it omitted essential elements and under O.C.G.A. § 24-6-3(a), the lease could not supply the missing elements since this required consideration of parol evidence, which was inadmissible for a contract required by the statute of frauds to be in writing. *Dabbs v. Key Equip. Fin., Inc.*, No. A10A0825, 2010 Ga. App. LEXIS 379 (Apr. 7, 2010).

Jury question. — As a general rule, the construction of a contract is a question for the court; but if the terms of a written instrument are ambiguous, the contract's meaning should be left to the jury. *Illges v. Dexter*, 77 Ga. 36 (1886).

Contracts, even when ambiguous, are to be construed by the court and no jury question is presented unless after application of applicable rules of construction an ambiguity remains. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

Effect of part performance. — Acceptance of the benefits and part performance of the contract by plaintiff would preclude the defendant from attacking the alleged oral portion of a contract which appeared to be an explanation of the entire contract

Writings Explaining Each Other (Cont'd)

rather than conflicting with any written provisions. *Consumers Fin. Corp. v. Lamb*, 217

Ga. 359, 122 S.E.2d 101 (1961).

Contract not ambiguous. — See *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 34 S.E.2d 839 (1945) (timber lease).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, §§ 329 et seq., 350, 356. 29A Am. Jur. 2d, Evidence, § 1145 et seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1207, 1221, 1246, 1248, 1265, 1266.

ALR. — Admissibility of parol evidence as to amount of commodity specified in written contract of sale, 8 ALR 747.

Parol evidence as to whether one whose name appears on the face of a note signed as a witness or as maker, 15 ALR 197.

Parol evidence rule as applied to lease, 25 ALR 787; 88 ALR 1380; 151 ALR 279.

Admissibility of parol evidence to explain ambiguity in description of land in deed or mortgage, 68 ALR 4.

“Contractual” consideration as regards parol evidence rule, 100 ALR 17.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 ALR 625.

Rule that latent ambiguities may be explained by parol evidence but that patent ambiguities may not, 102 ALR 287.

Admissibility of oral or extrinsic evidence on question of liability on bill of exchange, promissory note, or other contract where signature is followed by word or abbreviation

which may be either descriptive or indicative of contracting character, 113 ALR 1364.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 ALR 316.

Extrinsic evidence regarding character and size of trees contemplated by written timber contract or lease, 173 ALR 518.

Parol evidence to show duration of written contract for support or maintenance, 14 ALR2d 897.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 ALR2d 991.

Wills: admissibility of extrinsic evidence to determine whether fee or absolute interest, or only estate for life or years, was given, 21 ALR3d 778.

The parol evidence rule and admissibility of extrinsic evidence to establish and clarify ambiguity in written contract, 40 ALR3d 1384.

Admissibility of parol evidence to show whether guaranty of corporation's obligation was signed in officer's representative or individual capacity, 70 ALR3d 1276.

24-6-4. Circumstances surrounding execution of contracts.

The surrounding circumstances are always proper subjects of proof to aid in the construction of contracts. (Orig. Code 1863, § 3727; Code 1868, § 3751; Code 1873, § 3804; Code 1882, § 3804; Civil Code 1895, § 5205; Civil Code 1910, § 5792; Code 1933, § 38-505.)

Law reviews. — For article, “Supplementing Written Agreements: Restating the Parol

Evidence Rule in Terms of Credibility and Relative Fault,” see 34 Emory L.J. 93 (1985).

JUDICIAL DECISIONS

When statute applies. — Law applies only if a contract is of doubtful meaning; but a plain and unambiguous contract cannot be contradicted by parol. *Ward v. Campbell*, 73

Ga. 97 (1884); *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 263 S.E.2d 138 (1980).

Ambiguities are explainable by the surrounding circumstances. *Armistead v.*

McGuire, 46 Ga. 232 (1872); National Manufacture & Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408 (1934).

When the language of the written instrument may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the court will hear evidence as to the facts and surroundings. National Manufacture & Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408 (1934); Irwin v. Young, 212 Ga. 1, 90 S.E.2d 22 (1955).

Circumstances accompanying making of note. — Parol evidence was admissible to show the circumstances under which notes were made, and to explain the consideration and show the year in which the consideration appearing on the face of the notes was actually advanced. Anderson v. Brown, 72 Ga. 713 (1884); Camp v. Matthews, 143 Ga. 393, 85 S.E. 196 (1915).

Admissibility of parol evidence of site plan to show nonexistence of use restriction. — In a land use restriction action, a trial court erred by failing to consider a 1997 site plan, which allowed the parties to seek to

amend the use of the land at issue and future development of the land; therefore, the trial court erred in enjoining a developer from constructing condominium towers since no such use restriction existed. CPI Phipps, LLC v. 100 Park Ave. Partners, L.P., 288 Ga. App. 614, 654 S.E.2d 690 (2007), cert. denied, 2008 Ga. LEXIS 286 (Ga. 2008).

Improper admission. — If surrounding circumstances were improperly admitted, it was harmless error since substantially the same facts had already been established by the evidence of the plaintiff. Wells v. Gress, 118 Ga. 566, 45 S.E. 418 (1903).

Cited in Wilbur v. McNulty, 75 Ga. 458 (1885); Williamson-Inman & Co. v. Thompson, 53 Ga. App. 821, 187 S.E. 194 (1936); MacDougald Constr. Co. v. State Hwy. Dep't, 59 Ga. App. 708, 2 S.E.2d 197 (1939); Albany Fed. Sav. & Loan Ass'n v. Henderson, 200 Ga. 79, 36 S.E.2d 330 (1945); Wood v. Frank Graham Co., 91 Ga. App. 621, 86 S.E.2d 691 (1955); Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, §§ 351 et seq. 29A Am. Jur. 2d, Evidence, §§ 1112, 1150, 1151.

ALR. — Parol evidence rule; right to show fraud in inducement or execution of written contract, 56 ALR 13.

Competency of parol evidence to vary, contradict, or add to terms of ticket or token issued by carrier for transportation or accommodation of passenger, 62 ALR 655.

“Contractual” consideration as regards parol evidence rule, 100 ALR 17.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 105 ALR 1346.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 ALR2d 820.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 ALR2d 945.

Admissibility of oral evidence to show that a writing was a sham agreement not intended to create legal relations, 71 ALR2d 382.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 ALR2d 991.

24-6-5. Known usage.

Evidence of known and established usage shall be admissible to aid in the construction of contracts as well as to annex incidents. (Orig. Code 1863, § 3728; Code 1868, § 3752; Code 1873, § 3805; Code 1882, § 3805; Civil Code 1895, § 5206; Civil Code 1910, § 5793; Code 1933, § 38-506.)

JUDICIAL DECISIONS

To make a proof of a custom as such proper testimony, it should appear by the proof itself that such custom is a general one, and that it is so well known and recognized within the sphere of its operation, as to be usually considered a part of all contracts made in that particular locality, in business transactions to which such custom relates. *Hardeman v. English*, 79 Ga. 387, 5 S.E. 70 (1887).

Custom can only be proved by word of mouth from the men engaged in the business. *Wood v. Frank Graham Co.*, 91 Ga. App. 621, 86 S.E.2d 691 (1955).

Evidence thereof is necessarily in parol. *Wood v. Frank Graham Co.*, 91 Ga. App. 621, 86 S.E.2d 691 (1955).

Testimony of custom as matter of fact. — If a witness is shown to have knowledge of a custom, the witness can state what it is, not as a matter of opinion or law, but as a fact. *Farmers Ginnery & Mfg. Co. v. Thrasher*, 144 Ga. 598, 87 S.E. 804 (1916).

Custom is inadmissible when agreement is unambiguous. — Custom or usage, while admissible to explain an ambiguous written agreement, is inadmissible if repugnant to or inconsistent with a clear, express agreement. *Stamey v. Western Union Tel. Co.*, 92 Ga. 613, 18 S.E. 1008, 44 Am. St. R. 95 (1894).

When the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing. *Newark Fire Ins. Co. v. Smith*, 176 Ga. 91, 167 S.E. 79 (1932); *TBS v. Europe Craft Imports, Inc.*, 186 Ga. App. 286, 367 S.E.2d 99 (1988).

While proof of a custom is sometimes admissible to aid in the construction of a contract, such proof is not admissible when the contract is clear and unambiguous. *Atlantic Fertilizer Co. v. Southern States Phosphate & Fertilizer Co.*, 53 Ga. App. 798, 187 S.E. 237 (1936).

Law cannot be changed. — Custom may sometimes be invoked as entering into a contract or supplying incidents, but not to change the law. *Fidelity & Deposit Co. v. Butler*, 130 Ga. 225, 60 S.E. 851, 16 L.R.A. (n.s.) 994 (1908); *Happ Bros. Co. v. Hunter Mfg. & Comm'n Co.*, 145 Ga. 836, 90 S.E. 61 (1916).

Usage cannot make a contract when there is none nor prevent the effect of the settled

rules of law. *Newark Fire Ins. Co. v. Smith*, 176 Ga. 91, 167 S.E. 79 (1932).

In the absence of knowledge of the existence of the custom, it cannot be said that there was any meeting of the minds on this item. *Franco v. Bank of Forest Park*, 118 Ga. App. 700, 165 S.E.2d 593 (1968).

If there is no evidence tending to show a contract by known and established usage, it is error to charge on known usage or custom. *Craig v. Augusta Roofing & Metal Works, Inc.*, 78 Ga. App. 514, 51 S.E.2d 565 (1949).

Signing other party's name to contract. — It is not admissible to show that it was the custom in a particular business for one party making sales, or its agent representing it in such a transaction, to sign the name of the other party to a contract therefor, so as to bind the latter. *Happ Bros. Co. v. Hunter Mfg. & Comm'n Co.*, 145 Ga. 836, 90 S.E. 61 (1916).

Time of performance of contract. — Usage in business as to time of performance of contract for services is admissible in suit for breach thereof. *Beck v. Thompson & Taylor Spice Co.*, 108 Ga. 242, 33 S.E. 894 (1899).

Customs of warehousemen. — On the trial of a suit against warehousemen to recover the value of certain cotton which had been burned, and which plaintiff alleged the warehousemen had agreed to keep insured for plaintiff's benefit, but had failed to do so, proof, in their behalf, that it was their custom to insure cotton only to the extent of the advances the warehousemen had made thereon and for the warehousemen's own benefit, unless instructed by the customer to insure for full value, was primarily inadmissible; but after testimony had been allowed, without objection, in favor of plaintiff, tending to show it was the warehousemen's custom to insure cotton on which the warehousemen had made advances to its full value, such proof was properly admitted. *Hardeman v. English*, 79 Ga. 387, 5 S.E. 70 (1887).

If a general custom existed on the part of the warehouses in a certain municipality to insure to its full value the cotton of patrons stored with them with the necessary characteristics, patrons who stored cotton with one of such warehousemen, knowing of the cus-

tom, and relying upon the custom, can assert a duty on the part of such warehouseman to so insure one's cotton. *Farmers Ginnery & Mfg. Co. v. Thrasher*, 144 Ga. 598, 87 S.E. 804 (1916).

It is not necessary that a witness should be a warehouseman in order to have sufficient knowledge to render the witness competent to testify as to the existence of such usage or custom among the warehouses of a particular town or city. If a person has been accustomed to deal with such warehouses, and to deposit cotton with those warehouses, so as to know those warehouses usage or custom on that subject, the witness is competent to testify as to that usage or custom. *Farmers Ginnery & Mfg. Co. v. Thrasher*, 144 Ga. 598, 87 S.E. 804 (1916).

Customs of insurance companies. — It is well settled that insurers are bound to know the customs of a place where insurers transact business; and are assumed to have made

contracts in reference to such customs. *Todd v. German-American Ins. Co.*, 2 Ga. App. 789, 59 S.E. 94 (1907).

In this state, where life insurance companies deal with the assured for a time sufficient to make it their usage and custom to give notice to the assured of the date when the premiums fall due, and fail to give notice thereof, the policy will not be forfeited, if, within a period so reasonably short as to show an intent to continue one's policy, the assured take steps to inquire and pay the premium. *Grant v. Alabama Gold Life Ins. Co.*, 76 Ga. 575 (1886).

Cited in *Southern Brighton Mills v. Taber Mill*, 44 Ga. App. 513, 162 S.E. 515 (1931); *Williamson-Inman & Co. v. Thompson*, 53 Ga. App. 821, 187 S.E. 194 (1936); *Key Life Ins. Co. v. Mitchell*, 129 Ga. App. 192, 198 S.E.2d 919 (1973); *Puritan Mills, Inc. v. Pickering Constr. Co.*, 152 Ga. App. 309, 262 S.E.2d 586 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1112, 1151, 1154 et seq.

C.J.S. — 32A C.J.S., Evidence, § 1207.

ALR. — “Contractual” consideration as regards parol evidence rule, 100 ALR 17.

Validity and construction of “zoning with compensation” regulation, 41 ALR3d 636.

24-6-6. Rebuttal of equity; discharge of contract; proof of subsequent agreement; change of time or place of performance.

Parol evidence shall be admissible to rebut an equity, to discharge an entire contract, to prove a new and distinct subsequent agreement, to enlarge the time of performance, or to change the place of performance. (Orig. Code 1863, § 3729; Code 1868, § 3753; Code 1873, § 3806; Code 1882, § 3806; Civil Code 1895, § 5207; Civil Code 1910, § 5794; Code 1933, § 38-507.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DISCHARGE OF CONTRACT
SUBSEQUENT AGREEMENT

General Consideration

Cited in *Dunson v. Gresham*, 171 Ga. 146, 154 S.E. 783 (1930); *Helton v. Taylor*, 58 Ga.

App. 630, 199 S.E. 580 (1938); *Garvin v. Worthington Pump & Mach. Corp.*, 62 Ga. App. 240, 8 S.E.2d 589 (1940); *Barron v. Anderson*, 205 Ga. 487, 53 S.E.2d 682

General Consideration (Cont'd)

(1949); *R.P. Farnsworth & Co. v. Tri-State Constr. Co.*, 271 F.2d 728 (5th Cir. 1959); *Parker v. Anderson*, 221 Ga. 796, 147 S.E.2d 305 (1966); *Flexible Prods. Co. v. Lavin*, 128 Ga. App. 80, 195 S.E.2d 677 (1973).

Discharge of Contract

Plea of accord and satisfaction may be supported by parol evidence that the notes sued on were paid in full and satisfied by the surrender of the property described in the mortgage deed (given to secure the debt) in full and complete satisfaction of the debt; that the owner and holder of the note accepted the property in settlement of the notes sued on; and that the settlement was beneficial to the then owners and the holders of the notes, in that it enabled the owners to obtain property without the expense of foreclosure. *Butts v. Maryland Cas. Co.*, 52 Ga. App. 838, 184 S.E. 774 (1936).

Subsequent Agreement

Admissible testimony generally. — When there is strong presumptive evidence that, subsequently to the execution of a written contract, the parties agreed orally upon a new contract, which was a modification of the former, testimony may be received of negotiations and conversations between these parties previous to the written contract for the purpose of throwing light upon, and showing more clearly, the nature and character of the subsequent agreement. *Collins v. Lester*, 16 Ga. 410 (1954). See also *Cartright v. Clopton*, 25 Ga. 85 (1858).

Agreement must be based on valuable consideration. — While parol evidence is admissible to prove a new and distinct agreement subsequent to the original written contract in reference to the same subject matter, such new agreement must be based upon a valuable consideration. *Phelps v. Belle Isle*,

29 Ga. App. 571, 116 S.E. 217 (1923); *Guthrie v. Rowan*, 34 Ga. App. 671, 131 S.E. 93 (1925); *Moon Motor Car Co. v. Savannah Motor Car Co.*, 41 Ga. App. 231, 152 S.E. 611 (1930); *Alexander Film Co. v. Brittain*, 63 Ga. App. 384, 11 S.E.2d 66 (1940); *P & O Mach. Works, Inc. v. Pollard*, 115 Ga. App. 96, 153 S.E.2d 631 (1967); *American Century Mtg. Investors v. Bankamerica Realty Investors*, 246 Ga. 39, 268 S.E.2d 609 (1980); *Llop v. National Bank*, 154 Ga. App. 504, 268 S.E.2d 777 (1980).

Agreement must embody essentials of new contract. *Phelps v. Belle Isle*, 29 Ga. App. 571, 116 S.E. 217 (1923); *Guthrie v. Rowan*, 34 Ga. App. 671, 131 S.E. 93 (1925).

All previous verbal negotiations respecting a sale are merged in the subsequently written contract, and it is not permissible to prove a prior or contemporaneous parol agreement which has the effect of varying the terms of the written contract. *Cottle v. Tomlinson*, 192 Ga. 704, 16 S.E.2d 555 (1941).

Agreement to give collateral security. — A parol agreement of parties subsequent to the execution of a contract of sale that the purchaser would turn over to the vendor a certain paper as collateral security is admissible. *Loveless v. Bridges*, 136 Ga. 338, 71 S.E. 166 (1911).

Agreement as to time of delivery. — When a written contract for the purchase and sale of goods fixed no time for performance, it will be construed as implying that delivery will be made and accepted within a reasonable time, but parol evidence is admissible to prove a new and distinct subsequent agreement, mutually acted upon, that the deliveries will be made in installments at certain stated intervals. *Breman v. Rodbell*, 31 Ga. App. 358, 120 S.E. 697 (1923).

Evidence of agreement to rescind contract held admissible. — See *Manry v. Selph*, 77 Ga. App. 808, 50 S.E.2d 27 (1948); *Flatauer v. Goodman*, 84 Ga. App. 881, 67 S.E.2d 794 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1125.

C.J.S. — 32A C.J.S., Evidence, §§ 1213 et seq.

ALR. — “Contractual” consideration as regards parol evidence rule, 100 ALR 17.

Provision in sale contract to effect that only conditions incorporated therein shall

be binding, 127 ALR 132; 133 ALR 1360.

Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 ALR2d 78; 85 ALR3d 259.

Application of parol evidence rule in ac-

tion on contract for architect's services, 69 ALR3d 1353.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

24-6-7. Proof of mistake in deed or written contract.

Parol evidence is admissible to prove a mistake in a deed or any other contract required by law to be in writing. (Orig. Code 1863, § 3051; Code 1868, § 3063; Code 1873, § 3118; Code 1882, § 3118; Civil Code 1895, § 3975; Civil Code 1910, § 4572; Code 1933, § 38-510.)

JUDICIAL DECISIONS

In general. — If the description in a deed is unambiguous, extrinsic evidence cannot be resorted to, except for the purpose of reforming the deed so as to make the deed express the real intention of the parties and correct a mutual mistake of fact. *Miller v. Rackley*, 199 Ga. 370, 34 S.E.2d 438 (1945).

Resort to parol evidence is necessary to reform an instrument. — Written instrument is evidence of what the parties intend to do; but when a party seeks information of an instrument, the instrument is not the best evidence in such controversy. The very purpose of resorting to parol evidence is to contradict the instrument. *Nelson v. Spence*, 129 Ga. 35, 58 S.E. 697 (1907); *Gaulding v. Baker*, 9 Ga. App. 578, 71 S.E. 1018 (1911); *Green v. Johnson*, 153 Ga. 738, 113 S.E. 402 (1922); *Sapp v. Ritch*, 169 Ga. 33, 149 S.E. 636 (1929); *Head v. Stephens*, 215 Ga. 184, 109 S.E.2d 772 (1959), later appeal, 218 Ga. 191, 126 S.E.2d 623 (1962).

Because the decedent's offspring sought reformation of the option contract entered into with the decedent on the basis of mutual mistake of fact due to a scrivener's error mistakenly describing the property to be sold, parol evidence of the real terms of the

agreement was admissible. *Morris v. Morris*, 282 Ga. App. 127, 637 S.E.2d 838 (2006).

Parol evidence admissible. — Grant of summary judgment to a corporation was vacated as reformation was a possible remedy against a corporation since an owner's warranty deed to a buyer contained a mistaken descriptor; the owner could seek reformation against the corporation as the corporation bought the property from the buyer under the same mistake and parol evidence was admissible in such a reformation action, even though the owner and the corporation were never parties to the same transaction. *Amin v. Guruom, Inc.*, 280 Ga. 873, 635 S.E.2d 105 (2006).

Deed reformed. — See *West Lumber Co. v. Moore*, 179 Ga. 302, 175 S.E. 642 (1934) (stipulation as to assumption of liens); *Smith v. Smith*, 223 Ga. 560, 156 S.E.2d 901 (1967) (date of execution of deed).

Contract reformed. — See *West Lumber Co. v. Moore*, 179 Ga. 302, 175 S.E. 642 (1935) (stipulation as to assumption of liens).

Cited in *Harrison v. Hester*, 160 Ga. 865, 129 S.E. 528 (1925); *Southern Cotton Oil Co. v. Duskin*, 92 Ga. App. 288, 88 S.E.2d 421 (1955).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1123.

C.J.S. — 32A C.J.S., Evidence, §§ 1205, 1232, 1233, 1254.

ALR. — Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 ALR 51.

Exception to rule of admissibility of parol

evidence to show that deed absolute on its face was intended as a mortgage, 111 ALR 448.

Parol evidence rule as applied to lease, 151 ALR 279.

Admissibility of extrinsic evidence to iden-

tify person or persons intended to be designated by the name in which a contract is made, 80 ALR2d 1137.

Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

24-6-8. Original or subsequent voidness of writing.

Parol evidence shall be admissible to show that a writing either was originally void or subsequently became so. (Orig. Code 1863, § 3725; Code 1868, § 3749; Code 1873, § 3802; Code 1882, § 3802; Civil Code 1895, § 5203; Civil Code 1910, § 5790; Code 1933, § 38-503.)

JUDICIAL DECISIONS

Failure of consideration. — It may be shown that a note sued on was in fact without legal consideration of any kind, and that the actual basis of the undertaking was wholly illegal and the resultant promise absolutely void. *Simmons v. International Harvester Co. of Am.*, 22 Ga. App. 358, 96 S.E. 9 (1918). See also *Miller v. Whitesburg Banking Co.*, 58 Ga. App. 84, 197 S.E. 906 (1938); *S. & S. Bldrs., Inc. v. Equitable Inv. Corp.*, 219 Ga. 557, 134 S.E.2d 777 (1964).

A writing which undertakes to contract about a fictitious thing, even though it be denominated a consideration in the writing is in fact without consideration, is void, and the fact that it is void may be shown by parol under the rule of evidence. *Jewell v. Norrell*, 66 Ga. App. 11, 16 S.E.2d 797 (1941).

When the promise as stated in the writing is admitted, the promisor can show that there was no consideration or that there was a consideration which has failed wholly or in part, and therefore the promise is no longer supported, and must fail either in whole or in part, according to the facts. *First Nat'l Bank v. Harrison*, 408 F. Supp. 137 (N.D. Ga. 1975), *aff'd*, 529 F.2d 1350 (5th Cir. 1976).

The consideration of a contract may be always inquired into in order to show that the promise is no longer binding according to its tenor; but in inquiring into the consideration the promisor cannot deny that the promisor made the promise evidenced by the writing. *First Nat'l Bank v. Harrison*, 408 F. Supp. 137 (N.D. Ga. 1975), *aff'd*, 529 F.2d 1350 (5th Cir. 1976).

Different consideration may be shown by

parol evidence. *Harris v. Tisereau*, 52 Ga. 153 (1874).

Nonperformance of condition precedent. — Written document may by parol or other extrinsic evidence be shown not to be a contract at all because of the nonperformance of a condition precedent as to which the writing is silent. *Rudder v. Belle Isle*, 46 Ga. App. 336, 167 S.E. 753 (1933).

Violation of public policy. — When a contract apparently valid on the contract's face is attacked on the ground that the contract was entered into in violation of public policy, a court, when called upon to approve such a contract, will closely examine the terms of the contract and the circumstances under which the contract was entered into, before permitting the agreement to be made the judgment of the court. *Beverly v. Beverly*, 209 Ga. 468, 74 S.E.2d 89 (1953); *Funderburk v. Funderburk*, 229 Ga. 457, 192 S.E.2d 262 (1972).

Fraud. — Parol evidence is admissible to show that a writing was void on account of fraud. *Hinkle v. Hixon*, 154 Ga. 193, 113 S.E. 805 (1922); *Johnson v. Sherrer*, 197 Ga. 392, 29 S.E.2d 581 (1944); *S. & S. Bldrs., Inc. v. Equitable Inv. Corp.*, 219 Ga. 557, 134 S.E.2d 777 (1964); *Hinson v. Hinson*, 221 Ga. 291, 144 S.E.2d 381 (1965); *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975); *Lewis v. Citizens & S. Nat'l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976); *Thompson v. Wilkins*, 143 Ga. App. 739, 240 S.E.2d 183 (1977).

Trial court erred by granting summary judgment to a child in a suit brought by a

sibling seeking a determination that the sibling was the sole beneficiary of their parent's life insurance policy as the sibling sufficiently alleged fraud and/or forgery with regard to a second beneficiary designation form allegedly signed by the parent. As such, the trial court should have permitted the sibling to introduce two affidavits that supported the sibling's allegations that the second beneficiary designation form was void. *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008).

Promise by bank not to enforce promissory note. — There is no confidential relationship between a bank and a customer borrowing funds and therefore an oral agreement not to enforce a promissory note, which is a contract in writing, is not a type of fraud constituting an exception to the parol evidence rule. *Boatman v. Citizens & S. Nat'l Bank*, 155 Ga. App. 848, 273 S.E.2d 190 (1980).

Colorable scheme between husband and wife. — If a wife did not in fact purchase and was not to receive the machinery under the contract sued on, but the whole transaction was merely a colorable scheme or device by which the wife was induced by the plaintiff to assume the previous debt of the husband, without any consideration flowing to her, she would have the right to repudiate the entire illegal and void transaction, no matter by what device its true inwardness and purpose had been concealed. *Simmons v. International Harvester Co. of Am.*, 22 Ga. App. 358, 96 S.E. 9 (1918).

Evidence that party signed blank paper. — Evidence tending to prove that a party only signed a blank sheet of paper, instead of signing a written and printed contract, was admissible. *Chicago Bldg. & Mfg. Co. v. Butler*, 139 Ga. 816, 78 S.E. 244 (1913).

Contract to evade usury, penalty, or forfeiture. — Parol evidence was admissible to show the circumstances attending the execution of papers and the sayings of the parties at the time, for the purpose of ascertaining their intention as to a shipment of the cotton, and enabling a jury to determine whether the contract of shipment was a device to evade the law relating to usury. *Dwelle & Daniel v. Blackwood*, 106 Ga. 486, 32 S.E. 593 (1899).

While a valid written contract cannot be contradicted or varied by parol, it is competent by such evidence to show that the writing is but a cover for usury, penalty, or forfeiture. *Lytle v. Scottish Am. Mtg. Co.*, 122 Ga. 458, 50 S.E. 402 (1905).

What is called rent may be shown to have been really a part of the purchase money, or a device to obtain a penalty. *Lytle v. Scottish Am. Mtg. Co.*, 122 Ga. 458, 50 S.E. 402 (1905).

It is always permissible to show by parol evidence that a paper is but a cover for usury, penalty, forfeiture, or other illegal advantage to one of the parties. For if the law did not sedulously disregard form and seek for substance, nothing would be easier than its evasion by giving innocent names to prohibited acts. *Flood v. Empire Inv. Co.*, 35 Ga. App. 266, 133 S.E. 60 (1926).

Cited in *National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934); *Elliott v. Marshall*, 179 Ga. 639, 176 S.E. 770 (1934); *Citizens' Bank v. Hall*, 179 Ga. 662, 177 S.E. 496 (1934); *Eastern Motor Co. v. Lavender*, 69 Ga. App. 48, 24 S.E.2d 840 (1943); *Ryder v. Schreeder*, 224 Ga. 382, 162 S.E.2d 375 (1968); *Baitcher v. Louis R. Clerico Assocs.*, 132 Ga. App. 219, 207 S.E.2d 698 (1974); *Thomas Mote Trucking, Inc. v. PCL Civil Constructors, Inc.*, 246 Ga. App. 306, 540 S.E.2d 261 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1119 et seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1207, 1221, 1224 et seq., 1234 et seq.

ALR. — Parol evidence rule; right to show fraud in inducement or execution of written contract, 56 ALR 13.

“Contractual” consideration as regards parol evidence rule, 100 ALR 17.

Parol evidence rule as applied to lease, 151 ALR 279.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 ALR 316.

Admissibility of declarations by testator on issue of revocation of will, 172 ALR 354.

Failure to object to parol evidence, or

voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Admissibility of oral evidence to show that

a writing was a sham agreement not intended to create legal relations, 71 ALR2d 382.

24-6-9. Explanation or denial of receipts.

Receipts for money are always only prima-facie evidence of payment and may be denied or explained by parol. (Orig. Code 1863, § 3730; Code 1868, § 3754; Code 1873, § 3807; Code 1882, § 3807; Civil Code 1895, § 5208; Civil Code 1910, § 5795; Code 1933, § 38-508.)

JUDICIAL DECISIONS

Definition. — A receipt is a written admission or acknowledgment of payment or delivery. It is not required by law to be in a particular form. *Crider v. City Supply Co.*, 16 Ga. App. 377, 85 S.E. 350 (1915).

A receipt is not a contract, but merely an admission in writing of the fact of payment or other settlement between debtor and creditor. *Hamlin v. Lupo*, 24 Ga. App. 408, 101 S.E. 5 (1919).

Exception to general rule. — Receipt for money mentioned in this statute is, as a general rule, an exception to the principle that parol evidence is inadmissible to explain or contradict a writing. *Dunagan v. Dunagan*, 38 Ga. 554 (1868); *Jewell v. Norrell*, 66 Ga. App. 11, 16 S.E.2d 797 (1941) (see O.C.G.A. § 24-6-9).

Unless receipt is also contract. — See *Dunagan v. Dunagan*, 38 Ga. 554 (1868).

If a receipt is a contract and not simply a receipt, there is no reason why the receipt should be susceptible of attack or explanation by parol more than any other contract. *Jewell v. Norrell*, 66 Ga. App. 11, 16 S.E.2d 797 (1941).

No receipt is conclusive evidence, and evidence may be introduced to show the receipt does not correctly express the truth of the case. *Parker v. Wellons*, 43 Ga. App. 721, 160 S.E. 109 (1931).

Receipt may be explained. — It was held not error to permit the maker of a receipt in evidence to explain the items in the receipt, or to cast upon the various amounts and testify to the sum total for which the receipt was given. *Bigham v. Coleman*, 71 Ga. 176 (1883).

Defendant may show that the defendant received less on certain promissory notes

made by the defendant the receipt shows. *New England Mtg. Sec. Co. v. Gay*, 33 F. 636 (S.D. Ga. 1888), dismissed for lack of jurisdiction, 145 U.S. 123, 12 S. Ct. 815, 36 L. Ed. 646 (1892).

On an action on an open account, the trial court did not violate the parol evidence rule by admitting evidence that explained a "paid" notation on invoices. An invoice for goods delivered on open account was not "a valid written instrument" as that term was used in O.C.G.A. § 24-6-1; furthermore, O.C.G.A. § 24-6-9 specifically provided that receipts for money were always only prima facie evidence of payment and could be denied or explained by parol. *Wheeler v. IDN-Armstrong's, Inc.*, 288 Ga. App. 253, 653 S.E.2d 835 (2007).

Combination receipt and contract. — Written instrument may sometimes partake of the nature of both a receipt and a contract. Insofar as it is merely a receipt, this statute is applicable; but insofar as it is a contract, it cannot be changed, modified, or have its terms enlarged by parol evidence. *Southern Bell Tel. & Tel. Co. v. Smith*, 129 Ga. 558, 59 S.E. 215 (1907); *Graham v. Peacock*, 131 Ga. 785, 63 S.E. 348 (1909). See also *Riverside Milling & Power Co. v. Bank of Cartersville*, 141 Ga. 578, 81 S.E. 892 (1914) (see O.C.G.A. § 24-6-9).

Acknowledgment in form of affidavit. — Fact that an acknowledgment of payment is in the form of an affidavit does not render the affidavit inadmissible when offered in evidence as a receipt. *Crider v. City Supply Co.*, 16 Ga. App. 377, 85 S.E. 350 (1915).

Letter and a reply amounting to nothing more than a receipt is explainable by parol evidence. *Halls Self-Feeding Cotton Gin Co. v. Black*, 71 Ga. 450 (1883).

Ancient receipt. — When a receipt, as any other written instrument, is more than 30 years old, the receipt's execution need not be proved to admit the receipt in evidence, although the subscribing witness may be living. *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393 (1850).

Administrator's receipt. — Receipt in full given by the administrator de bonis non with the will annexed, to the administratrix of the deceased executor, was open to explanation. *Watts v. Baker*, 78 Ga. 622, 3 S.E. 773 (1887).

Receipts by wards to guardian. — Receipts in full by wards to their guardian, which, in express terms, discharge the guardian from all liability, may be explained by parol evidence. *Alexander v. Alexander*, 46 Ga. 283 (1872).

Attorney's receipts. — When an attorney gave a receipt for a note to collect, in which the note is described, but omitting the fact that the note was endorsed in an action for damages, it was competent to prove by parol, the fact of the indorsement. *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386 (1849); *Barclay v. Hopkins*, 59 Ga. 562 (1877).

Recital in lease that rent paid. — When a written lease states that the rent is a certain amount and contains a mere recital that it is paid, it is permissible to show by parol testimony that only a part of the rent was paid at the execution of the agreement and that the balance is still unpaid. *Google v. York*, 38 Ga. App. 62, 142 S.E. 562 (1928).

Words in a release placed upon a recorded security instrument importing payment of the secured indebtedness are not a contract but constitute a receipt, or evidence of payment of money, and can be contradicted by parol evidence. *Security Fin. Corp. v. Blackwood*, 111 Ga. App. 850, 143 S.E.2d 515 (1965).

Parol agreement at variance with contract as to time of payment. — When a contract calls for the payment of money at a certain time, evidence of a parol agreement at vari-

ance with the writing as to such matter is not admissible. *Google v. York*, 38 Ga. App. 62, 142 S.E. 562 (1928).

Effect of accepting incorrect receipt. — When a passenger accepts an incorrect receipt for fare paid, the passenger is not estopped from asserting that the passenger paid a different amount. *Atlantic C.L.R.R. v. Thomas*, 14 Ga. App. 619, 82 S.E. 299 (1914).

Province of jury to disregard receipt. — If an explanation given by authority of the law is satisfactory, the receipt may be disregarded by the jury. *Atlantic Coast Line R.R. v. Blalock*, 8 Ga. App. 44, 68 S.E. 743 (1910).

As receipts for money are only prima facie evidence of payment and may be denied or explained by parol, if an explanation is given, the existence of the receipt may be disregarded by the trier of fact. *Meadows v. Phillips*, 188 Ga. App. 377, 373 S.E.2d 27 (1988).

Instructions. — Court should instruct the jury, in addition to the statutory language, that it is a question for the jury to say whether or not the party's evidence sufficiently explained the receipts. *McJenkin Ins. & Realty Co. v. Thompson*, 79 Ga. App. 473, 54 S.E.2d 336 (1949).

O.C.G.A. § 24-6-9 was applied in the following cases. — See *Newsom v. Reynolds Chevrolet Co.*, 43 Ga. App. 376, 158 S.E. 763 (1931) (recital in written contract of sale of personalty concerning purchase-money); *Greeson v. Farmers' & Merchants' Bank*, 50 Ga. App. 566, 179 S.E. 191 (1935) (deposit slip).

Cited in *Stephenson v. Empire Life Ins. Co.*, 139 Ga. 82, 76 S.E. 592 (1912); *Gibson v. State*, 13 Ga. App. 459, 79 S.E. 354 (1913); *Armour Fertilizer Works v. Dwight*, 22 Ga. App. 144, 95 S.E. 746 (1918); *Oliver v. Head*, 60 Ga. App. 13, 2 S.E.2d 716 (1939); *Wyatt v. Murray*, 90 Ga. App. 138, 82 S.E.2d 159 (1954); *Crooke v. Elliott*, 96 Ga. App. 314, 99 S.E.2d 842 (1957); *Tomlinson, Inc. v. Roberts*, 142 Ga. App. 134, 235 S.E.2d 721 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1141.

C.J.S. — 32A C.J.S., Evidence, § 1206.

ALR. — Admissibility of parol evidence to vary or explain contract implied from the

regular endorsement of a bill or note, 92 ALR 721.

Parol evidence rule as applied to deposit of funds in name of depositor and another, 33 ALR2d 569.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificates of

deposit, or similar instruments, 42 ALR2d 600.

24-6-10. Explanation of blank endorsements.

Blank endorsements of negotiable paper may always be explained between the parties themselves or those taking with notice of dishonor or of the actual facts of such endorsements. (Orig. Code 1863, § 3731; Code 1868, § 3755; Code 1873, § 3808; Code 1882, § 3808; Civil Code 1895, § 5209; Civil Code 1910, § 5796; Code 1933, § 38-509.)

Cross references. — Effect of blank endorsement generally, § 11-3-204. Provision that signature on negotiable instrument is

an endorsement unless instrument clearly indicates that signature was made in some other capacity, § 11-3-402.

JUDICIAL DECISIONS

Only blank endorsements affected by statute. — Law of blank endorsements changes the rule that even a blank endorsement was not subject to be modified in the endorsement's legal effect by parol evidence, but the law does not expose any other endorsements to like modification. *Meador v. Dollar Sav. Bank*, 56 Ga. 605 (1876); *Jones v. Commercial Credit Co.*, 52 Ga. App. 796, 184 S.E. 652 (1936).

Application to parties or those taking with notice. — As between the parties themselves, or those taking with notice of dishonor or of the actual facts of the endorsement, parol evidence is admissible to explain the endorsement. *Pickett v. Bank of Ellijay*, 182 Ga. 540, 186 S.E. 426, answer conformed to, 53 Ga. App. 607, 186 S.E. 746 (1936); *Hopkins Auto. Equip. Co. v. Lyon*, 59 Ga. App. 468, 1 S.E.2d 460 (1939). See also *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938).

But not to innocent third parties. — Law is plain and emphatic that a blank endorsement may be explained by parol, except as against subsequent holders for value, bona fide and without notice. *McMillan v. Fourth Nat'l Bank*, 17 Ga. App. 590, 87 S.E. 843 (1916).

Law has application between the parties, or those taking with notice of dishonor, or of the actual facts of such endorsement, and has no application to the rights of third parties. *Pickett v. Bank of Ellijay*, 182 Ga. 540, 186 S.E. 426, answer conformed to, 53 Ga. App. 607, 186 S.E. 746 (1936).

As against a third party, the holder of the note before maturity, for value, and without notice of dishonor or of the actual facts of the endorsement, parol evidence is not admissible to contradict or explain the capacity in which such written endorsement was signed, but the construction thereof is for the court. *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936), *aff'd*, 184 Ga. 644, 192 S.E. 298 (1937). See also *Hopkins Auto. Equip. Co. v. Lyon*, 59 Ga. App. 468, 1 S.E.2d 460 (1939).

Endorsements within statute. — This rule is not confined to technical endorsements, i.e., endorsements essential to transfer of title, but extends to endorsements in the broader sense which are irregular and unnecessary to pass title. *Atkinson v. Bennett*, 103 Ga. 508, 30 S.E. 599 (1898).

This rule is not confined merely to blank endorsements in the strict sense, as where the endorser writes only the endorser's name upon the negotiable instrument; the rule relates to all endorsements which are not full or complete. *McMillan v. Fourth Nat'l Bank*, 17 Ga. App. 590, 87 S.E. 843 (1916); *Procter v. Royster Guano Co.*, 21 Ga. App. 617, 94 S.E. 821 (1918); *Bowden v. Owens*, 33 Ga. App. 700, 127 S.E. 664 (1925).

Agreement to endorse. — An agreement to endorse may be construed as a contract of guarantee. *Georgia Cas. Co. v. Dixie Trust & Sec. Co.*, 23 Ga. App. 447, 98 S.E. 414 (1919).

Endorsement in full. — If an endorsement in blank had been partially completed by a subsequent endorser writing the words, “without recourse,” and signing the endorser’s name, it was not an endorsement in full, and parol evidence was admissible. *West Yellow Pine Co. v. Kendrick*, 9 Ga. App. 350, 71 S.E. 504 (1911).

When the endorsement is one “in full,” though followed by the words “without recourse,” parol evidence is not admissible to explain any unambiguous terms. *Odom Realty Co. v. Central Trust Co.*, 22 Ga. App. 711, 97 S.E. 116 (1918).

Endorsement for special purpose. — It may be shown by parol evidence that the endorsement of a note was made for a special purpose. *Carhart Bros. & Co. v. Wynn*, 22 Ga. 24 (1857).

Transfer for collection. — When the payee of a note, payable to the payee or order, transfers the note in writing to a third person, without recourse, and signs the transfer, parol evidence is admissible, at the instance of the payee or the payee’s executors to show that such transfer was made for collection. This was the rule at common law; and the statute was not intended to abrogate this principle of the common law, the purpose of the statute being, not to narrow the admission of parol evidence when it was permissible by common law, but to extend the admission of such evidence to the explanation of endorsements in blank, which was not permissible by that law. *Sanders v. Ayers*, 155 Ga. 630, 117 S.E. 651 (1923). See also *Carhart Bros. & Co. v. Wynn*, 22 Ga. 24 (1857).

Accommodation endorsements. — Law applies to accommodation endorsements. *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923).

An accommodation endorser has the right to stipulate the character of the liability which the endorser assumes in signing a particular paper. *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923).

Endorsements to pass title merely. — Parol evidence is, in any given instance, admissible to show that such an endorsement upon a promissory note was made simply to pass title and not to create liability in the endorser. *Bryan v. Windsor*, 99 Ga. 176, 25 S.E. 268 (1896); *Cowart Co. v. Sheffield*, 18 Ga. App. 512, 89 S.E. 1101

(1916). See also *Stapler v. Burns*, 43 Ga. 382 (1871); *Galceran v. Noble*, 66 Ga. 367 (1881) (suit by plaintiff who took note after dishonor).

In a suit by the payee of a promissory note signed in the name of a corporation as maker, a plea by certain individuals who had signed their names in blank upon the back of the note, to the effect that their names were so placed upon the instrument “only for the purpose of perfecting title and passing title, and upon the distinct understanding that they were not to be held liable thereon in any way,” does not set up a good defense. *Proctor v. Royster Guano Co.*, 21 Ga. App. 617, 94 S.E. 821 (1918).

Assuming that the contract of suretyship or accommodation endorsement sued on should be taken as having been signed in blank, a plea merely denying all liability thereunder, without showing any bona fide reason why the endorsement was entered for a purpose other than that of incurring liability, cannot be taken as an effort to explain the true nature and intent of the contract, as is permitted by this statute, and does not set up a good defense. *Pearce v. Swift & Co. Fertilizer Works*, 21 Ga. App. 622, 94 S.E. 915 (1918). See also *Proctor v. Royster Guano Co.*, 21 Ga. App. 617, 94 S.E. 821 (1918) (see O.C.G.A. § 24-6-10).

Capacity of signers. — When a promissory note is upon the note’s face payable to the order of the payee at a chartered bank, though reading “we promise to pay,” etc., and signed by one person only, the prima facie import of an endorsement thereon in blank by a third person is that such endorser undertakes to be liable as a second endorser, and not as a joint maker. The true intent of the parties, however, in an action by the payee upon the instrument, is open to explanation by parol evidence. *Neal & Co. v. Wilson*, 79 Ga. 736, 5 S.E. 54 (1887).

Party signing negotiable paper in blank may show by parol that the party is a surety only. *Sibley v. American Exch. Nat’l Bank*, 97 Ga. 126, 25 S.E. 470 (1895).

When several parties are sued on a check, one as maker and the others as endorsers, the payee can show by parol that those signing apparently as endorsers are in fact sureties or joint makers. *James v. Calder*, 7 Ga. App. 707, 67 S.E. 1125 (1910).

Evidence could not be introduced, as

against third persons, to show a different capacity, but could be introduced to show as between the immediate parties, an agreement that the person signing should be bound in a capacity different from that shown by the instrument. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938).

Showing agency of drawer. — Agency of the drawer and knowledge by the payee and endorsee cannot be shown by parol in defense to a suit on a draft. *Bedell v. Scarlett*, 75 Ga. 56 (1885).

Endorsement of mortgage note. — Blank endorsement of a mortgage note may be explained by parol to show an agreement

that an indebtedness of the mortgagee was to be first satisfied out of the mortgaged property. *Willingham & Cone v. Huguenin*, 129 Ga. 835, 60 S.E. 186 (1908).

Cited in *Eppens, Smith & Weimann v. Forbes & Co.*, 82 Ga. 748, 9 S.E. 723 (1889); *Atkinson v. Bennett*, 103 Ga. 508, 30 S.E. 599 (1898); *Winnebago Nat'l Bank v. Woodliff*, 145 Ga. 239, 88 S.E. 973 (1916); *Bowden v. Owens*, 33 Ga. App. 700, 127 S.E. 664 (1925); *Cantrell v. Byars*, 66 Ga. App. 672, 19 S.E.2d 44 (1942); *Jordan v. Daniel*, 94 Ga. App. 456, 95 S.E.2d 28 (1956); *Sanders v. Fulton Nat'l Bank*, 148 Ga. App. 684, 252 S.E.2d 189 (1979); *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008).

RESEARCH REFERENCES

ALR. — Endorsement, “to the order of any bank or banker,” as a restrictive endorsement, 10 ALR 709.

Admissibility of parol evidence to vary or explain the contract implied from the regu-

lar endorsement of a bill or note, 35 ALR 1120; 54 ALR 999; 92 ALR 721.

Parol evidence as to liability of irregular endorser to payee, 37 ALR 1222.

CHAPTER 7

AUTHENTICATION OF WRITINGS

Article 1		Article 2	
In General		Public Records	
Sec.		Sec.	
24-7-1.	Production of writing and proof of execution required generally.	24-7-20.	Exemplifications — By state or county officers.
24-7-2.	When material alterations to be explained.	24-7-21.	Exemplifications — Of municipal records and minutes.
24-7-3.	When necessity of proof dispensed with.	24-7-22.	Judicial notice of ordinance or resolution.
24-7-4.	Subscribing witnesses to be produced; exceptions.	24-7-23.	Notarial acts proved by notary's certificate, filed in trial court.
24-7-5.	Proof of execution where subscribing witnesses inaccessible; primary evidence; secondary evidence.	24-7-24.	Proof of laws and judicial records of other states, territories, or possessions; full faith and credit.
24-7-6.	Proof of handwriting.	24-7-25.	Proof of nonjudicial records or books of other states territories, or possessions; full faith and credit.
24-7-7.	Comparison of other writings; submittal to opposite party.	24-7-26.	Proof of judgments and proceedings of justice of the peace courts in other states.
24-7-8.	Proving medical records or reproductions.	24-7-27.	Admissibility of records of Department of Corrections.
24-7-9.	Identification of medical bills; expert witness unnecessary.		

RESEARCH REFERENCES

C.J.S. — 32 C.J.S., Evidence, § 835 et seq.

ARTICLE 1

IN GENERAL

24-7-1. Production of writing and proof of execution required generally.

Generally, an original writing shall be produced and its execution proved. Exceptions are prescribed by law. (Orig. Code 1863, § 3754; Code 1868, § 3778; Code 1873, § 3831; Code 1882, § 3831; Civil Code 1895, § 5239; Civil Code 1910, § 5828; Code 1933, § 38-701.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROOF OF AUTHENTICITY OF WRITING

General Consideration

In general. — Law applies only where the contents of the missing writing are in issue. *Springer v. State*, 238 Ga. 81, 230 S.E.2d 883 (1976); *Pryor v. State*, 238 Ga. 698, 234 S.E.2d 918, overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977).

Document in possession of opposing party. — When the document was in the defendant's possession, a witness for the plaintiff in fi. fa. was not allowed to testify as to the witness's examination of the document since the document itself is the best evidence. *Hawes v. Red Oak Hauling Co.*, 116 Ga. App. 302, 157 S.E.2d 38 (1967).

Copies. — Original papers, if to be procured, are always better evidence than copies; and the latter are allowed only from necessity or convenience. *Dobbs v. Justices of Inferior Court*, 17 Ga. 624 (1855).

Copies made in same operation. — Court did not err in admitting in evidence copies or duplicate licenses for operation of hotel when the city clerk testified that the duplicate documents were made at the same time as the originals, with the same operation. *Hannifin v. Wolpert*, 56 Ga. App. 466, 193 S.E. 81 (1937).

Alterations in original writing. — It is presumed, absent a contrary showing, or a denial by the signer, that alterations, erasures, or corrections in a writing were made prior to the signing of the writing. *Kingston v. State*, 127 Ga. App. 660, 194 S.E.2d 675 (1972).

Writings admitted as evidence. — When a plea of guilty from a prior criminal case is admitted in a subsequent civil case for impeachment, the plea was not admitted as a court paper but as a private writing. *Webb v. May*, 91 Ga. App. 437, 85 S.E.2d 641 (1955).

Admission of prejudicial hearsay testimony held harmless error. — Because the trial court's admission of prejudicial hearsay testimony regarding the victim's ministry ordination certificates was harmless error, given the overwhelming evidence of the defendant's guilt, a voluntary manslaughter conviction, as a lesser-included offense of murder, was upheld on appeal. *Smith v. State*, 283 Ga. App. 722, 642 S.E.2d 399 (2007).

Lease need not be introduced in action for rent. — When the landlord's testimony that the tenant has not paid the tenant's rent as agreed under the lease is based on the tenant's personal knowledge, this is primary evidence and there is no reason why the original writing need be produced. *McKinnon v. Shoemaker*, 166 Ga. App. 231, 303 S.E.2d 770 (1983).

Cited in *Burt v. Gooch*, 37 Ga. App. 301, 139 S.E. 912 (1927); *A.B. & C.R.R. Benefit Ass'n v. South*, 49 Ga. App. 659, 175 S.E. 924 (1934); *Brewer v. Commercial Credit Co.*, 66 Ga. App. 138, 17 S.E.2d 243 (1941); *Goettee v. Carlyle*, 68 Ga. App. 288, 22 S.E.2d 854 (1942); *Stow v. Hargrove*, 203 Ga. 735, 48 S.E.2d 454 (1948); *Warren v. Gray*, 90 Ga. App. 398, 83 S.E.2d 86 (1954); *State Hwy. Dep't v. Alexander*, 222 Ga. 354, 149 S.E.2d 788 (1966); *American San. Servs., Inc. v. EDM of Tex., Inc.*, 139 Ga. App. 662, 229 S.E.2d 136 (1976); *Dillard v. State*, 147 Ga. App. 587, 249 S.E.2d 640 (1978); *Rollins, Inc. v. Tennant Co.*, 170 Ga. App. 641, 317 S.E.2d 659 (1984); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984).

Proof of Authenticity of Writing

Kinds of proof acceptable. — Execution of a deed may be proven by: (1) its ancientness and self-contained evidence of genuineness; (2) by admission of the opposite party; (3) by registration according to law; and (4) by witnesses. *Gibson v. Causey*, 223 Ga. 135, 153 S.E.2d 704 (1967).

Ancient documents. — Deed more than 30 years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession had been consistent therewith, is admissible in evidence without proving the deed's execution. *McArthur v. Morrison*, 107 Ga. 796, 34 S.E. 205 (1899).

Letter received in mail. — Letter received through the mail is not admissible in evidence when offered by the recipient, without proof of the letter's authenticity, but proof of the letter's execution may be shown by circumstantial evidence. *Deaderick v. Deaderick*, 182 Ga. 96, 185 S.E. 89 (1936).

Email not properly authenticated. — In a child molestation prosecution, an email that the defendant claimed the victim sent, which the defendant sought to introduce for impeachment, was properly excluded. The vic-

tim denied writing the email, and the only proof the defendant offered to authenticate the email was the fact that the email came from the victim's email address, which did not prove the email's genuineness. *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009).

Admission of opposite party. — When the plaintiff admitted the execution of the deed offered in evidence by the defendant, further proof of execution is unnecessary. *Ward-Truitt Co. v. Nicholson*, 23 Ga. App. 672, 99 S.E. 153 (1919).

Circumstantial evidence. — Genuineness of a writing may be proved by circumstantial evidence. *State v. Smith*, 246 Ga. 129, 269 S.E.2d 21 (1980).

Possession combined with other circumstances required. — While possession alone is insufficient to establish a prima facie showing of authenticity, possession, together with other circumstances, may meet the burden. *Martin v. State*, 135 Ga. App. 4, 217 S.E.2d

312 (1975); *State v. Smith*, 246 Ga. 129, 269 S.E.2d 21 (1980); *Hull v. State*, 265 Ga. 757, 462 S.E.2d 596 (1995).

Burden of proof. — Burden of proving the genuineness of a writing rests upon the party introducing the writing. *Anderson v. Cuthbert*, 103 Ga. 767, 30 S.E. 244 (1898); *State v. Smith*, 246 Ga. 129, 269 S.E.2d 21 (1980).

Laying a proper foundation. — When a writing other than an original is introduced into evidence, a proper foundation must be laid including evidence that the original is not available and that the evidence being introduced is a fair and correct representation of what it purports to show. *Matthews & Son v. Richards*, 13 Ga. App. 412, 79 S.E. 227 (1913), later appeal, 19 Ga. App. 489, 91 S.E. 914 (1917); *Ward-Truitt Co. v. Nicholson*, 23 Ga. App. 672, 99 S.E. 153 (1919); *Swiney v. State Hwy. Dep't*, 116 Ga. App. 667, 158 S.E.2d 321 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1045.

C.J.S. — 32 C.J.S., Evidence, §§ 835 et seq., 891 et seq., 974 et seq.

ALR. — Authorship or authenticity of written or printed matter as inferable without extrinsic proof from name used therein or from its contents or subject matter, 131 ALR 301.

Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses, 154 ALR 649.

Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 ALR3d 1018.

Unaccepted offer for purchase of real property as evidence of its value, 25 ALR4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 ALR4th 615.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983.

Admissibility of evidence as to linguistics of typing style (forensic linguistics) as basis of identification of typist or author, 36 ALR4th 598.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 ALR6th 613.

24-7-2. When material alterations to be explained.

If a paper appears to have been altered materially, unless it is the paper sued on and no plea of non est factum is filed, the party offering it in evidence shall explain the alteration unless the paper comes from the custody of the opposite party. (Orig. Code 1863, § 3758; Code 1868, § 3782; Code 1873, § 3835; Code 1882, § 3835; Civil Code 1895, § 5242; Civil Code 1910, § 5831; Code 1933, § 38-704.)

Cross references. — Provision that purchaser of instrument takes with notice of claim or defense if instrument bears visible evidence of forgery or alteration, § 11-3-304.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION BURDEN OF PROOF

General Consideration

Law does not apply to registered deeds. *Gilmer v. Harrison*, 146 Ga. 721, 92 S.E. 67 (1917).

Entering alterations in record. — If an instrument offered in evidence is objected to on account of interlineations, what the interlineations were should be entered in the record. *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506 (1857).

Failure to object to altered writing. — When a writing is introduced in evidence it is not necessary to submit proof of nor to explain alterations without an objection under oath. *Tedlie v. Dill*, 2 Ga. 128 (1847); *May v. Sorrell*, 153 Ga. 47, 111 S.E. 810 (1922).

Materiality of an alteration is a question of law for the court. *Winkles v. Guenther & Co.*, 98 Ga. 472, 25 S.E. 527 (1896).

Explanation is question for jury. — When the genuineness of the instrument is denied under oath, the time when, and the intention with which, a change was made in the instrument, are questions for a jury. *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506 (1857); *Winkles v. Guenther & Co.*, 98 Ga. 472, 25 S.E. 527 (1896).

Cited in *Crawford v. Brady*, 35 Ga. 184 (1866); *Georgia Power Co. v. Busbin*, 149 Ga. App. 274, 254 S.E.2d 146 (1979); *Nationwide Mut. Fire Ins. Co. v. Rhee*, 160 Ga. App. 468, 287 S.E.2d 257 (1981); *Cox v. State*, 205

Ga. App. 375, 422 S.E.2d 68 (1992).

Burden of Proof

Alterations presumed to precede execution. — It is presumed, absent a contrary showing, or a denial by the signer, that alterations, erasures, or corrections in a writing were made prior to the signing of the writing. *Craig v. National City Bank*, 26 Ga. App. 128, 105 S.E. 632 (1921); *Kingston v. State*, 127 Ga. App. 660, 194 S.E.2d 675 (1972).

Overcoming presumption of valid alterations. — Presumption that alterations were made before execution is overcome when a special plea of non est factum under oath is entered, admitting the signing of the paper, but plainly and distinctly attacking the instrument as having been fraudulently and materially altered. *Craig v. National City Bank*, 26 Ga. App. 128, 105 S.E. 632 (1921).

Burden is on party relying on alterations. — Plea of non est factum forces the plaintiff to prove the execution of the altered writing sued on but when the defendant by a plea of non est factum sets up material alterations not apparent on the face of the writing the defendant has the burden to prove that the document sued on is materially different from the writing signed. *Winkles v. Guenther & Co.*, 98 Ga. 472, 25 S.E. 527 (1896); *Craig v. National City Bank*, 26 Ga. App. 128, 105 S.E. 632 (1921).

RESEARCH REFERENCES

ALR. — Admissibility of books of account as affected by mutilation, erasures, or alterations, 142 ALR 1406.

Mutilations, alterations, and deletions as

affecting admissibility in evidence of public record, 28 ALR2d 1443.

Presumptions and burden of proof as to time of alteration of deed, 30 ALR3d 571.

24-7-3. When necessity of proof dispensed with.

The production of a paper by the opposite party, if he claims any benefit under it, dispenses with the necessity of proof. The notice to produce shall dispense with proof as against the party giving the notice. (Orig. Code 1863, § 3759; Code 1868, § 3783; Code 1873, § 3836; Code 1882, § 3836; Civil Code 1895, § 5243; Civil Code 1910, § 5832; Code 1933, § 38-705.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WRITINGS PRODUCED UNDER NOTICE

SPECIFIC WRITINGS PRODUCED UNDER NOTICE

General Consideration

Writing with subscribing witnesses. — When a writing was offered in evidence, to which there was a subscribing witness, the latter must be produced in all cases, except in the five instances specified in former Civil Code 1910, § 5833 (see O.C.G.A. § 24-7-4), and those named in former Civil Code 1910, § 5832 (see O.C.G.A. § 24-7-3). *Lamb v. Empire Life Ins. Co.*, 143 Ga. 180, 84 S.E. 439 (1915).

Reliance on writing creates presumption of validity. — Reason of this statute is founded in the fact that when a paper is drawn out from the possession of a party claiming title or other benefit under the paper, that the presumption of the law is that one relies upon its genuineness and validity, and, therefore, the producing dispenses with the proof. *Campbell v. Roberts*, 66 Ga. 733 (1881) (see O.C.G.A. § 24-7-3).

Failure to prove execution. — There was no error in admitting in evidence a document sued on, over the objection that the document's execution had not been sufficiently shown at the time, notwithstanding the general rule that "where the execution of a note is denied by a plea of non est factum, the note will not be received until some extrinsic evidence of its execution has been submitted." *Mendel v. Converse & Co.*, 30 Ga. App. 549, 118 S.E. 586 (1923).

Claim of benefit. — To hold a paper as a receipt or voucher is a sufficient claim of benefit under it to meet the requirements of law. *Louisville & N.R.R. v. Yudelson*, 135 Ga. 731, 70 S.E. 576 (1911).

Cited in *Hobby v. Alford*, 73 Ga. 791 (1884); *Cambron v. Canal Ins. Co.*, 246 Ga.

147, 269 S.E.2d 426 (1980).

Writings Produced Under Notice

Objection to writing produced under notice. — Production under notice provided by law does not affect the right of the party against whom the paper is offered to object to the paper's introduction in evidence on account of irrelevancy, or because of the paper's secondary nature. *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S.E. 265 (1911); *Mendel v. Converse & Co.*, 30 Ga. App. 549, 118 S.E. 586 (1923).

Use at subsequent trials. — While writings produced on notice and inspected will thereby become evidence for the producing party without further proof on all trials of the same case, this will not suffice on the trial of a subsequent case, though brought for the same cause of action. *Wooten & Co. v. Nall*, 18 Ga. 509 (1855); *Cushman v. Coleman*, 92 Ga. 772, 19 S.E. 46 (1894).

Specific Writings Produced Under Notice

Irrelevant paper. — Production of a paper, upon notice that is not relevant to the issue, but which recites another paper that is pertinent and material, will not overcome the necessity of proof of execution of the latter paper that is material. *Doe v. Guthry*, 32 Ga. 307 (1861).

Book of ordinances. — In a suit against a municipality to enjoin the enforcement of an ordinance, where the plaintiff serves the municipality with notice to produce its book of ordinances, and the book is produced under notice, inspected by the plaintiff, and

Specific Writings Produced Under Notice (Cont'd)

so much of the book as contains a certain ordinance is offered in evidence by the plaintiff, it is the right of the defendant to offer in evidence the book to prove any other ordinance therein, without further identification which may be relevant. *Stone v. Town of Tallulah Falls*, 131 Ga. 452, 62 S.E. 592 (1908).

Printed circular. — When a printed circu-

lar, produced by the defendant under notice from the complainants, was offered in evidence by the latter, it must first be proved that defendants had issued and circulated the paper before the paper could be read in evidence against the defendants. *Berry v. Mathewes*, 7 Ga. 457 (1849).

Bond for title. — Bond for title produced pursuant to notice from the opposite party claiming an interest need not be proved. *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351 (1851); *McMath v. Teel*, 64 Ga. 595 (1880).

RESEARCH REFERENCES

ALR. — Production, in response to call therefor by adverse party, of document oth-

erwise inadmissible in evidence, as making it admissible, 151 ALR 1006.

24-7-4. Subscribing witnesses to be produced; exceptions.

The subscribing witness shall be produced in all cases except the following:

- (1) Ancient writings which prove themselves;
- (2) If from any cause the witness cannot be produced or sworn;
- (3) Office bonds required by law to be approved or tested by a particular functionary;
- (4) If the paper is only incidentally or collaterally material to the case; or
- (5) If the party executing the written instrument testifies to its execution. (Orig. Code 1863, § 3760; Code 1868, § 3784; Code 1873, § 3837; Code 1882, § 3837; Ga. L. 1895, p. 31, § 1; Civil Code 1895, § 5244; Civil Code 1910, § 5833; Code 1933, § 38-706.)

Cross references. — Requirements regarding proving of wills by witnesses, § 53-3-13.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ANCIENT WRITINGS

SUBSCRIBING WITNESSES NOT AVAILABLE

WRITING ONLY COLLATERALLY MATERIAL

TESTIMONY BY PARTY EXECUTING WRITING

General Consideration

Production of subscribing witnesses. —

When a writing, to which there is a subscribing witness, is offered in evidence the witness must be produced except in the five instances specified by statute. *Watts v. Kilburn*, 7 Ga. 354 (1849); *Lamb v. Empire Life Ins. Co.*, 143 Ga. 180, 84 S.E. 439 (1915); *Wooten v. Life Ins. Co.*, 93 Ga. App. 665, 92 S.E.2d 567 (1956).

Other witnesses with more knowledge. —

Fact that others may know more of the transaction will not dispense with testimony of attesting witnesses. *Ellis v. Doe*, 10 Ga. 253 (1851).

One witness to bill of sale. — Bill of sale to personalty though attested by two subscribing witnesses, is admissible in evidence upon due proof of its execution by only one of them, without calling or accounting for the other. *Cooper v. O'Brien*, 98 Ga. 773, 26 S.E. 470 (1896).

Copy of lost original. — Lost original having been accounted for and the copy being relevant to the issue, the latter was admissible in evidence under this provision over an objection that there was no proof of the existence and execution of the original. The handwriting of the subscribing witnesses to an inaccessible paper could not possibly be proved. *Baker v. Adams*, 99 Ga. 135, 25 S.E. 28 (1896).

Failure to object to writing. — When a proper plea of non est factum has not been filed, proof of execution of the instrument on which suit is based is not necessary. *Diversified Growth Corp. v. Equitable Leasing Corp.*, 140 Ga. App. 511, 231 S.E.2d 505 (1976).

Witnesses not infallible. — Witness can never testify truthfully as to any past transaction with which the witness was connected, except from the witness's recollection, and so a jury is not required to find against the declared recollection of a witness merely because the witness states that the witness may be in error and cannot swear positively — thus recognizing that the witness's memory may not be infallible. *Saliba v. Saliba*, 202 Ga. 791, 44 S.E.2d 744 (1947).

Witnesses were required to authenticate a material writing in the following cases. — See *Barron v. Walker*, 80 Ga. 121, 7 S.E. 272 (1888); *Coody v. Gress Lumber Co.*, 82 Ga. 793, 10 S.E. 218 (1889) (contract of sale);

Summerour v. Felker, 102 Ga. 254, 29 S.E. 448 (1897); *Thornton v. Martin*, 116 Ga. 115, 42 S.E. 348 (1902); *Singer Sewing Mach. Co. v. Wardlaw*, 29 Ga. App. 626, 116 S.E. 207 (1923); *Commercial Credit Co. v. Grant*, 33 Ga. App. 31, 125 S.E. 382 (1924) (conveyance not recorded); *Hines v. Moore*, 168 Ga. 451, 148 S.E. 162 (1929).

Cited in *Standback v. Thornton*, 106 Ga. 81, 31 S.E. 805 (1898); *White v. Sailors*, 17 Ga. App. 550, 87 S.E. 831 (1916); *Burt v. Gooch*, 37 Ga. App. 301, 139 S.E. 912 (1927); *Cook v. Parks*, 46 Ga. App. 749, 169 S.E. 208 (1933); *McDay v. Metropolitan Life Ins. Co.*, 51 Ga. App. 791, 181 S.E. 871 (1935); *Newmans v. State*, 65 Ga. App. 288, 16 S.E.2d 87 (1941); *Bloodworth v. McCook*, 193 Ga. 53, 17 S.E.2d 73 (1941); *Brewer v. Commercial Credit Co.*, 66 Ga. App. 138, 17 S.E.2d 243 (1941); *Peters v. Adcock*, 196 Ga. 118, 26 S.E.2d 342 (1943); *Gibson v. Causey*, 223 Ga. 135, 153 S.E.2d 704 (1967); *Martin v. State*, 135 Ga. App. 4, 217 S.E.2d 312 (1975); *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980); *National Bank v. Hill*, 161 Ga. App. 499, 288 S.E.2d 365 (1982); *Burke County Dialysis Center, Inc. v. Walters*, 194 Ga. App. 535, 391 S.E.2d 33 (1990).

Ancient Writings

Writing more than 30 years old. — When a receipt or other written instrument is more than 30 years old, the receipt's execution need not be proved to admit the receipt in evidence, although the subscribing witness may be living. *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393 (1850).

Subscribing witness alive and available. — An ancient writing is admissible in evidence though an attesting witness is still alive and accessible, and is not examined. *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393 (1850); *Gardner v. Grannis*, 57 Ga. 539 (1876).

Subscribing Witnesses Not Available

Names of witnesses unknown. — In view of the statute when a deed has been lost, and the subscribing witnesses are unknown, proof of the deed's existence and due execution may be made by any witness who knows the facts. *Turner v. Cates*, 90 Ga. 731, 16 S.E. 971 (1893). See also *Felton v. Pitman*, 14 Ga. 530 (1854).

Witness not in county. — Fact that a witness is not in the county will not (without

Subscribing Witnesses Not Available (Cont'd)

more) lay the foundation for receiving other evidence. *Baker & Swain v. Massengale*, 83 Ga. 137, 10 S.E. 347 (1889).

Witness not in state. — If the subscribing witnesses to a deed reside out of the state, secondary evidence may be resorted to in order to prove the deed's execution. *Harris v. Cannon*, 6 Ga. 382 (1849).

Writing Only Collaterally Material

Bond for title. — When a bond for title admitted over objection is only collaterally material, the bond falls within this exception. *Chance v. Chance*, 163 Ga. 267, 135 S.E. 923 (1926).

Contract on action on check. — Since this was an action on the check itself, the contract between the purchaser and the seller was only incidentally or collaterally involved, and proof of the proper execution of the check was neither necessary nor material to the case. *Dealers Dist. & Inv. Co. v. Mitchell Motors, Inc.*, 101 Ga. App. 900, 115 S.E.2d 420 (1960).

Contract of sale. — Contract of sale, whereby the sole stockholder of the old corporation transferred part of the stockholder's interest therein, established no rights between the parties to a pending suit by a new corporation, to recover the unpaid purchase-money on a contract of sale entered into between the corporation and the defendant, and is therefore only incidentally and collaterally material to the suit. Permitting proof of the execution of a contract otherwise than by the testimony of the subscribing witnesses thereto was not error. *Johnson-Battle Lumber Co. v. Emanuel Lumber Co.*, 33 Ga. App. 517, 126 S.E. 861 (1925).

Landlord's lien. — When the existence of a landlord's lien for supplies is directly in issue, a writing attested by a subscribing witness and purporting to create such a lien is not admissible in evidence without proof by such witness of the writing's execution or duly accounting for nonproduction in view of the statute. *Baker & Swain v. Massengale*, 83 Ga. 137, 10 S.E. 347 (1889).

Transfer of mortgage. — When the transfer of a mortgage, if material at all, is simply incidentally or collaterally relevant to the

real issues in the case, as a mere circumstance which may tend to throw some light upon a question of fact involved in the case it is not necessary to produce a subscribing witness, in view of the law. *Prescott v. Fletcher*, 133 Ga. 404, 65 S.E. 877 (1909).

Testimony by Party Executing Writing

Accounting for absence of party executing. — On trial of a suit by a beneficiary in a life-insurance policy, it was error to receive in evidence secondary evidence respecting the execution of the application to reinstate without preliminary proof accounting for the subscribing witness thereto. *Lamb v. Empire Life Ins. Co.*, 143 Ga. 180, 84 S.E. 439 (1915).

Deed not recorded. — Deed need not be recorded to be admissible if proper foundation is laid; such foundation can be laid if party executing deed testifies to the deed's execution in accordance with the law or witnesses to deed are examined as to the deed's execution. *Smith v. Forrester*, 156 Ga. App. 79, 274 S.E.2d 101 (1980).

Time of execution. — When the subscribing witnesses to a deed were called to prove the deed's execution, but because of failure of memory were unable to locate the time of the deed's execution, the deed was, even before the passage of this provision, competent for the alleged maker to testify that the deed was in fact made at the time the deed purported on the deed's face to have been executed. *Kelly v. William Sharp Saddlery Co.*, 99 Ga. 393, 27 S.E. 741 (1896).

Signature to blank paper. — When the maker of an instrument testified that the maker's signature thereto was genuine, the court properly admitted the instrument in evidence, notwithstanding the fact that in the same breath the maker testified that when the maker put the maker's signature on this paper it was a blank piece of paper, that the maker did not make the statements contained in this paper, and knew nothing of the contents thereof. *Campbell v. State*, 157 Ga. 233, 121 S.E. 306 (1924).

Transfer of note by corporation. — Execution of a written transfer of a promissory note by a corporation as the payee, denied on oath, is proved by the undisputed evidence of the president of the corporation that as president and duly authorized agent of the corporation the written transfer of the

note was executed, for and in the name of the corporation. *Christie v. Shingler*, 10 Ga. App. 529, 73 S.E. 751 (1912).

Bill of sale not acknowledged. — It was not error to admit in evidence a paper purporting to be a bill of sale, over objection that the paper appeared to have been recorded but not to have been acknowledged before a notary public; there being testi-

mony that the maker signed the paper, and the maker as a witness admitting so signing. *James v. Bettis*, 21 Ga. App. 170, 94 S.E. 85 (1917).

Deed. — Between the parties, the testimony of the maker is sufficient proof of execution of a deed. *Vizard v. Moody*, 119 Ga. 918, 47 S.E. 348 (1904).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1051, 1190, 1203 et seq., 1229.

C.J.S. — 32 C.J.S., Evidence, §§ 986, 989, 990, 1125.

ALR. — Authorship or authenticity of

written or printed matter as inferable without extrinsic proof from name used therein or from its contents or subject matter, 131 ALR 301.

24-7-5. Proof of execution where subscribing witnesses inaccessible; primary evidence; secondary evidence.

Whenever the subscribing witnesses to an instrument in writing are dead, insane, incompetent, or inaccessible or, being produced, do not recollect the transaction, proof of the actual signing by or the handwriting of the alleged maker shall be received as primary evidence of the fact of execution. If such evidence shall not be attainable, the court may admit evidence of the handwriting of the subscribing witnesses or other secondary evidence to establish the fact of execution. (Orig. Code 1863, § 3761; Code 1868, § 3785; Code 1873, § 3838; Code 1882, § 3838; Ga. L. 1895, p. 90, § 1; Civil Code 1895, § 5245; Civil Code 1910, § 5834; Code 1933, § 38-707.)

History of Code section. — The language of this Code section is derived in part from

the decision in *McVicker v. Conkle*, 96 Ga. 584, 24 S.E. 23 (1895).

JUDICIAL DECISIONS

Origin of statute. — Prior to the 1895 amendment to this statute where the writing could not be proven by the subscribing witnesses, first resort was to proof of the handwriting of the witnesses, but the Supreme Court suggested the change on a rational basis and the change was made and inserted into the Code of 1895. *McVicker v. Conkle*, 96 Ga. 584, 24 S.E. 23 (1895); *Strickland v. Babcock Lumber Co.*, 142 Ga. 120, 82 S.E. 531 (1914) (see O.C.G.A. § 24-7-5).

Any competent evidence admissible. — While it is incumbent upon a party offering

in evidence a paper the execution of which the party is required to prove, and which purports to have been attested by a subscribing witness, to introduce or account for such witness, if the latter upon examination does not remember or denies that the witness attested the instrument, the execution thereof may then be proved by any other competent evidence. *Buchanan v. Simpson Grocery Co.*, 105 Ga. 393, 31 S.E. 105 (1898).

Circumstantial evidence. — Existence and genuineness of a deed may be proved by circumstantial evidence. *Campbell v. Sims*,

161 Ga. 517, 131 S.E. 483 (1926).

Witness attending school in another state.

— When it appeared that the subscribing witness to a written instrument was attending school in another state at the time of the trial, the witness's absence was sufficiently accounted for, and the execution of the instrument could be proved otherwise than by the witness's testimony. *Terry v. Broadhurst*, 127 Ga. 212, 56 S.E. 282 (1906).

Ancient writings. — An instrument may be properly admitted as having been sufficiently proved irrespective of whether or not there was a sufficient compliance with the rule admitting ancient writings without proof. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Witnesses to last writing unknown. —

When the witnesses, if any, are unknown, it is not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. *Sharp v. Autry*, 185 Ga. 160, 194 S.E. 194 (1937).

Death of subscribing witnesses. — When an affidavit of forgery was filed to a recorded deed, after having shown death of the two attesting witnesses, the plaintiff should introduce proof of actual signing by the alleged

maker or of the genuinenesses of the maker's signature fixed thereto, or that such evidence was not attainable. *Strickland v. Babcock Lumber Co.*, 142 Ga. 120, 82 S.E. 531 (1914).

Proof of handwriting. — When the alleged maker of an unrecorded deed, who signed by the maker's mark, and the two subscribing witnesses to the instrument are dead, proof that the signature of the two latter upon the instrument are in their genuine handwriting is evidence of the fact of execution; and the charge of the court, which in effect instructed the jury that such proof was prima facie evidence of the fact of the execution of the deed, was not contrary to law. *Edenfield v. Brinson*, 149 Ga. 377, 100 S.E. 373 (1919).

Cited in *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930); *Miller v. Everett*, 192 Ga. 26, 14 S.E.2d 449 (1941); *Newmans v. State*, 65 Ga. App. 288, 16 S.E.2d 87 (1941); *Brewer v. Commercial Credit Co.*, 66 Ga. App. 138, 17 S.E.2d 243 (1941); *Woods v. Universal C.I.T. Credit Corp.*, 110 Ga. App. 394, 138 S.E.2d 593 (1964); *Newton v. Higdon*, 226 Ga. 649, 177 S.E.2d 57 (1970); *Carter v. State*, 163 Ga. App. 640, 295 S.E.2d 576 (1982); *Jackson v. State*, 209 Ga. App. 217, 433 S.E.2d 655 (1993).

RESEARCH REFERENCES

ALR. — Introduction of decedent's books of account by his personal representative as

waiver of "dead man's statute," 26 ALR2d 1009.

24-7-6. Proof of handwriting.

Proof of handwriting may be resorted to in the absence of direct evidence of execution. In such case, any witness who shall swear that he knows or would recognize the handwriting shall be competent to testify as to his belief. The source of his knowledge shall be a question for investigation and shall go entirely to the credit and weight of his evidence. (Orig. Code 1863, § 3762; Code 1868, § 3786; Code 1873, § 3839; Code 1882, § 3839; Civil Code 1895, § 5246; Penal Code 1895, § 1016; Civil Code 1910, § 5835; Penal Code 1910, § 1042; Code 1933, § 38-708.)

Law reviews. — For comment on *Copeland v. State*, 66 Ga. App. 142, 17 S.E.2d 288 (1941), see 4 Ga. B.J. 53 (1942).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SOURCE OF KNOWLEDGE OF WITNESSES

EXPERT WITNESSES

NONEXPERT WITNESSES

LETTERS

General Consideration

Handwriting inadmissible without proof.

— Writing, alleged to be in the handwriting or signature of a party, is inadmissible unless the writing is proved or acknowledged to be genuine. *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Witnesses to the authenticity of handwriting may be illiterate. *Smith v. State*, 77 Ga. 705 (1886).

Circumstantial evidence. — Authenticity of the writing may be proved by circumstantial evidence. *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Presumption of authenticity. — When a witness swears positively to the genuineness of handwriting and when other handwriting by the same author is submitted to the jury for comparison, an inference of genuineness is proper. *Boggus v. State*, 34 Ga. 275 (1866) (Admission of author); *Gatlin v. State*, 18 Ga. App. 9, 89 S.E. 345 (1916).

Witness must express opinion. — Before the testimony of a witness as to the identity of handwriting can go to the jury, the witness must express what amounts to an opinion, one way or the other, at the time when the witness is testifying, under the circumstances then existing. *Foster v. Jenkins & Belt*, 30 Ga. 476 (1860).

Comparison with signature on pleading in case. — Defendant's handwriting may not be measured in genuineness by a comparison with defendant's signature to a plea filed in the case, merely because such plea is in the case. *Washington v. State*, 124 Ga. 423, 52 S.E. 910 (1905).

Writings admitted solely for comparison.

— Former Code 1933, § 38-708 (see O.C.G.A. § 24-7-6), together with former Code 1933, § 38-709 (see O.C.G.A. § 24-7-7), may be applied to writings not normally admissible under former Code 1933, § 38-418 (see O.C.G.A. § 24-9-21) if the documents were not to be used for their

content, but rather for the limited use of a comparison of the handwritings. *Guy v. State*, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

Authenticity is question for jury. — Statement that the handwriting is that of a certain person is to be taken not as a conclusion but merely as an opinion the weight of which is a matter entirely for the jury. *Borders v. City of Macon*, 18 Ga. App. 333, 89 S.E. 451 (1916); *Bates v. State*, 18 Ga. App. 718, 90 S.E. 481 (1916); *Rogers v. Rogers*, 52 Ga. App. 548, 184 S.E. 404 (1936); *Notis v. State*, 84 Ga. App. 199, 65 S.E.2d 622 (1951); *Gaulding v. Courts*, 90 Ga. App. 472, 83 S.E.2d 288 (1954).

Improperly admitted testimony harmless when relevant only to counts on which defendant acquitted. — When handwriting testimony is improperly admitted but is relevant only to those counts of the indictment of which defendant was acquitted, the admission of such testimony is clearly harmless. *Dowdy v. State*, 159 Ga. App. 805, 285 S.E.2d 764 (1981).

Cited in *Brown v. McBride*, 129 Ga. 92, 58 S.E. 702 (1907); *Finch v. Hayes*, 147 Ga. 147, 93 S.E. 89 (1917); *Guthrie v. Harper*, 167 Ga. 588, 146 S.E. 320 (1928); *Wilson-Weesner-Wilkinson Co. v. Collier*, 62 Ga. App. 457, 8 S.E.2d 171 (1940); *Stow v. Hargrove*, 203 Ga. 735, 48 S.E.2d 454 (1948); *Walker v. State*, 127 Ga. App. 460, 193 S.E.2d 892 (1972); *Martin v. State*, 135 Ga. App. 4, 217 S.E.2d 312 (1975); *Gross v. State*, 161 Ga. App. 489, 288 S.E.2d 733 (1982); *Jones v. State*, 165 Ga. App. 498, 299 S.E.2d 920 (1983); *Goodman v. State*, 167 Ga. App. 378, 306 S.E.2d 417 (1983); *Centennial Life Ins. Co. v. Smith*, 210 Ga. App. 194, 435 S.E.2d 498 (1993); *Flanders v. State*, 217 Ga. App. 73, 456 S.E.2d 604 (1995); *Parker v. State*, 283 Ga. App. 714, 642 S.E.2d 111 (2007); *Rollins, Inc. v. Warren*, 288 Ga. App. 184, 653 S.E.2d 794 (2007).

Source of Knowledge of Witnesses

Knowledge from business correspondence. — When a witness testifies that from business correspondence the witness is acquainted with the handwriting of the writer of a letter received by due course of mail, such testimony is enough to carry to the jury as evidence, and the court was right to admit the evidence. *Pearson & Co. v. McDaniel*, 62 Ga. 100 (1878).

Witness comparing by recollection. — It is not competent for a witness to testify as to the genuineness of a signature to a lost writing when all the knowledge that the witness has upon the subject is based upon a comparison of the witness's recollection of such signature with writing proved by other witnesses to be that of the person whose name was signed to the lost instrument. *Gress Lumber Co. v. Georgia Pine Shingle Co.*, 120 Ga. 751, 48 S.E. 115 (1904).

Manner in which a witness acquires knowledge of a person's handwriting is immaterial. *Reid v. State*, 20 Ga. 681 (1856); *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467 (1869); *Shaw v. Chiles*, 9 Ga. App. 460, 71 S.E. 745 (1911); *Notis v. State*, 84 Ga. App. 199, 65 S.E.2d 622 (1951).

Expert Witnesses

Handwriting expert may testify as to the genuineness of handwriting. *Borders v. City of Macon*, 18 Ga. App. 333, 89 S.E. 451 (1916).

When handwriting expert's testimony is based upon the expert's comparison between admitted exemplars of defendant's handwriting and other unadmitted documents, introduction of such testimony into the record is error. *Dowdy v. State*, 159 Ga. App. 805, 285 S.E.2d 764 (1981).

Nonexpert Witnesses

Basis for testimony of nonexpert witness. — Anyone familiar with the handwriting of another may testify as to an opinion of the authenticity to the best of that person's knowledge and belief. *Bates v. State*, 18 Ga. App. 718, 90 S.E. 481 (1916); *Waddell v. Watkins Medical Co.*, 25 Ga. App. 657, 104 S.E. 250 (1920); *Haygood v. Clark Co.*, 27 Ga. App. 101, 107 S.E. 379 (1921); *Copeland v. State*, 66 Ga. App. 142, 17 S.E.2d 288 (1941); *Gaulding v. Courts*, 90 Ga. App. 472,

83 S.E.2d 288 (1954); *Wooten v. Life Ins. Co.*, 93 Ga. App. 665, 92 S.E.2d 567 (1956); *Kinney v. Youngblood*, 216 Ga. 354, 116 S.E.2d 608 (1960).

Nonexpert witness may identify the handwriting of a particular individual (as the witness would identify the individual personally), provided the witness knows the handwriting or is so familiar with the handwriting that the witness would recognize the handwriting. *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497 (1987); *Summerour v. State*, 211 Ga. App. 65, 438 S.E.2d 176 (1993).

Availability of direct evidence of execution. — O.C.G.A. § 24-7-6 does not exclude opinion testimony on the authenticity of a signature when direct evidence of execution is available. *Ham v. Ham*, 257 Ga. App. 415, 571 S.E.2d 441 (2002).

Nonexpert witness must have reasons for recognizing the writing in question. *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467 (1869); *Wimbish v. State*, 89 Ga. 294, 15 S.E. 325 (1892); *Haygood v. Clark Co.*, 27 Ga. App. 101, 107 S.E. 379 (1921).

Comparison with other handwriting. — Nonexpert witness may not testify as to the identity of handwriting if the witness's opinion is based solely on comparison with handwriting proved to be genuine. *Copeland v. State*, 66 Ga. App. 142, 17 S.E.2d 288 (1941), for comment, see 4 Ga. B.J. 53 (1942).

Trial court did not err in allowing a police detective, who gained knowledge of defendant's signature by witnessing the defendant sign the arraignment form, from identifying the signature on an indictment from a prior conviction; the source of the detective's knowledge was a proper question for investigation and went entirely to the credit and weight of the detective's evidence. *Williams v. State*, 259 Ga. App. 742, 578 S.E.2d 128 (2003).

Employee's recognition of supervisor's signature. — Employee's testimony that the employee transmitted a document to a supervisor and received the document back with the supervisor's signature and that the employee recognized the signature as that of the supervisor because the employee was familiar with the signature satisfied the requirements of O.C.G.A. § 24-7-6. *Malin v. Servisco, Inc.*, 172 Ga. App. 418, 323 S.E.2d 278 (1984).

Letters

For proof necessary to authenticate an unsigned letter, see *Rumph v. State*, 91 Ga. 20, 16 S.E. 104 (1892).

Last letters. — Contents of a lost note are not proven when the witness can give no evidence of knowledge of the handwriting of the person alleged to have written the note. *Bone v. State*, 86 Ga. 108, 12 S.E. 205 (1890).

Possession not proof of authenticity. — Proof that letters were found in the defendant's possession is not proof that the handwriting in the letters was defendant's handwriting. *McCombs v. State*, 109 Ga. 496, 34 S.E. 1021 (1900).

Authentication sufficient. — Testimony by the recipient of a letter that the handwriting on the letter appeared to be that of the defendant was sufficient authentication of the letter to allow the letter's admission against defendant during defendant's trial for aggravated assault. *Harrison v. State*, 253 Ga. App. 179, 558 S.E.2d 760 (2002).

Handwritten note, in which the first of two defendants admitted to killing the victim in order to prevent the victim from testifying was properly authenticated because the letter was consistent with prior conversations involving the non-accomplice witness and the first defendant, and was personally addressed to the non-accomplice. *Williams v. State*, 280 Ga. 584, 630 S.E.2d 370 (2006).

Trial court did not err in the admission of

two letters handwritten by the defendant that were used by the state to cast doubt on the defendant's mental retardation claim with regard to the defendant's murder conviction and the death sentence imposed as a Department of Corrections employee authenticated the letters after testifying that the employee would recognize the defendant's handwriting because the employee observed the defendant sign the defendant's name and had received written communications from the defendant. The employee's statement that the handwriting in the body of the letters "appears to be that of" the defendant did not render the employee's testimony too tentative to support a finding of authenticity. *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, U.S. , 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008).

Any error in the admission of a defendant's response to a detective's statement that the co-indictee had implicated the defendant in a murder and robbery made before Miranda warnings were administered was harmless as the statement was cumulative of a non-expert's admissible testimony authenticating letters from the defendant to the co-indictee under O.C.G.A. § 24-7-6 containing a certain racial epithet also used by the defendant in the response. *Phillips v. State*, 285 Ga. 213, 675 S.E.2d 1 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1209.

ALR. — Use of photographs in examination and comparison of handwriting or type-writing, 31 ALR 1431; 17 ALR2d 308.

Admissibility and weight of opinion evidence as to genuineness of signature by mark, 101 ALR 767.

Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses, 154 ALR 649.

Admissibility in evidence of enlarged pho-

tographs or photostatic copies, 72 ALR2d 308.

Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose, 72 ALR2d 1274.

Propriety of jury, or court sitting as trier of facts, making a comparison of a disputed writing with a standard produced in court, without the aid of an expert witness, 80 ALR2d 272.

Admissibility of handwriting expert's testimony in federal criminal case, 183 ALR Fed. 333.

24-7-7. Comparison of other writings; submittal to opposite party.

Other writings proved or acknowledged to be genuine may be admitted in evidence for the purpose of comparison by the jury. Such other papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial. (Orig. Code 1863, § 3763; Code 1868, § 3787; Code 1873, § 3840; Code 1882, § 3840; Civil Code 1895, § 5247; Civil Code 1910, § 5836; Code 1933, § 38-709.)

Law reviews. — For comment on *Copeland v. State*, 66 Ga. App. 142, 17 S.E.2d 288 (1941), see 4 Ga. B.J. 53 (1942).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SUBMISSION OF WRITINGS TO OPPOSITE PARTY

AUTHENTICATION OF DOCUMENT SUBMITTED FOR COMPARISON

NONEXPERT WITNESSES

EXPERT WITNESSES

DOCUMENTS AFFECTING PARTY'S CHARACTER OR REPUTATION

AUTHENTICITY IS QUESTION FOR JURY

General Consideration

Documents admitted for comparison only.

— Law may be applied to writings not normally admissible if the documents are to be used for a comparison of handwriting and not for documents' content. *Mitchell v. State*, 89 Ga. App. 80, 78 S.E.2d 563 (1953); *Guy v. State*, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

Document to show that party can sign name in writing and not by mark is admissible. *Stewart v. White*, 143 Ga. 22, 84 S.E. 63 (1915); *Corley v. Parson*, 236 Ga. 346, 223 S.E.2d 708 (1976).

Cited in *Waddell v. Watkins Medical Co.*, 25 Ga. App. 657, 104 S.E. 250 (1920); *Gibson v. Gibson*, 54 Ga. App. 187, 187 S.E. 155 (1936); *Stow v. Hargrove*, 203 Ga. 735, 48 S.E.2d 454 (1948); *Gaulding v. Courts*, 90 Ga. App. 472, 83 S.E.2d 288 (1954); *Walker v. State*, 127 Ga. App. 460, 193 S.E.2d 892 (1972); *Geiger v. State*, 129 Ga. App. 488, 199 S.E.2d 861 (1973); *Quaid v. State*, 132 Ga. App. 478, 208 S.E.2d 336 (1974); *Martin v. State*, 135 Ga. App. 4, 217 S.E.2d 312 (1975); *West v. State*, 149 Ga. App. 191, 253 S.E.2d 854 (1979); *Huskins v. State*, 245 Ga. 541, 266 S.E.2d 163 (1980); *Gross v. State*, 161 Ga. App. 489, 288 S.E.2d 733 (1982);

Carter v. State, 163 Ga. App. 640, 295 S.E.2d 576 (1982); *Jackson v. Jackson*, 163 Ga. App. 767, 296 S.E.2d 100 (1982); *Chavis v. State*, 178 Ga. App. 44, 341 S.E.2d 907 (1986); *Boyce v. State*, 184 Ga. App. 578, 362 S.E.2d 229 (1987).

Submission of Writings to Opposite Party

In general. — Under the wording of this statute, writings tendered for the purpose of proving handwriting by comparison are inadmissible unless submitted to the opposite party before that party announces oneself ready for trial. *Georgia Masonic Mut. Life Ins. Co. v. Gibson*, 52 Ga. 640 (1874); *Axson v. Belt*, 103 Ga. 578, 30 S.E. 262 (1898); *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S.E. 143 (1904); *Gress Lumber Co. v. Georgia Pine Shingle Co.*, 120 Ga. 751, 48 S.E. 115 (1904); *Ginn v. Ginn*, 142 Ga. 420, 83 S.E. 118 (1914); *Thomas v. State*, 39 Ga. App. 659, 148 S.E. 277 (1929); *Notis v. State*, 84 Ga. App. 199, 65 S.E.2d 622 (1951); *Padula v. State*, 119 Ga. App. 562, 167 S.E.2d 696 (1969); *Smith v. State*, 138 Ga. App. 226, 225 S.E.2d 744 (1976); *Henderson v. State*, 145 Ga. App. 597, 244 S.E.2d 136 (1978).

Documents not submitted to the adverse party prior to announcing ready for trial are

not admissible. *Painter v. State*, 159 Ga. App. 479, 283 S.E.2d 695 (1981).

Provisions of O.C.G.A. § 24-7-7 are mandatory. *Painter v. State*, 159 Ga. App. 479, 283 S.E.2d 695 (1981).

Substantial compliance with O.C.G.A. § 24-7-7 is not countenanced unless documents are presented to other side well in advance of trial. *Painter v. State*, 159 Ga. App. 479, 283 S.E.2d 695 (1981).

Writings acknowledged as authentic must be submitted to the opposite party. *Marietta Fertilizer Co. v. Gary*, 22 Ga. App. 604, 96 S.E. 711 (1918); *Beeland v. Clark*, 47 Ga. App. 77, 169 S.E. 681 (1933).

Submission of the same documents in another case does not put the defendant on notice that such documents are intended to be used in the case on trial, and does not give the defendant notice as contemplated by law. *Mitchell v. State*, 89 Ga. App. 80, 78 S.E.2d 563 (1953).

Writings offered in evidence without objection need not have been offered to opposite party prior to trial. *Thomas v. State*, 59 Ga. 784 (1877).

Document not previously revealed to the opposite party admissible for the purpose of showing that a party can write and that the party can sign one's name in writing and not by mark. *Corley v. Parson*, 236 Ga. 346, 223 S.E.2d 708 (1976).

Failure to submit may not be raised initially on appeal. — When the defendant contends that exhibits used for comparison purposes should not have been admitted into evidence because the exhibits were not submitted prior to trial, but the defendant made no objection at trial, the objection could not be raised for the first time on appeal. *McDaniel v. State*, 169 Ga. App. 254, 312 S.E.2d 363 (1983).

Authentication of Document Submitted for Comparison

Writing must be either proven or acknowledged before admissible in evidence for comparison. *McVicker v. Conkle*, 96 Ga. 584, 24 S.E. 23 (1895); *Vizard v. Moody*, 119 Ga. 918, 47 S.E. 348 (1904); *Chicago Bldg. & Mfg. Co. v. Butler*, 139 Ga. 816, 78 S.E. 244 (1913); *Ginn v. Ginn*, 142 Ga. 420, 83 S.E. 118 (1914); *Smith v. State*, 138 Ga. App. 226, 225 S.E.2d 744 (1976); *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

An ancient deed was so far proven to be the genuine deed of the grantor, and so far established the genuineness of the grantor's signature thereto as to authorize the deed's admission in evidence for the purpose of a comparison of handwriting, upon the trial of a cause involving the question of the genuineness of the signature of such grantor to another instrument. *Goza v. Browning*, 96 Ga. 421, 23 S.E. 842 (1895).

Circumstantial evidence. — Genuineness of the writing may be proved by circumstantial evidence. *Gunter v. State*, 243 Ga. 651, 256 S.E.2d 341 (1979).

Circumstantial evidence of a postmark and a return address for a handwritten letter, along with a witness's testimony that the witness received the letter in the mail, was not sufficient authentication of the letter. *Ross v. State*, 194 Ga. App. 464, 390 S.E.2d 671 (1990).

Possession not proof of authenticity. — Possession of letters is not of itself sufficient to prove that the possessor wrote letters, and thus establish the handwriting thereof as a standard with which to compare the handwriting. *McCombs v. State*, 109 Ga. 496, 34 S.E. 1021 (1900).

Plea in another action. — When the deed was signed by mark instead of by the signature of the vendor, and it was shown that the vendor could write, it was not error to allow the plaintiff to introduce in evidence the original plea, filed in another suit brought against the vendor about the time of the execution of the deed alleged to be forged, with the signature of the vendor affixed to such plea, for the purpose of showing that the vendor could write and that the vendor signed the vendor's name in writing and not by mark. *Stewart v. White*, 143 Ga. 22, 84 S.E. 63 (1915).

Nonexpert Witnesses

In general. — A nonexpert witness may identify the handwriting of a particular individual (as the witness would identify the individual personally), provided the witness knows the handwriting or is so familiar with the handwriting that the witness would recognize the handwriting, but such witness may not testify as to the identity of handwriting if the witness's opinion is founded solely on a comparison of a handwriting brought into court and proved to be genuine with the

Nonexpert Witnesses (Cont'd)

handwriting in question. *Copeland v. State*, 66 Ga. App. 142, 17 S.E.2d 288 (1941), for comment, see 4 Ga. B.J. 53 (1942).

Expert Witnesses

In general. — When two other letters, purporting to come from the same source as the first, were shown to experts, who compared the letters with the first letter and testified that the experts were of the opinion that the letters were all in the same handwriting, this was sufficient to admit the letters in evidence. *Smith v. State*, 77 Ga. 705 (1886).

Trial court did not err in admitting in evidence two notebooks, representing handwriting samples, for comparison with the kidnapping ransom note, and in refusing to strike the testimony of the state's expert witness as to comparison of these notebooks with the ransom note. *Gross v. State*, 161 Ga. App. 489, 288 S.E.2d 733 (1982).

Documents Affecting Party's Character or Reputation

In general. — Upon the trial of one accused of murder it was not error to admit signatures of defendant on two pleas of guilty on two indictments for check forgery for comparison over the objection that this evidence put the defendant's character in

issue. *Hyde v. State*, 196 Ga. 475, 26 S.E.2d 744 (1943) (even though other samples of defendant's handwriting were available); *Watkins v. State*, 151 Ga. App. 496, 260 S.E.2d 547 (1979).

Documents showing another crime. — Checks which were the basis for a prior forgery conviction could be offered for a comparison with the handwriting on the 34 checks at issue in the forgery case on trial as those checks had a direct relevancy to the case and, therefore, were not objectionable because those checks also tended to show a distinct and separate crime on the part of appellant. *Watkins v. State*, 151 Ga. App. 510, 260 S.E.2d 547 (1979).

Authenticity Is Question for Jury

In general. — It is the duty of the jury to compare the disputed writing with admittedly or proven authentic writings and then determine the authenticity of the disputed writing. *Boggus v. State*, 34 Ga. 275 (1866); *Bruce v. Crews*, 39 Ga. 544, 99 Am. Dec. 467 (1869); *Collins v. Glisson*, 35 Ga. App. 111, 132 S.E. 114 (1926); *Rogers v. Rogers*, 52 Ga. App. 548, 184 S.E. 404 (1936).

Jury instructions. — If any specific instruction was desired as to the jury's duty to compare such writings with the signature on the note alleged to have been forged, a special written request should have been made. *McRae v. Wilby*, 59 Ga. App. 401, 1 S.E.2d 77 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1209.

C.J.S. — 32 C.J.S., Evidence, § 820 et seq.

ALR. — Admissibility in evidence, for purpose of comparison, of writing made by accused person at request of public authorities, 1 ALR 1304.

Use of photographs in examination and comparison of handwriting or typewriting, 31 ALR 1431; 72 ALR2d 308.

Changes in handwriting as evidence of change in physical or mental condition, 134 ALR 641.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature, 41 ALR2d 575.

Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose, 72 ALR2d 1274.

Propriety of jury, or court sitting as trier of facts, making a comparison of a disputed writing with a standard produced in court, without the aid of an expert witness, 80 ALR2d 272.

24-7-8. Proving medical records or reproductions.

(a) As used in this Code section, the term “medical records” means all written clinical information which relates to the treatment of individuals, when such information is kept in an institution.

(b) Medical records or reproductions thereof, when duly certified by their custodians, need not be identified at the trial and may be used in any manner in which records identified at the trial by the custodian could be used. (Ga. L. 1971, p. 441, §§ 1, 2.)

Law reviews. — For annual survey article on evidence law, see 52 Mercer L. Rev. 263 (2000).

JUDICIAL DECISIONS

Purpose. — Ga. L. 1971, p. 441, §§ 1 and 2 (see O.C.G.A. § 24-7-8) and Ga. L. 1970, p. 225, § 1 (see O.C.G.A. § 24-7-9) deal with the method of authenticating records which are otherwise admissible and are not new rules of admissibility eliminating the hearsay rule. *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

Rules of evidence apply. — Admissibility of the contents of hospital records is governed by the rules of admissibility and not by the manner in which the records are obtained, whether the records be obtained through certification, or through subpoena, or notice to produce. *Dennis v. Adcock*, 138 Ga. App. 425, 226 S.E.2d 292 (1976).

In a premises liability suit, the trial court properly excluded certified copies of some of an invitee’s medical records under O.C.G.A. § 24-7-8 because the invitee had not provided the requisite 60-day notice under O.C.G.A. § 24-3-18. Section 24-7-8 concerned only the authentication of medical records and did not allow the invitee to circumvent other evidentiary rules; furthermore, the invitee failed to provide a record citation for the specific medical records that the invitee claimed should have been admitted and thus it was unclear whether those records were narratives, to which § 24-3-18(a) applied, or other types of records. *Fuller v. Flash Foods, Inc.*, 298 Ga. App. 217, 679 S.E.2d 775 (2009).

Hearsay rule applicable. — O.C.G.A. § 24-7-8 deals with the authentication of medical records which are otherwise admis-

sible, and does not eliminate the rule against hearsay or create a new one. *Giles v. Taylor*, 166 Ga. App. 563, 305 S.E.2d 154 (1983).

Statutes which pertain to the authentication of documents do not remove hearsay considerations. *Manning v. State*, 231 Ga. App. 584, 499 S.E.2d 650 (1998).

Effect of certification is to dispense with preliminary proof of authenticity on the part of the custodian of the records, but not to make admissible any matter contained in the reports which is otherwise subject to objection. *Smith v. State*, 141 Ga. App. 720, 234 S.E.2d 385 (1977); *Adams v. Metropolitan Atlanta Rapid Transit Auth.*, 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Certification by custodian. — If a hospital record contains diagnostic opinions and conclusions, the record cannot, upon proper objection, be admitted into evidence unless and until the person who entered such diagnostic opinions and conclusions upon the record qualifies as an expert and relates the facts upon which the entry was based. *Dennis v. Adcock*, 138 Ga. App. 425, 226 S.E.2d 292 (1976).

Relevant portion of records admissible. — Records which contain diagnostic opinions, conclusions, and other statements of third parties not before the court are still not admissible if tendered in toto though relevant portions of such records not subject to such defects may be. *Dennis v. Adcock*, 138 Ga. App. 425, 226 S.E.2d 292 (1976); *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

Photographs are admissible to show the condition of the body of the deceased and

the nature and extent of the deceased's wounds, and when used to illustrate medical testimony as to the cause of death of the deceased, photographs are not inadmissible because the photographs might inflame the jury, but are relevant and material to the issue. *Sirmans v. State*, 229 Ga. 743, 194 S.E.2d 476 (1972).

Testimony of preparer of records unnecessary. — When the records in question were certified as accurate by the custodian of the treating hospital and contained no inadmissible hearsay evidence, it was not necessary for foundation to be laid for admitting records in evidence by offering testimony of examining doctor or medical personnel who

prepared the records. *Venenga v. State*, 163 Ga. App. 161, 293 S.E.2d 553 (1982); *Wilson v. Childers*, 174 Ga. App. 179, 329 S.E.2d 503 (1985).

Cited in *Taylor v. State*, 229 Ga. 536, 192 S.E.2d 249 (1972); *Graham v. State*, 236 Ga. 378, 223 S.E.2d 803 (1976); *B.G. v. State*, 143 Ga. App. 725, 240 S.E.2d 133 (1977); *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *McCall v. Parker*, 177 Ga. App. 774, 341 S.E.2d 303 (1986); *McGaha v. State*, 221 Ga. App. 440, 471 S.E.2d 533 (1996); *Opio v. State*, 283 Ga. App. 894, 642 S.E.2d 906 (2007); *Allstate Ins. Co. v. Sutton*, 290 Ga. App. 154, 658 S.E.2d 909 (2008).

RESEARCH REFERENCES

ALR. — Conclusiveness as against insured or beneficiary or physician's report made as, or in connection with, proofs of loss or death, 93 ALR 1342.

Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Admissibility of records of a practicing physician or surgeon as evidence of physical or mental condition of person examined, 135 ALR 1258.

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures, 6 ALR2d 406.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 ALR3d 303.

Necessity of expert evidence to support action against hospital for injury to or death of patient, 40 ALR3d 515.

Admissibility under business entry statutes of hospital records in criminal case, 69 ALR3d 22.

Admissibility under Uniform Business Records and Evidence Act or similar statute of medical report made by consulting physician to treating physician, 69 ALR3d 104.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 ALR3d 456.

Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 ALR3d 1012.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 ALR4th 906.

24-7-9. Identification of medical bills; expert witness unnecessary.

(a) Upon the trial of any civil case involving injury or disease, the patient or the member of his family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

- (1) A hospital;
- (2) An ambulance service;

(3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or

(4) A licensed practicing physician, chiropractor, dentist, orthotist, podiatrist, or psychologist.

(b) Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence. (Code 1933, § 38-706.1, enacted by Ga. L. 1970, p. 225, § 1; Ga. L. 1983, p. 525, § 1; Ga. L. 1987, p. 3, § 24.)

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Purpose. — Law creates a stream-lined procedure permitting laymen to introduce bills incurred for treatment of injuries resulting from the subject of litigation without requiring an expert witness to testify that such charges were reasonable and necessary. *Lester v. S.J. Alexander, Inc.*, 127 Ga. App. 470, 193 S.E.2d 860 (1972); *Piggly-Wiggly S., Inc. v. Tucker*, 139 Ga. App. 873, 229 S.E.2d 804 (1976).

O.C.G.A. § 24-7-9 is only a statutory rule of evidence regarding the admission of medical bills. It does not purport to obviate a plaintiff's further satisfaction of the evidentiary obligation to demonstrate the liability of the defendant for the damages being sought. *Eberhart v. Morris Brown College*, 181 Ga. App. 516, 352 S.E.2d 832 (1987).

Chiropractors' bills are not medical bills that the legislature has declared may be admitted without proof by an expert witness as to their reasonableness and necessity. *Giles v. Taylor*, 166 Ga. App. 563, 305 S.E.2d 154 (1983) (decided prior to 1983 amendment).

Scope. — Law accomplishes three goals: (1) it eliminates the necessity of having the person submitting the bill to testify; (2) it makes it unnecessary to produce an expert witness to prove such charges were reasonable and necessary; and (3) it makes laymen competent witnesses to identify such bills.

Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972).

Statute not exclusive. — Law was not intended as the sole means of proving medical damages in personal injury suits. *Piggly-Wiggly S., Inc. v. Tucker*, 139 Ga. App. 873, 229 S.E.2d 804 (1976).

Rules of evidence apply. — Ga. L. 1970, p. 225, § 1 (see O.C.G.A. § 24-7-9) and Ga. L. 1971, p. 441, §§ 1 and 2 (see O.C.G.A. § 24-7-8) deal with the method of authenticating records which are otherwise admissible and are not new rules of admissibility eliminating the hearsay rule. *Dennis v. Adcock*, 138 Ga. App. 425, 226 S.E.2d 292 (1976); *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

Right to cross-examine not limited. — Law allows a thorough and sifting cross-examination for the purpose of undermining the credibility of the lay witness, but the fact that the witness's accuracy is impugned does not affect the admissibility of the exhibits. *Atlanta Transit Sys. v. Smith*, 141 Ga. App. 87, 232 S.E.2d 580 (1977).

Law does not require the showing that a hospital is licensed as a prerequisite to admission of hospital and medical bills from that institution. *Kamman v. Seabolt*, 149 Ga. App. 167, 253 S.E.2d 842 (1979).

Irrelevant items in records. — When a submitted bill includes without differentiation items having no relevance to the automobile collision, the proffered evidence not

only fails to meet the statutory requisites but may be properly rejected under the rule that testimony offered as a whole without separating the relevant from that which is irrelevant and inadmissible is to be repelled in its entirety. *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972); *Lester v. S.J. Alexander, Inc.*, 127 Ga. App. 470, 193 S.E.2d 860 (1972); *Jordan v. Hagewood*, 133 Ga. App. 958, 213 S.E.2d 85 (1975).

A trial court properly admitted a deceased patient's medical bills in support of the patient's claims against a nursing home under O.C.G.A. § 24-7-9, because the patient's expert subtracted from the total hospital bills the amount that would have been incurred had the patient remained in the nursing home receiving treatment for previous problems. *Tucker Nursing Ctr., Inc. v. Mosby*, No. A09A1756, 2010 Ga. App. LEXIS 277 (Mar. 24, 2010).

Physician's action for services. — Physician in an action to recover for professional services rendered has the burden of proving the value as represented by the ordinary and reasonable fee for the services, despite this statute whereby in certain cases it shall not be necessary for an expert to testify that the medical charges were reasonable and necessary. *Bouldin v. Baum*, 134 Ga. App. 484, 214 S.E.2d 734 (1975) (see O.C.G.A. § 24-7-9).

Authentication of canceled checks. — Law does not mention authentication of canceled checks and, as a result, canceled checks may be authenticated in the traditional manner. *Piggly-Wiggly S., Inc. v. Tucker*, 139 Ga. App. 873, 229 S.E.2d 804 (1976).

Canceled checks as evidence. — Since neither the spirit nor the literal application of this statute places a limitation upon the admission of canceled checks in evidence, the checks' admission would be assessed by the jury in light of testimony showing the checks had been drawn for payment of treatment of injuries which plaintiff received due to defendant's negligence. *Piggly-Wiggly S., Inc. v. Tucker*, 139 Ga. App. 873, 229 S.E.2d 804 (1976) (see O.C.G.A. § 24-7-9).

Testimony on reasonableness of charges. — When testimony of plaintiff describes the plaintiff's injuries arising out of an auto collision and number of visits to a named doctor for treatment and the spouse identifies the doctor's bill and states the spouse's

payment thereof, it is not necessary to have the physician testify that the charges were reasonable and necessary. *Rutledge v. Glass*, 125 Ga. App. 549, 188 S.E.2d 261 (1972).

Testimonial foundation was sufficient for the admission of evidence. — See *Harper v. Samples*, 164 Ga. App. 511, 298 S.E.2d 29 (1982); *Zack's Properties, Inc. v. Gafford*, 241 Ga. App. 43, 526 S.E.2d 80 (1999).

Testimonial foundation was insufficient for admission of evidence. — Plaintiff in a personal injury action failed to lay the proper foundation for admission of a summary of plaintiff's medical expenses, where the plaintiff introduced a summary sheet that listed only the medical providers by name, a range of dates, the total amount per provider, and the final total of services from multiple sources, but the plaintiff admitted that the plaintiff did not and could not compile the totals, and the plaintiff did not provide specific testimony substantiating the various subtotals. *Hossain v. Nelson*, 234 Ga. App. 792, 507 S.E.2d 243 (1998).

Error in admission of bills held harmless. — See *Binns v. Metropolitan Atlanta Rapid Transit Auth.*, 168 Ga. App. 261, 308 S.E.2d 674 (1983), *aff'd*, 252 Ga. 289, 313 S.E.2d 104 (1984).

Medical bills not speculative evidence. — In a personal injury suit brought by a married couple, evidence of the cost of medical treatment that the injured spouse received from all of the various medical providers was not speculative and was properly considered by the jury when the injured spouse testified as to the medical treatment received and introduced the medical bills into evidence. *Hart v. Shergold*, 295 Ga. App. 94, 670 S.E.2d 895 (2008), *cert. denied*, No. S09C0582, 2009 Ga. LEXIS 230 (Ga. 2009).

Expert medical testimony not required to withstand defendant's motion for directed verdict. — A causal connection, requiring expert medical testimony, must be established when the "potential continuance of a disease" is at issue. However, if there is no significant lapse of time between the injury sustained and the onset of the physical condition for which the injured party seeks compensation, and the injury sustained is a matter which jurors must be credited with knowing by reason of common knowledge, expert medical testimony is not required in order for a plaintiff to establish a personal

injury case sufficient to withstand a defendant's motion for directed verdict. *Jordan v. Smoot*, 191 Ga. App. 74, 380 S.E.2d 714 (1989).

Chiropractors not licensed physicians. — A chiropractor is not a licensed practicing physician, and a chiropractor's bills are not admissible. *Dilliplane v. Henderson*, 141 Ga. App. 684, 234 S.E.2d 357 (1977).

Clarification of opposing counsel's semantics argument did not impact testimony on medical bills. — In a premises liability case, the trial court did not prevent an invitee from identifying the invitee's medical bills through the invitee's own testimony. This contention was clearly belied by the record which demonstrated that the trial court simply clarified opposing counsel's semantics argument but allowed the invitee to testify regarding the invitee's medical bills and the total dollar amount incurred. *Fuller v. Flash Foods, Inc.*, 298 Ga. App. 217, 679 S.E.2d 775 (2009).

Cited in *Sharp v. Thomas*, 125 Ga. App. 137, 186 S.E.2d 589 (1971); *Parham v. Roach*, 131 Ga. App. 728, 206 S.E.2d 686 (1974); *Glover v. Southern Bell Tel. & Tel. Co.*, 132 Ga. App. 74, 207 S.E.2d 584 (1974); *Bennett v. Haley*, 132 Ga. App. 512, 208 S.E.2d 302 (1974); *P. & M. Masonry v. W.J. Black Co.*, 136 Ga. App. 646, 222 S.E.2d 152 (1975); *Atlanta Transit Sys. v. Nowell*, 138 Ga. App. 443, 226 S.E.2d 286 (1976); *Monson v. Brown*, 163 Ga. App. 42, 292 S.E.2d 486 (1982); *Davis v. Pachuiilo*, 169 Ga. App. 677, 314 S.E.2d 692 (1984); *Georgia Farm Bureau Mut. Ins. Co. v. Middleton*, 171 Ga. App. 454, 319 S.E.2d 909 (1984); *Aetna Cas. & Sur. Co. v. Hulsey*, 173 Ga. App. 316, 325 S.E.2d 923 (1985); *Odom v. Dekle*, 178 Ga. App. 788, 344 S.E.2d 675 (1986); *CFUS Props., Inc. v. Thornton*, 246 Ga. App. 75, 539 S.E.2d 571 (2000).

RESEARCH REFERENCES

ALR. — Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 ALR3d 1012.

ARTICLE 2

PUBLIC RECORDS

Cross references. — Proof of lack of public record by evidence showing that record cannot be found, § 9-11-44. Records, docu-

ments, and papers of public officers generally, T. 50, C. 18.

RESEARCH REFERENCES

ALR. — Admissibility, in personal injury or death action arising out of airplane acci-

dent, of documents and reports pertaining to investigations, 23 ALR2d 1360.

24-7-20. Exemplifications — By state or county officers.

The certificate or attestation of any public officer, either of this state or any county thereof, shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper of file, or other matter or thing in his respective office, or pertaining thereto, to admit the same in evidence. (Laws 1819, Cobb's 1851 Digest, p. 272; Laws 1830, Cobb's 1851 Digest, p. 273; Ga. L. 1855-56, p. 143, § 1; Code 1863, § 3739; Code 1868, § 3763; Code 1873, § 3816; Code 1882, § 3816; Civil Code 1895, § 5211; Penal Code 1895, § 1015; Civil Code 1910, § 5798; Penal Code 1910, § 1041; Code 1933, § 38-601.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

"PUBLIC OFFICER" DEFINED

CERTIFICATE AND SEAL

FEDERAL RECORDS

COURT RECORDS

TREATMENT OF SPECIFIC RECORDS

General Consideration

Editor's notes. — This section and Code Section 24-5-20, being so closely allied, and so often construed together by the courts, the notes to one will be found helpful in construing the other.

Nothing in O.C.G.A. § 24-7-20 requires that certified copies be photostatic copies of original documents. *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Objection to admission of record. — It is too late to object to a record for want of proper authentication after the record has been admitted and read to the jury without objection. *Williams v. Rawlins*, 33 Ga. 117 (1861).

Clerical error in a certified copy of the sentence of one convicted of crime will not render the paper inadmissible in evidence if it clearly appears from the context what the true purport of the document was. *Daniel v. State*, 114 Ga. 533, 40 S.E. 805 (1902).

Validity of record certified. — In action for alimony when plaintiff introduces a certified copy of marriage certificate, no issue as to validity of marriage is made in the absence of a direct attack on the record by the defendant. *Guess v. Guess*, 202 Ga. 364, 43 S.E.2d 326 (1947).

Authentication does not automatically establish admissibility. — O.C.G.A. § 24-7-20 does not address hearsay concerns; the statute does not require the admission of hearsay merely because the hearsay has been recorded in a court of record. *McGaha v. State*, 221 Ga. App. 440, 471 S.E.2d 533 (1996).

Cited in *Manley v. State*, 166 Ga. 563, 144 S.E. 170 (1928); *Georgia Fertilizer Co. v. Walker*, 45 Ga. App. 68, 163 S.E. 277 (1932); *Citizens' Bank v. American Sur. Co.*, 174 Ga. 852, 164 S.E. 817 (1932); *Smoak v. State*, 58 Ga. App. 299, 198 S.E. 99 (1938); *Brooks v.*

State, 63 Ga. App. 575, 11 S.E.2d 688 (1940); *Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961); *Lilly v. Crisp County Sch. Sys.*, 117 Ga. App. 868, 162 S.E.2d 456 (1968); *Anderson v. Department of Family & Children Servs.*, 118 Ga. App. 318, 163 S.E.2d 328 (1968); *Harrison v. State*, 120 Ga. App. 812, 172 S.E.2d 328 (1969); *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970); *Elliott v. Leavitt*, 122 Ga. App. 622, 178 S.E.2d 268 (1970); *Spurlin v. State*, 228 Ga. 763, 187 S.E.2d 856 (1972); *Beets v. Padgett*, 125 Ga. App. 551, 188 S.E.2d 265 (1972); *Musgrove v. State*, 230 Ga. 46, 195 S.E.2d 407 (1973); *Locklear v. Morgan*, 129 Ga. App. 763, 201 S.E.2d 163 (1973); *Wheless v. State*, 135 Ga. App. 406, 218 S.E.2d 88 (1975); *Williams v. State*, 138 Ga. App. 662, 226 S.E.2d 816 (1976); *Genins v. Geiger*, 144 Ga. App. 244, 240 S.E.2d 745 (1977); *Huskins v. State*, 245 Ga. 541, 266 S.E.2d 163 (1980); *Rutledge v. Colonial Fin. Serv., Inc.*, 170 Ga. App. 317, 316 S.E.2d 867 (1984); *Whitlock v. State*, 174 Ga. App. 5, 329 S.E.2d 286 (1985); *Bland v. State*, 174 Ga. App. 584, 330 S.E.2d 796 (1985); *Roberts v. Porter, Davis, Saunders & Churchill*, 193 Ga. App. 898, 389 S.E.2d 361 (1989); *Williamson v. State*, 194 Ga. App. 439, 390 S.E.2d 658 (1990); *Cannon Air Transp. Servs., Inc. v. Stevens Aviation, Inc.*, 249 Ga. App. 514, 548 S.E.2d 485 (2001); *Hill v. State*, 251 Ga. App. 437, 554 S.E.2d 579 (2001); *Battle v. State*, 266 Ga. App. 532, 597 S.E.2d 417 (2004); *Green v. Bd. of Dirs. of Park Cliff Unit Owners Ass'n*, 279 Ga. App. 567, 631 S.E.2d 769 (2006); *McKinley v. State*, 303 Ga. App. 203, 692 S.E.2d 787 (2010).

"Public Officer" Defined

Commission not required. — "Public officer," whose certification authenticates copies of records, is not expressly required to be commissioned by the Governor. *Cowan v.*

State, 130 Ga. App. 320, 203 S.E.2d 311 (1973); *Waddill v. Waddill*, 143 Ga. App. 806, 240 S.E.2d 129 (1977).

Deputies authorized to certify. — Certificate need not be by a public officer personally, rather than by a deputy officer who certifies that the deputy is the custodian of the records. *Musgrove v. State*, 230 Ga. 46, 195 S.E.2d 407 (1973); *Cowan v. State*, 130 Ga. App. 320, 203 S.E.2d 311 (1973); *Waddill v. Waddill*, 143 Ga. App. 806, 240 S.E.2d 129 (1977); *Blackmon v. State*, 153 Ga. App. 359, 265 S.E.2d 320 (1980) (decided prior to 1980 amendment to former Code 1933, § 68B-215 (see § 40-5-2)).

Court reporters are not authorized to certify. *Hardeman v. English*, 79 Ga. 387, 5 S.E. 70 (1888).

Clerk of court authorized to certify. — Any witness who has read the records in the clerk's office can testify as to what was found or not found but only the certificate of the clerk is sufficient to authenticate any record existing in the clerk's office. *Hines v. Johnston*, 95 Ga. 644, 23 S.E. 970 (1895).

Federal officers and employees are not authorized to certify. *O'Connor v. United States*, 11 Ga. App. 246, 75 S.E. 110 (1912); *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946); *Pressley v. State*, 207 Ga. 274, 61 S.E.2d 113 (1950); *Mach v. State*, 109 Ga. App. 154, 135 S.E.2d 467 (1964); *Cowan v. State*, 130 Ga. App. 320, 203 S.E.2d 311 (1973).

Municipal officer not included. — Law applies exclusively and in terms to the public officers of this state and the several counties thereof, and therefore can have no reference to certificates signed by municipal officers. *Central of Ga. Ry. v. Bond*, 111 Ga. 13, 36 S.E. 299 (1900).

In addition to officers specifically mentioned in the above cases several by implication are authorized to certify public records within their custody. *Shivers v. State*, 53 Ga. 149 (1874). But this rule is now modified by § 24-7-21; *Clark v. Empire Lumber Co.*, 87 Ga. 742, 13 S.E. 826 (1891); *Cannon v. Gorham*, 136 Ga. 167, 71 S.E. 142, 1912C Ann. Cas. 39 (1911) (Comptroller General); *Ferrell v. Hurst*, 68 Ga. 132 (1881); *Berry v. Clark*, 117 Ga. 964, 44 S.E. 824 (1903) (Secretary of State); *Jett v. Hart*, 152 Ga. 266, 109 S.E. 654 (1921) (tax receiver).

Certificate and Seal

Form of certificate. — Certificate in the following form: "The above and foregoing is a true copy," etc., is a sufficient authentication of a record. *Harden v. Webster, Parmelee & Co.*, 29 Ga. 427 (1859).

Sufficiency of certificate. — To make a certificate from the Executive Department admissible in evidence, it is not necessary that the certificate should give a copy of that to which it relates. It is sufficient that it gives, substantially, the contents, or a part of the contents, of the thing to which it relates. *Henderson v. Hackney*, 16 Ga. 521 (1854).

Contents of record. — Statute merely requires a certificate or attestation, without specifying any detail as to the location and length of the record, by reference to the number of pages, minute book, case number, and similar details. *McIntyre v. Balkcom*, 229 Ga. 81, 189 S.E.2d 445 (1972) (see O.C.G.A. § 24-7-20).

Seal not required. — Statute requires a certificate or attestation without specifying the necessity for the seal by a court reporter. *Kinney v. Avery & Co.*, 14 Ga. App. 180, 80 S.E. 663 (1914); *Canal Ins. Co. v. Tate*, 111 Ga. App. 377, 141 S.E.2d 851 (1965); *McIntyre v. Balkcom*, 229 Ga. 81, 189 S.E.2d 445 (1972) (see O.C.G.A. § 24-7-20).

Federal Records

Elements of authentication, the authority, the incumbency, and the genuineness of the signature of the certifying custodian, are applicable to records of the federal, not the state, government. *O'Connor v. United States*, 11 Ga. App. 246, 75 S.E. 110 (1912); *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946); *Pressley v. State*, 207 Ga. 274, 61 S.E.2d 113 (1950); *Mach v. State*, 109 Ga. App. 154, 135 S.E.2d 467 (1964); *Cowan v. State*, 130 Ga. App. 320, 203 S.E.2d 311 (1973).

Court Records

In general. — Clerk of court may certify a copy or transcript of the court record but the clerk's certificate of the nonexistence on the records of certain facts is not admissible. *Miller v. Reinhart*, 18 Ga. 239 (1855); *Dillon v. Mattox*, 21 Ga. 113 (1857); *Martin v. Anderson*, 21 Ga. 301 (1857); *Walker v. Logan*, 75 Ga. 759 (1885); *Lamar v. Pearre*,

Court Records (Cont'd)

90 Ga. 377, 17 S.E. 92 (1892); Hines v. Johnston, 95 Ga. 644, 23 S.E. 470 (1895); Greer v. Ferguson, 104 Ga. 552, 30 S.E. 943 (1898); but see for contra implication, Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979).

Court proceedings. — The only legal way to prove proceedings of the superior court is by an extract from the minutes of that court duly certified by the court's clerk. Bowden v. Taylor, 81 Ga. 199, 6 S.E. 277 (1888); Weaver v. Tuten, 138 Ga. 101, 74 S.E. 835 (1912).

Criminal proceedings. — Exemplification of the record of an illegality case, under the hand and seal of the clerk, exhibiting among other things, the assignment by the plaintiff of the writ of *fi. fa.*, is admissible in evidence to prove the transfer. Napier v. Neal, 3 Ga. 298 (1847).

Guilty plea. — Trial court properly used a prior guilty plea to sentence the defendant as a recidivist when the state had presented a certified copy of the plea that was signed and initialed by defense counsel along with a plea hearing transcript; even if the plea hearing transcript was uncertified and unauthenticated, the certified copy of the plea was admissible under O.C.G.A. § 24-7-20, and the defendant did not produce evidence of invalidity once the fact of conviction was proved and the state showed that the defendant was represented by counsel. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537 (2007), cert. denied, 2007 Ga. LEXIS 806 (Ga. 2007).

Proceedings in same court. — Original papers of proceedings in the court are admissible in another case in the same court where otherwise relevant. Sellers v. Page, 127 Ga. 633, 56 S.E. 1011 (1907); Woods v. Travelers Ins. Co., 53 Ga. App. 429, 186 S.E. 467 (1936); Clarkum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936); Williford v. State, 55 Ga. App. 40, 192 S.E. 93 (1937); Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852 (1970); Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979).

Proceedings in other courts. — Statute makes provision for exemplification by certificate of any public officer of authenticity of any copy or transcript of any record, but has no relation to the court record in another case or cases pending in the same

court in which the records are offered in evidence. Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852 (1970) (see O.C.G.A. § 24-7-20).

Certification of nonconforming record. — Certification by the clerk of court shall speak the truth, and the clerk may not be required by a mandamus, or otherwise, to certify an instrument that does not conform to the records in the clerk's office. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81 (1954).

Judgment. — Introduction of a certified copy of a judgment against a party is sufficient evidence to prove the existence of that judgment. Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309 (1985).

Conviction records from a North Carolina court identified the court, contained a filed and date stamp, certified that each record was "a true copy of the original filed in this office" under the signature of the clerk of superior court whose authority was indicated by the initials following the clerk's signature, and contained the raised seal of the clerk; accordingly, the North Carolina convictions were properly authenticated under O.C.G.A. § 24-7-20. Horner v. State, 257 Ga. App. 12, 570 S.E.2d 94 (2002).

Treatment of Specific Records

Acknowledgment of service. — There was no error in admitting in evidence the certified copy of an acknowledgment of service. James v. Edward Thompson Co., 17 Ga. App. 578, 87 S.E. 842 (1916).

Administrative records. — Properly authenticated administrative records are admissible. Niehaus v. State, 149 Ga. App. 575, 254 S.E.2d 895 (1979).

Conditional sales contract. — Conditional sales contract duly recorded and on its face properly executed and attested is admissible in evidence. Central Bank & Trust Co. v. Creede, 103 Ga. App. 203, 118 S.E.2d 844 (1961).

County bonds. — It is the duty of the clerk of the superior court to sign a validation certificate and attach the seal of the clerk's office to all county bonds regularly validated. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81 (1954).

Distribution of estate. — When a division in kind is made between heirs and distributees of a decedent, a certified copy of

the return of the commissioners, and of the order of the court approving the return, are admissible in evidence in an action involving title to the land covered by the award. *Bell v. Cone*, 208 Ga. 467, 67 S.E.2d 558 (1951).

Fertilizer analysis record. — A certified copy of an analysis of fertilizers to be used in an action for false or incorrect branding should not contain a statement as to the penalty or damage for which the manufacturer or dealer might be deemed to be liable; only the mathematical result of the chemical analysis should be stated. *Georgia Fertilizer Co. v. Walker*, 45 Ga. App. 68, 163 S.E. 277 (1932).

Map of county. — Properly certified copy of a map of a county, in the office of the Secretary of State, is admissible in evidence without proof of the correctness or existence of the original. *Berry v. Clark*, 117 Ga. 964, 44 S.E. 824 (1903).

Marriage record. — Public record of a ceremonial marriage is conclusive evidence of such marriage, in the absence of a timely direct attack on such record, which attack must be supported by proper proof. *Guess v. Guess*, 202 Ga. 364, 43 S.E.2d 326 (1947).

Intoxilyzer report. — Defendant's conviction for driving under the influence to the extent that defendant's blood-alcohol content exceeded the legal limit was reversed as the trial court erroneously admitted a copy of the Intoxilyzer report over a best evidence objection; the state was unable to explain the absence of the original, the state presented no evidence that the state made any effort to locate the original, and O.C.G.A. § 24-7-20 did not apply. *Lumley v. State*, 280 Ga. App. 82, 633 S.E.2d 413 (2006).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. *Hunter v. Hardnett*, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991).

Pleading not used as court record. —

When a plea of guilty, in a prior criminal proceeding arising from the same occurrence, was admitted in evidence in the subsequent civil case for its impeaching value, the plea was not admitted as a court paper, and this statute did not apply. *Webb v. May*, 91 Ga. App. 437, 85 S.E.2d 641 (1955) (see O.C.G.A. § 24-7-20).

Book-in photographs. — Although the appellate court found that book-in photographs which the state offered to prove that defendant was the same person who was convicted of a prior felony, albeit under a different name, could have been admitted under O.C.G.A. § 24-7-20, and the appellate court recommended that practice, the appellate court held that the trial court did not abuse the court's discretion during the sentencing phase of defendant's trial when the court admitted the photographs and used them to determine that defendant was subject to a sentence of life in prison without parole, pursuant to O.C.G.A. § 17-10-7(c), because defendant had prior felony convictions. *Farmer v. State*, 268 Ga. App. 831, 603 S.E.2d 16 (2004).

Record of conviction. — Certification and seal on record of conviction furnished by an officer of the Department of Offender Rehabilitation (now Corrections) who was required by law to keep the records on file was sufficient to qualify the record for admission into evidence to establish the fact of lawfulness of incarceration even though the certification was not by the Superior Court of Whitfield County, the source of the original document. *Ward v. State*, 165 Ga. App. 163, 300 S.E.2d 528 (1983).

Trial court did not abuse the court's discretion when the court excluded a document purported to be the codefendant's felony conviction, as the document was not a properly certified copy and was unauthenticated. *McClendon v. State*, 276 Ga. App. 543, 623 S.E.2d 738 (2005).

Search warrants. — Rule that a public record can be proved only by a duly certified copy thereof, in the absence of admission in open court that the document is an original public record does not apply to search warrants. *DePalma v. State*, 228 Ga. 272, 185 S.E.2d 53 (1971).

Secretary of State's office records. — A certified copy of a record in the office of the

Treatment of Specific Records (Cont'd)

Secretary of State was held admissible on the question as to who was the grantee of land from the state. *Ferrell v. Hurst*, 68 Ga. 132 (1881).

Former homeowner was required to give notice to a defendant under O.C.G.A. § 10-1-399 even though the defendant was incorporated and had its principal place of business in a different state. There was no evidence that the defendant did not maintain a place of business in Georgia or keep some assets in Georgia, and the homeowner's contention was predicated on uncertified computer printouts from the Secretary of State's website, which were inadmissible under O.C.G.A. § 24-7-20. *Steed v. Fed. Nat'l Mortg. Corp.*, 301 Ga. App. 801, 689 S.E.2d 843 (2009).

Transcript of tax records. — Upon the trial of a tax collector for embezzlement, transcripts from the books of the Comptroller General and former Treasurer of the State, certified under statute, are admissible in evidence to show a failure on the part of such defendant to pay over the taxes collected by the defendant tax collector. *Shivers v. State*, 53 Ga. 149 (1874).

Tax returns. — It was not error to allow material portions of certified copies of tax returns of the defendant in ejectment, as to the number of acres of land given in by the defendant and the value thereof for certain years, to be received in evidence over the objection that the copies were certified to by the tax receiver, and not by the tax collector; that the original returns themselves, and not certified copies of the returns, should be produced in evidence. *Jett v. Hart*, 152 Ga. 266, 109 S.E. 654 (1921).

Tax return records of state. — Books of tax returns in the office of the Comptroller

General are of equal rank as evidence with those in the proper offices of the respective counties, and the certificate of the Comptroller General touching the contents of such books is no less admissible than the certificates of the proper county officer would be. *Clark v. Empire Lumber Co.*, 87 Ga. 742, 13 S.E. 826 (1891).

Execution for unpaid taxes. — After an execution for unpaid taxes was issued by the Comptroller General against a certain tract of unreturned wild land, and a sale of the land was made thereunder, and the execution was returned to the Comptroller's office with the official entries thereon, it became an office paper, and a certified copy of such execution and entries was admissible in evidence in lieu of the original. *Cannon v. Gorham*, 136 Ga. 167, 71 S.E. 142, 1912C Ann. Cas. 39 (1911).

Uncertified copies of computer printouts. — Uncertified copies of computer printouts apparently obtained from the Secretary of State's website could not be used as evidence to show a relationship between corporations because the printouts did not contain a certificate or attestation of a public officer and thus were not properly authenticated. *Matson v. Noble Inv. Group, LLC*, 288 Ga. App. 650, 655 S.E.2d 275 (2007).

Name search records from Secretary of State in form of computer printouts. — Trial court erred in considering name search documents from the Ohio Secretary of State's office because the documents were not properly authenticated under O.C.G.A. § 24-7-20. Uncertified copies of computer printouts from a Secretary of State's website were not admissible as evidence unless authenticated. *Std. Bldg. Co. v. Wallen Concept Glazing, Inc.*, 298 Ga. App. 443, 680 S.E.2d 527 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Statute relates only to the certification of state and county records, and does not em-

brace federal records. 1970 Op. Att'y Gen. No. U70-176 (see O.C.G.A. § 24-7-20).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1303, 1320, 1321.

Am. Jur. Pleading and Practice Forms. —

21A Am. Jur. Pleading and Practice Forms, Records and Recording Laws, § 5.

C.J.S. — 32 C.J.S., Evidence, §§ 841 et

seq., 886, 896, 897. 32A C.J.S., Evidence, § 1037.

ALR. — Presumption and prima facie case as to ownership of vehicle causing highway accident, 27 ALR2d 167.

Admissibility of report of police or other public officer or employee, or portions of reports, as to cause of or responsibility for

accident, injury to person, or damage to property, 69 ALR2d 1148.

Weather reports and records as evidence, 57 ALR3d 713.

Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, 80 ALR3d 414.

24-7-21. Exemplifications — Of municipal records and minutes.

Exemplifications of the records and minutes of municipal corporations of this state, when certified under seal by the clerks or keepers of such records, shall be admitted in evidence under the same rules and regulations as exemplifications of the records of the courts of record of this state. (Ga. L. 1890-91, p. 109, § 1; Civil Code 1895, § 5216; Civil Code 1910, § 5803; Code 1933, § 38-606.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COUNCIL RECORDS

PROVING ORDINANCES

1. IN GENERAL
2. EXEMPLIFICATION UNDER THIS STATUTE
3. PRODUCTION OF ORIGINAL

General Consideration

In general. — This statute (see O.C.G.A. § 24-7-21) came from an Act of Legislature (Ga. L. 1890-91, p. 109). Former Code 1882, § 3816 (see O.C.G.A. § 24-7-20) applied exclusively to public officers of this state and the several counties thereof and therefore could have no reference to certificates signed by municipal officers. In fact, exemplification of the records of municipal corporations were not admissible at all until made so by this section, and it merely provides that the records shall be admitted in evidence when certified under seal. *Metropolitan St. R.R. v. Johnson*, 90 Ga. 500, 16 S.E. 49 (1892); *Western & Atl. R.R. v. Hix*, 104 Ga. 11, 30 S.E. 424 (1898); *Farrar Lumber Co. v. City of Dalton*, 20 Ga. App. 138, 92 S.E. 946 (1917); *Harrison v. Central of Ga. Ry.*, 44 Ga. App. 167, 160 S.E. 694 (1931); *R.O.H. Properties, Inc. v. Westside Elec. Co.*, 151 Ga. App. 857, 261 S.E.2d 767 (1979).

Certified copy is not the exclusive evidence of the minutes and records of a municipal corporation. *Mullis v. State*, 197 Ga.

550, 30 S.E.2d 99 (1944).

City clerk is the proper person to certify to the ordinance. *Cason v. State*, 134 Ga. 786, 68 S.E. 554 (1910).

Seal is required. — An exemplification of a municipal record is not admissible in evidence unless duly certified under the corporate seal. *Western & Atl. R.R. v. Hix*, 104 Ga. 11, 30 S.E. 424 (1898); *Central of Ga. Ry. v. Bond*, 11 Ga. 13, 36 S.E. 299 (1900); *Sewell v. City of Tallapoosa*, 145 Ga. 19, 88 S.E. 577 (1916).

Municipality without corporate seal. — When a municipality has no seal, it is not error to admit in evidence an original ordinance if it is admitted to be such. *Greenberg v. Rothberg*, 72 Ga. App. 882, 35 S.E.2d 485 (1945).

Talley sheets of election. — Exemplifications of "records and minutes" of municipal corporations do not include talley sheets of former municipal elections. *Sewell v. City of Tallapoosa*, 145 Ga. 19, 88 S.E. 577 (1916).

Trial court properly admitted certified copy of arrest warrant. — See *Elliott v. State*,

General Consideration (Cont'd)

253 Ga. 417, 320 S.E.2d 361 (1984).

Uniform Traffic Citations admissible. — Uniform Traffic Citations that came before the court within the court clerk's file were "certified under seal" as required by O.C.G.A. § 24-7-21. *Graves v. State*, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

Venue. — Uniform Traffic Citations are not evidence, and thus cannot provide the factual basis necessary to establish venue. *Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds. *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing *Graves v. State*, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

Cited in *Kinney v. Avery & Co.*, 14 Ga. App. 180, 80 S.E. 663 (1914); *Johnson v. Frazier*, 121 Ga. App. 212, 173 S.E.2d 434 (1970); *Locklear v. State*, 131 Ga. App. 536, 206 S.E.2d 527 (1974); *Burns v. State*, 240 Ga. 827, 242 S.E.2d 579 (1978); *Argonaut Ins. Co. v. Head*, 149 Ga. App. 528, 254 S.E.2d 747 (1979); *Crass v. State*, 150 Ga. App. 374, 257 S.E.2d 909 (1979); *Davis v. State*, 172 Ga. App. 193, 322 S.E.2d 497 (1984).

Council Records

Action of city council. — Until the contrary appears, the action of a city council is supposed to be in writing; and its book of minutes, properly proved as such, or an exemplification of the record, certified by the clerk or keeper of such records, under seal, is the proper mode of placing the evidence before the court. *Farrar Lumber Co. v. City of Dalton*, 20 Ga. App. 138, 92 S.E. 946 (1917); *Mullis v. State*, 197 Ga. 550, 30 S.E.2d 99 (1944).

Original book of minutes. — Official minutes of the city council may be proved by the production of the original book of minutes identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. *Mullis v. State*, 197 Ga. 550, 30 S.E.2d 99 (1944).

Proving Ordinances**1. In General**

Two methods of proof of city ordinances are: (1) by an official certified copy thereof

under seal as provided by statute; or, (2) by the production of the original book of ordinances, identified as such by the clerk of the corporation and shown to have come from the clerk's custody. *Metropolitan St. R.R. v. Johnson*, 90 Ga. 500, 16 S.E. 49 (1892); *Western & Atl. R.R. v. Hix*, 104 Ga. 11, 30 S.E. 424 (1898); *Southern Ry. v. Thompson*, 96 Ga. App. 305, 99 S.E.2d 845 (1957); *R.O.H. Properties, Inc. v. Westside Elec. Co.*, 151 Ga. App. 857, 261 S.E.2d 767 (1979).

Judicial notice. — Municipal ordinance cannot be judicially noticed by state courts is well settled rule since the ordinances are treated as private statutes, and must be alleged and proved as matters of fact. *Greenberg v. Rothberg*, 72 Ga. App. 882, 35 S.E.2d 485 (1945).

If a local ordinance is relied on, the ordinance must be pled and proved in the trial court and, absent a properly admitted copy of the ordinance, neither the trial court nor the court of appeals may take judicial notice of the ordinance's existence. *In re J.T.*, 239 Ga. App. 756, 521 S.E.2d 862 (1999).

Parol evidence insufficient. — An ordinance of a municipality cannot be established by parol evidence. *Western & A.R.R. v. Peterson*, 168 Ga. 259, 147 S.E. 513 (1929); *Harrison v. Central of Ga. Ry.*, 44 Ga. App. 167, 160 S.E. 694 (1931); *Greenberg v. Rothberg*, 72 Ga. App. 882, 35 S.E.2d 485 (1945); *Southern Ry. v. Thompson*, 96 Ga. App. 305, 99 S.E.2d 845 (1957).

2. Exemplification Under This Statute

Certification of whole ordinance. — Where it is sought to have the clerk of a municipal corporation certify to a transcript of an ordinance, generally the entire ordinance on the subject in hand should be copied, but the admission of the certified transcript of one section will not always furnish ground for a reversal. *Cason v. State*, 134 Ga. 786, 68 S.E. 554 (1910).

Codified ordinances. — When city ordinances were codified, and such codification was adopted by an ordinance, and the clerk copied and certified a section of such codification, and also prepared and certified from the record a copy of the adopting ordinance, this was sufficient to authorize the admission in evidence of the copy of the section of the city code. *Nashville, C. & St. L.*

Ry. v. Peavler, 134 Ga. 618, 68 S.E. 432 (1910); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931).

Improper certification. — City court did not err in refusing to admit in evidence a copy of an ordinance which copy was not properly exemplified. Carroll v. Yearty, 102 Ga. App. 677, 117 S.E.2d 248 (1960).

Ordinance from published book or pamphlet. — Certification that the alleged ordinance is an exemplification from a book gives it no greater dignity than the book itself as the statute refers to records and minutes and the ordinance without proof of the ordinance's validity in the form of proper records or minutes is inadmissible. Western & A.R.R. v. Peterson, 168 Ga. 259, 147 S.E. 513 (1929); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931); City of Dalton v. Cochran, 80 Ga. App. 252, 55 S.E.2d 907 (1949); Southern Ry. v. Thompson, 96 Ga. App. 305, 99 S.E.2d 845 (1957).

Constitutionality of ordinance. — When there is no constitutional attack on the statute permitting a local ordinance, the appeals court must hold that a properly certified copy of such ordinance is admissible in evidence on the trial of an automobile negligence case in which it is alleged, and proof

is tendered, that the defendants violated such an ordinance. Cambron v. Cogburn, 118 Ga. App. 454, 164 S.E.2d 350 (1968).

Validity of ordinance. — City ordinance certified by the clerk and keeper of the records of the municipality was not subject to the objection that it must be shown that the ordinance was duly and properly adopted. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948); Cambron v. Cogburn, 118 Ga. App. 454, 164 S.E.2d 350 (1968).

3. Production of Original

Municipal ordinance may be proved by the production of the original book of ordinances, identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931).

Ordinance proven by original minutes. — It was not error for the court to permit the introduction, under proper proof, of the original minutes showing the adoption of the ordinance in question, rather than to require a certified copy thereof; this was competent evidence of an expression of formal corporate action. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99 (1944).

24-7-22. Judicial notice of ordinance or resolution.

When certified by a public officer, clerk, or keeper of the county or municipal records specified in Code Section 24-7-20 or 24-7-21 and in the absence of contrary evidence, judicial notice may be taken of a copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of Code Section 36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body. (Code 1981, § 24-7-22, enacted by Ga. L. 2001, p. 1219, § 1.)

Editor's notes. — Ga. L. 1983, p. 884, § 4-2, repealed former Code Section 24-7-22, relating to certified transcript of proceedings in justices' courts. The former Code section was based on Ga. L. 1884-85, p. 100, §§ 1, 2; Civil Code 1895, §§ 5214, 5215;

Civil Code 1910, §§ 5801, 5802; Code 1933, §§ 38-604, 38-605.

Law reviews. — For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001).

24-7-23. Notarial acts proved by notary's certificate, filed in trial court.

All notarial acts of notaries public in relation to bills of exchange, drafts, and promissory notes, required to be done by law, may be proved by the certificate of such notary under his hand and seal, provided that such certificate is filed in the trial court at its first term and permitted to remain there until the trial. (Laws 1836, Cobb's 1851 Digest, p. 273; Code 1863, § 3753; Code 1868, § 3777; Code 1873, § 3829; Code 1882, § 3829; Civil Code 1895, § 5235; Civil Code 1910, § 5822; Code 1933, § 38-625.)

JUDICIAL DECISIONS

Certificate of protest. — Certificate of protest by a notary affords prima facie evidence of the facts therein recited. *Patton v. Bank of La Fayette*, 124 Ga. 965, 53 S.E. 664, 5 L.R.A. (n.s.) 592, 4 Ann. Cas. 639 (1906), overruled on other grounds, *Sharpe v. Department of Transp.*, 267 Ga. 267, 476 S.E.2d 722 (1996).

Scope of certificate. — Notarial certificate alone is not prima facie evidence as to any act of the notary not therein certified to have been performed. *Hobbs & Tucker v. Chemical Nat'l Bank*, 97 Ga. 524, 25 S.E. 348 (1895).

Two sets of protests. — When two sets of notarial protests upon the same bill are filed both are entitled to be read without further proof by the notary. *Southern Bank v. Mechanics Sav. Bank*, 27 Ga. 252 (1859).

Failing to file in court. — That a certificate may not have been filed in court and there permitted to remain, agreeably to the provisions of this statute, simply furnished grounds for objecting to the certificate's reception in evidence. Having been regularly admitted in evidence, it was proper for the court to tell the jury what effect the law attaches to a notarial certificate of protest. *Patton v. Bank of La Fayette*, 124 Ga. 965, 53 S.E. 664, 5 L.R.A. (n.s.) 592, 4 Ann. Cas. 639 (1906), overruled on other grounds, *Sharpe v. Department of Transp.*, 267 Ga. 267, 476 S.E.2d 722 (1996).

Protest rejected for nonfiling. — When considered in connection with the evidence of the notary public who issued a certificate of protest on the paper sued on, the certificate not having been filed in court and permitted to remain there as provided by statute, it was not error to reject the certificate from evidence when offered by the plaintiff. *Woods v. Mays*, 143 Ga. 209, 84 S.E. 450 (1915).

Protest with notice. — Notarial certificate, which states that a draft was presented at maturity, and payment demanded and refused for want of funds, and that due notice of the nonpayment was given on the same day to all the parties concerned, is sufficient notice of the dishonor thereof. *Fields v. Thornton*, 1 Ga. 306 (1846).

Law not only makes certificates prima facie evidence of the nonpayment of a note, but evidence of notice also, when so stated in the certificate under the hand and seal of the notary. *Walker v. Bank of Augusta*, 3 Ga. 486 (1847).

Protest without notice. — But a notarial certificate reciting the fact of protest for nonpayment but silent as to whether or not notice of protest was given to the endorser is no evidence that such notice was in fact given. *Hobbs & Tucker v. Chemical Nat'l Bank*, 97 Ga. 524, 25 S.E. 348 (1895).

RESEARCH REFERENCES

ALR. — Right of notary who protests paper to change or contradict his certificate, 28 ALR 543.

24-7-24. Proof of laws and judicial records of other states, territories, or possessions; full faith and credit.

(a)(1) The acts of the legislature of any other state, territory, or possession of the United States shall be authenticated by affixing the seal of such state, territory, or possession thereto; provided, however, nothing herein shall be construed as repealing or modifying Code Section 9-11-43. The records and judicial proceedings, or copies thereof, of any court of any such state, territory, or possession shall be proved or admitted in other courts within this state by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form.

(2) Such acts, records, and judicial proceedings, or copies thereof, so authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken.

(b) In lieu of the above, the records and judicial proceedings, or copies thereof, of any court, tribunal, or quasi-judicial agency of any such state, territory, or possession may also be proved or admitted in any court, tribunal, office, or agency in this state when certified under the hand and seal, if any, of the judge, clerk, or other official of such court, tribunal, or quasi-judicial agency and shall be given the same full faith and credit as provided in subsection (a) of this Code section. (Civil Code 1895, § 5237; Civil Code 1910, § 5824; Code 1933, § 38-627; Ga. L. 1973, p. 299, § 1; Ga. L. 1995, p. 10, § 24.)

Editor’s notes. — This Code section is derived in part from 28 U.S.C. § 1738. domestic relations, see 34 Mercer L. Rev. 113 (1982).

Law reviews. — For survey article on

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- FULL FAITH AND CREDIT GRANTED
- FULL FAITH AND CREDIT DENIED
- ATTESTATION

General Consideration

In general. — It is usually considered that a substantial compliance with the terms of the statute is sufficient. *Drake v. Drake*, 187 Ga. 423, 1 S.E.2d 573 (1939).

This full faith and credit statute applies only to state records and proceedings. *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946).

Georgia law applies in absence of proof of

foreign law. — Although an insurance policy provided that the policy should be construed pursuant to another state’s law, upon the failure to prove that state’s law as required by O.C.G.A. § 24-7-24, the law of Georgia was applied. *General Am. Life Ins. Co. v. Samples*, 167 Ga. App. 622, 307 S.E.2d 51 (1983).

In an action to domesticate a New York default judgment, the trial court properly applied Georgia law because the judgment

General Consideration (Cont'd)

debtor did not give written notice of intent to rely on foreign law pursuant to O.C.G.A. § 9-11-43(c), nor did the debtor prove New York law as required by O.C.G.A. § 24-7-24. *Giarratano v. Glickman*, 232 Ga. App. 75, 501 S.E.2d 266 (1998).

Child support orders. — Courts of this state are required to give full faith and credit to child support orders from other states that satisfy the jurisdictional due process standards of the federal Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B). *Georgia Dep't of Human Resources v. Pinter*, 241 Ga. App. 10, 525 S.E.2d 715 (1999).

Adoption proceedings. — Relatives of the mother of a child born with Fetal Alcohol Syndrome were not required to comply with the requirements of O.C.G.A. § 19-8-7, as the father's relinquishment of his rights was valid because it was knowingly and voluntarily made in accordance with New Mexico law pursuant to O.C.G.A. § 24-7-24. *Rokowski v. Gilbert*, 275 Ga. App. 305, 620 S.E.2d 509 (2005).

Lack of jurisdiction not appearing on face of judgment. — Judgment creditor's evidence showed a prima facie case for domestication where judgment creditor produced an authenticated copy of its Louisiana judgment and the lack of jurisdiction did not appear on the face of the judgment nor did any fact regarding judgment debtor's possible nonresidency. *Toledo Center Floor Covering, Inc. v. Richfield Carpet Mills, Inc.*, 176 Ga. App. 400, 336 S.E.2d 320 (1985).

Statute applicable to state, territorial and possession, but not federal, records, acts, and proceedings. — O.C.G.A. § 24-7-24 applies only to acts, records, and judicial proceedings of states, territories, and possessions of the United States. There is no Georgia statute expressly governing the authentication of copies of federal records. *Rice v. State*, 178 Ga. App. 748, 344 S.E.2d 720 (1986).

Owner of a lost negotiable promissory note no longer has the option of "establishing" the note pursuant to O.C.G.A. § 24-7-24. The owner must now bring suit directly on the lost note itself pursuant to O.C.G.A. § 11-3-804. *Ballard v. Frey*, 179 Ga. App. 455, 346 S.E.2d 893 (1986).

Giving effect to judgment granted in sister state. — Full faith and credit clause of the United States Constitution requires the courts of this state to give effect to a judgment granted in a sister state when the same is properly proved in a proceeding in which it may be relevant. *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979).

Case action summary. — Certified copy of Alabama court's case action summary was admissible as proof of defendant's status as a convicted felon in a prosecution for possession of a firearm by a convicted felon. *Taylor v. State*, 249 Ga. App. 5389, 548 S.E.2d 662 (2001).

Prima facie case is made by alleging and proving a properly authenticated copy of the judgment itself. *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979).

Judgment rendered by competent court of another state is conclusive on merits when made basis of action or defense in the courts of Georgia, and the merits cannot be reinvestigated. *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979).

Foreign judgment is conclusive as to all matters which were decided or could have been heard at the time of the obtaining of the foreign judgment. *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979).

Responsibility on party wishing to raise foreign law issue. — Notice of intent is required to raise an issue of foreign law, to establish such law by compliance with statutory means (O.C.G.A. §§ 9-11-43(c), 24-1-4, and 24-7-24), or cause a duty to be imposed on a court to judicially recognize any relevant, existing foreign law. *Samay v. Som*, 213 Ga. App. 812, 446 S.E.2d 230 (1994).

Provisions not exclusive. — This statute is not exclusive but cumulative of the method authorized by statute. *Sloan v. Wolfsfeld*, 110 Ga. 70, 35 S.E. 344 (1900); *Seaboard Air-Line Ry. v. Phillips*, 117 Ga. 98, 43 S.E. 494 (1903); *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S.E. 93 (1907) (see O.C.G.A. § 24-7-24).

Responsibility of state. — State cannot by merely failing or refusing to amend the state's code place greater restrictions upon a party seeking to rely on a foreign judgment

than are imposed by the procedure enacted by Congress pursuant to the provisions of the full faith and credit clause of the United States Constitution. *Peeples v. Peeples*, 103 Ga. App. 462, 119 S.E.2d 710 (1961).

Collateral attack. — An authenticated foreign judgment does not preclude the defendant from pleading any special matter in avoidance of the judgment, such as fraud in the judgment's rendition. *Potter v. Potter*, 40 Ga. App. 324, 149 S.E. 579 (1929).

Collateral attack upon a petition to domesticate a foreign judgment that it was based on lack of personal jurisdiction is precluded in this state only if the defendant has appeared in the foreign court and has thus had an opportunity to litigate the issue. *Maxwell v. Columbia Realty Venture*, 155 Ga. App. 289, 270 S.E.2d 704 (1980).

When defense to foreign judgment is made, the responsibility of raising the issue concerning the law of the sister state is upon the plaintiff. *Ramseur v. American Mgt. Ass'n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

Applicability. — Georgia resident's argument that the supplemental affidavit attached to the motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State was inadmissible because it did not comply with O.C.G.A. § 24-7-27 failed because § 24-7-27 provides the method for authenticating out-of-state court records and the affidavit was not a court record. *Wollesen v. State*, 242 Ga. App. 317, 529 S.E.2d 630 (2000).

Cited in *Leonard v. Peeples*, 30 Ga. 61 (1860); *Simms v. Southern Express Co.*, 38 Ga. 129 (1868); *Seaboard Air-Line Ry. v. Phillips*, 117 Ga. 98, 43 S.E. 494 (1903); *Conrad v. Kennedy*, 123 Ga. 242, 51 S.E. 299 (1905); *Joyner v. Joyner*, 131 Ga. 217, 62 S.E. 182, 127 Am. St. R. 220, 18 L.R.A. (n.s.) 647 (1908); *Brown v. Beckner*, 56 Ga. App. 662, 193 S.E. 356 (1937); *Davis v. Baldwin*, 185 Ga. 40, 193 S.E. 892 (1937); *Buckner v. Endicott-Johnson Corp.*, 61 Ga. App. 163, 6 S.E.2d 123 (1939); *McLendon v. McLendon*, 66 Ga. App. 156, 17 S.E.2d 252 (1941); *Gaston v. Keehn*, 195 Ga. 559, 24 S.E.2d 675 (1943); *McLendon v. McLendon*, 70 Ga. App. 664, 29 S.E.2d 97 (1944); *Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949); later appeal, 207 Ga. 308, 61 S.E.2d 282 (1950); *Richards v. Richards*, 85 Ga. App.

605, 69 S.E.2d 911 (1952); *Meeks v. Meeks*, 209 Ga. 588, 74 S.E.2d 861 (1953); *Rodale v. Grimes*, 211 Ga. 50, 84 S.E.2d 68 (1954); *Nuckolls v. Merritt*, 216 Ga. 35, 114 S.E.2d 427 (1960); *Baker v. Metallizing Co. of America*, 103 Ga. App. 174, 118 S.E.2d 842 (1961); *Hamby v. Hamby*, 103 Ga. App. 826, 121 S.E.2d 169 (1961); *Dunn v. Royal Bros. Co.*, 111 Ga. App. 322, 141 S.E.2d 546 (1965); *Watkins v. State*, 129 Ga. App. 891, 201 S.E.2d 825 (1973); *Interstate Life & Accident Ins. Co. v. Hoopgood*, 133 Ga. App. 6, 209 S.E.2d 703 (1974); *Blois v. Blois*, 234 Ga. 475, 216 S.E.2d 281 (1975); *Reid v. Albright*, 142 Ga. App. 826, 237 S.E.2d 229 (1977); *Young v. Foster*, 148 Ga. App. 737, 252 S.E.2d 680 (1979); *Roehl v. O'Keefe*, 243 Ga. 696, 256 S.E.2d 375 (1979); *Findley v. Sanders*, 153 Ga. App. 146, 264 S.E.2d 659 (1980); *Borg-Warner Health Prods., Inc. v. May*, 154 Ga. App. 482, 268 S.E.2d 770 (1980); *Maxwell v. Columbia Realty Venture*, 155 Ga. App. 289, 270 S.E.2d 704 (1980); *Mid-Georgia Bandage Co. v. National Equip. Rental, Ltd.*, 164 Ga. App. 68, 296 S.E.2d 391 (1982); *Perry Agri Distributions, Inc. v. Bailey Seed Farms, Inc.*, 169 Ga. App. 58, 311 S.E.2d 497 (1983); *Ferron v. Anclote Psychiatric Center, Inc.*, 169 Ga. App. 699, 314 S.E.2d 714 (1984); *Clark v. State*, 189 Ga. App. 68, 374 S.E.2d 783 (1988); *Carr v. Farmer*, 213 Ga. App. 568, 445 S.E.2d 350 (1994); *Askari v. Dolat*, 240 Ga. App. 633, 524 S.E.2d 310 (1999); *Murdock v. Madison River Term., Inc.*, 249 Ga. App. 608, 547 S.E.2d 802 (2001).

Full Faith and Credit Granted

Judicial cognizance taken of substantive Alabama law. — Presenting copies of relevant portions of the Code of Alabama and copies of two decisions of the Alabama Supreme Court published in the Southern Reporter, and requesting that the trial court take judicial notice of the Alabama law, permitted judicial cognizance of the substantive Alabama law. *Meeker v. Eufaula Bank & Trust*, 208 Ga. App. 702, 431 S.E.2d 475 (1993).

Judicial records and proceedings. — See *Jackson v. Johnson*, 67 Ga. 167 (1881); *Tharpe v. Pearce*, 89 Ga. 194, 15 S.E. 46 (1892); *McFarland v. Fricks*, 99 Ga. 104, 24 S.E. 868 (1896); *Sloan v. Wolfsfeld*, 110 Ga. 70, 35 S.E. 344 (1900); *Hope v. First Nat'l*

Full Faith and Credit Granted (Cont'd)

Bank, 142 Ga. 310, 82 S.E. 929 (1914); Parker v. Cramton, 143 Ga. 421, 85 S.E. 338 (1915); Clein v. Diamond, 17 Ga. App. 652, 87 S.E. 1101 (1916); Sullivan v. Douglas Gibbons, Inc., 58 Ga. App. 708, 199 S.E. 554 (1938), *aff'd*, 187 Ga. 764, 2 S.E.2d 89 (1939); Brown v. Beckner, 60 Ga. App. 827, 5 S.E.2d 409 (1939); Roadway Express, Inc. v. McBroom, 61 Ga. App. 223, 6 S.E.2d 460 (1939); Minor v. Lillie Rubin, Inc., 84 Ga. App. 112, 65 S.E.2d 691 (1951); Albert v. Albert, 86 Ga. App. 560, 71 S.E.2d 904 (1952); Soman v. Yeager, 209 Ga. 444, 73 S.E.2d 198 (1952); Peeples v. Peeples, 103 Ga. App. 462, 119 S.E.2d 710 (1961); Kelly v. Kelly, 115 Ga. App. 700, 155 S.E.2d 732 (1967); Ramseur v. American Mgt. Ass'n, 155 Ga. App. 340, 270 S.E.2d 880 (1980); Southeastern Metal Prods., Inc. v. Horger, 175 Ga. App. 143, 332 S.E.2d 662 (1985); Smith v. Airtouch Cellular of Ga., Inc., 244 Ga. App. 71, 534 S.E.2d 832 (2000).

Properly exemplified acts, records, and judicial proceedings or copies thereof shall have the same full faith and credit in every court within this state as those documents have by law or usage in the courts of the state from which those documents are taken. Van Buskirk v. Great Am. Bank, 175 Ga. App. 101, 332 S.E.2d 394 (1985).

Bankruptcy proceedings. — See Venable v. Venable, 153 Ga. 689, 112 S.E. 891 (1922).

Divorce decrees. — See Beggs v. Beggs, 208 Ga. 415, 67 S.E.2d 135 (1951); Parker v. Parker, 233 Ga. 434, 211 S.E.2d 729 (1975).

Letters of administration. — See Stewart v. Fisher, 18 Ga. App. 519, 89 S.E. 1052 (1916).

Prior criminal conviction. — See Strong v. State, 232 Ga. 294, 206 S.E.2d 461 (1974).

When clerk of court in Ohio certified the records of three prior felony convictions of a person with the same name of appellant, the trial court properly admitted the records into evidence because the appellant admitted having lived in Ohio at the time of the convictions and the appellant's name was unusual; moreover, this gave the jury a sufficient basis to find that the appellant actually was a convicted felon for impeachment purposes. Wyley v. State, 169 Ga. App. 106, 311 S.E.2d 530 (1983).

Certified copies of a defendant's out-of-state judgment of conviction, associ-

ated complaint, and plea hearing transcript were properly admitted into evidence to show that the defendant was a convicted felon for purposes of O.C.G.A. § 16-11-131, which prohibits possession of a firearm by a convicted felon. Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008), *cert. denied*, 2008 Ga. LEXIS 508 (Ga. 2008).

Wills. — See White v. First Nat'l Bank, 174 Ga. 281, 162 S.E. 701 (1932); Blackwell v. Grant, 46 Ga. App. 241, 167 S.E. 333 (1933); Tripp v. Hutchings, 214 Ga. 330, 104 S.E.2d 423 (1958).

Full Faith and Credit Denied

In suit to domesticate default judgment rendered against defendant in another state, summary judgment was not authorized, it appearing that the copy of the foreign state's return of service which was filed of record in the Georgia case was not properly certified, in that it was not accompanied by the certificate of a judge to the effect that the attestation of the clerk was in proper form, nor was the seal of the foreign court affixed to the clerk's attestation. Moore v. Sanford, Adams, McCullough & Beard, 171 Ga. App. 549, 320 S.E.2d 394 (1984).

Foreign order found improperly certified in accordance with Georgia law. Southeastern Metal Prods., Inc. v. Horger, 166 Ga. App. 205, 303 S.E.2d 536 (1983).

Judicial record or proceedings. — See James v. Kerby, 29 Ga. 684 (1859). See also Tharpe v. Pearce, 89 Ga. 194, 15 S.E. 46 (1892); Sloan v. Wolfsfeld, 110 Ga. 70, 35 S.E. 344 (1900); Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911); Atkinson v. Atkinson, 160 Ga. 480, 128 S.E. 765 (1925); King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948).

Divorce proceedings. — See Elliott v. Elliott, 181 Ga. 545, 182 S.E. 845 (1935).

Without an original signature or court seal, a foreign divorce decree did not meet the statutory requirements for proper domestication. Henderson v. Justice, 223 Ga. App. 591, 478 S.E.2d 434 (1996).

Wills. — See Youmans v. Ferguson, 122 Ga. 331, 50 S.E. 141 (1905).

Attestation

Authentication not exclusive means of proving law. — Authentication of foreign law

pursuant to O.C.G.A. § 24-7-24 renders that evidence of foreign law admissible, and perhaps constitutes the most certain method of proving foreign law, but it is not the exclusive means of introducing foreign law in a case. *Meeker v. Eufaula Bank & Trust*, 208 Ga. App. 702, 431 S.E.2d 475 (1993).

Elements of authentication. — Establishment of three elements is commonly spoken of as authentication: the authority of the officer issuing the document, the incumbency of the officer, and the genuineness of the officer's signature or seal. *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946).

Judge's certificate. — Certificate of the judge must affirmatively show that the judge presides in the court from which the record comes, and the judge's omission so to do cannot be supplied by an additional certificate to that effect from the clerk. *Taylor v.*

McKee, 118 Ga. 874, 45 S.E. 672 (1903).

Clerk's certificate. — A clerical error in a clerk's certificate was held not to vitiate the certificate. *Conley v. Chapman*, 74 Ga. 709 (1885).

When the clerk's certificate was incomplete, the docket of mayor's court was not given full faith and credit. *Mason v. Nashville, C. & St. L. Ry.*, 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911).

There is no requirement that the signature of the clerk be handwritten rather than stamped. *Sandifer v. Lynch*, 244 Ga. 369, 260 S.E.2d 78 (1979).

Under O.C.G.A. § 24-7-24, the signature of the clerk need not be handwritten, nor is there a requirement that the foreign judgment itself be explicitly mentioned in the clerk's certificate. *Foy v. Lewis*, 248 Ga. 234, 282 S.E.2d 295 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1192, 1193, 1272, 1323, 1333 et seq., 1339 et seq.

C.J.S. — 32 C.J.S., Evidence, §§ 842 et seq., 900 et seq., 909.

ALR. — Refusal to entertain an action upon a judgment rendered in another state upon a cause of action which it would have been contrary to statute or public policy of the forum to have entertained, 4 ALR 968; 10 ALR 719; 24 ALR 1437.

Pendency of appeal from judgment as affecting right to enforce it in another state, 5 ALR 1269.

Weight of oral testimony as to law of another state or country, 6 ALR 1344.

Full-faith and credit provision as applying to decree of another state admitting a will to probate, 13 ALR 498.

Determination of question relating to foreign law as one of law or of fact, 34 ALR 1447.

Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 ALR 740.

Foreign judgment based upon, or which fails to give effect to, a judgment previously rendered at the forum, or in a third jurisdiction, 53 ALR 1146.

Construction and effect of foreign statutes or judicial decisions as question for court or for jury, 68 ALR 809.

Judgment or order upholding prior judgment in the same state against direct attack upon ground of lack of jurisdiction, as conclusive in another state under the full faith and credit provision or doctrine of res judicata, 104 ALR 1187.

Full faith and credit provision as affecting insurance contracts, 119 ALR 483; 173 ALR 1138.

Conflict of laws as to trusts inter vivos, 139 ALR 1129.

Waiver of, or estoppel to assert, failure to plead or prove foreign law (apart from judicial notice), 149 ALR 759.

Decree for alimony in instalments as within full faith and credit provision, 157 ALR 170.

Necessity that the transcript of a judgment of another state upon a cognovit under warrant of attorney shall include the cognovit and the note containing the alleged warrant of attorney, 162 ALR 685.

Right to maintain action or proceeding in one state or country to collect or enforce tax due to another state or country or political subdivision thereof, 165 ALR 796.

Conclusiveness of decree assessing stockholders or policyholders of insolvent corporations or mutual insurance companies, as against nonresidents, not personally served within state in which decree was rendered, 175 ALR 1419.

Recognition as to marital status of foreign divorce decree attached on ground of lack of domicile, since Williams decision, 1 ALR2d 1358; 28 ALR2d 1303.

Foreign divorce decree as subject to attack by spouse in state of which neither spouse is resident, 12 ALR2d 382.

Foreign filiation or support order in bastardy proceedings, requiring periodic payments, as extraterritorially enforceable, 16 ALR2d 1098.

Injunction against suit in another state or country for divorce or separation, 54 ALR2d 1240.

Identification of parties in action on foreign judgment, 60 ALR2d 1024.

Choice of law in application of automobile guest statutes, 95 ALR2d 12.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Disbarment or suspension of attorney in one state as affecting right to continue practice in another state, 81 ALR3d 1281.

Choice of law as to application of comparative negligence doctrine, 86 ALR3d 1206.

24-7-25. Proof of nonjudicial records or books of other states territories, or possessions; full faith and credit.

(a)(1) All nonjudicial records or books, or copies thereof, kept in any public office of any state, territory, or possession of the United States shall be proved or admitted in any court or office in this state by the attestation of the custodian of the records or books, and the seal of his office annexed, if there is a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or a certificate of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, territory, or possession that the attestation is in due form and by the proper officers.

(2) If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify under his hand and the seal of his office that the judge is duly commissioned and qualified; or, if given by the governor, secretary of state, chancellor, or keeper of the great seal, the certificate shall be under the great seal of the state, territory, or possession in which it is made.

(3) Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within this state as they have by law or usage in the courts or offices of the state, territory, or possession from which they are taken.

(b) In lieu of the above, the nonjudicial records or books, or copies thereof, kept in any public office of any state, territory, or possession of the United States may also be proved or admitted in evidence in any court, tribunal, office, or agency in this state when certified under the hand and seal, if any, by the officer or other official having custody or possession of the original thereof and shall be given the same full faith and credit as provided in subsection (a) of this Code section. (Civil Code 1895, § 5238; Civil Code 1910, § 5827; Code 1933, § 38-630; Ga. L. 1973, p. 299, § 2; Ga. L. 1995, p. 10, § 24.)

Editor's notes. — This Code section is derived in part from 28 U.S.C. § 1739.

JUDICIAL DECISIONS

Authentication consists of the establishment of three elements. — Authority of the officer issuing the document, the incumbency of the officer, and the genuineness of the officer's signature or seal. *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946).

State records. — This full faith and credit statute applies only to state records and proceedings. *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946) (see O.C.G.A. § 24-7-25).

Cited in *Williford v. State*, 56 Ga. App. 40, 192 S.E. 93 (1937); *Associates Disct. Corp. v.*

Lindsey Chevrolet Co., 107 Ga. App. 446, 130 S.E.2d 597 (1963); *Department of Pub. Safety v. Irby*, 232 Ga. 384, 207 S.E.2d 23 (1974); *Parker v. Parker*, 233 Ga. 434, 211 S.E.2d 729 (1975); *Wheless v. State*, 135 Ga. App. 406, 218 S.E.2d 88 (1975); *Smith v. Hart*, 243 Ga. 59, 252 S.E.2d 470 (1979); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1980); *Speight v. State*, 159 Ga. App. 5, 282 S.E.2d 651 (1981); *Morris v. State*, 163 Ga. App. 118, 293 S.E.2d 866 (1982); *Keen v. State*, 164 Ga. App. 81, 296 S.E.2d 91 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1323.

C.J.S. — 32 C.J.S., Evidence, § 906 et seq.

ALR. — Refusal to entertain an action upon a judgment rendered in another state on a cause of action which it would have been contrary to public policy of the forum to have entertained, 24 ALR 1437.

Right to maintain action or proceeding in one state or country to collect or enforce tax due to another state or country or political subdivision thereof, 165 ALR 796.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 ALR2d 752.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Weather reports and records as evidence, 57 ALR3d 713.

Admissibility in evidence of professional directories, 7 ALR4th 638.

24-7-26. Proof of judgments and proceedings of justice of the peace courts in other states.

(a) The official certificate of a justice of the peace of any state of the United States to any judgment, and the preliminary proceedings before him, with the official certificate of the clerk of any court of record within the county in which the justice resides, under the seal of such court of record, stating that the justice is an acting justice of the peace of that county and that the signature to his certificate is genuine, shall be prima-facie evidence of the proceedings and judgment.

(b) When the term of office of a justice of the peace of another state has expired or when for any reason the office has been vacated, the official certificate of the successor in office of the justice to any judgment and the preliminary proceedings before the retired justice, stating that he is the successor in office of the retired justice and the proper custodian of the judgment and preliminary proceedings, the same being in his custody, with the official certificate of the clerk of any court of record within the county

in which the justice making the certificate resides, under the seal of such court of record, stating that the justice making the certificate is an acting justice of the peace of that county and the successor in office of the justice before whom the proceedings were had and by whom the judgment was rendered and that the signature to his certificate is genuine, shall be prima-facie evidence of such proceedings and judgment. (Ga. L. 1900, p. 78, §§ 1, 2; Civil Code 1910, §§ 5825, 5826; Code 1933, §§ 38-628, 38-629.)

RESEARCH REFERENCES

C.J.S. — 32 C.J.S., Evidence, § 904.

ALR. — Refusal to entertain an action upon a judgment rendered in another state upon a cause of action which it would have

been contrary to statute or public policy of the forum to have entertained, 10 ALR 719; 24 ALR 1437.

24-7-27. Admissibility of records of Department of Corrections.

Records of the Department of Corrections, or authenticated copies thereof, when certified in accordance with the terms of subsection (d) of Code Section 42-5-36, shall be admissible as evidence in any civil or criminal proceeding as proof of the contents thereof. (Code 1981, § 24-7-27, enacted by Ga. L. 1997, p. 851, § 3.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Georgia St. U. L. Rev. 230 (1997).

CHAPTER 8

ESTABLISHMENT OF LOST RECORDS

Article 1		Sec.	
Public Records			
Sec.			
24-8-1.	Establishment of lost records in superior court — Authorization; use as evidence.	24-8-22.	Summary establishment of lost or destroyed evidence of indebtedness in probate court — Service of nonresidents; effect.
24-8-2.	Establishment of lost records in superior court — Petition by judge of probate court; when heard; establishment of records in whole or in part.	24-8-23.	Establishment of lost paper in justice of the peace court; affidavit or other proof; issuance and service of rule nisi; entry of judgment; certified copy [Repealed].
24-8-3.	Establishment of lost records in superior court — Contents of petition; copies to conform to originals.	24-8-24.	Establishment of lost or destroyed paper in superior court — Petition and affidavit; issuance and service of rule nisi.
24-8-4.	Establishment of lost records in superior court — Appointment of auditor authorized; auditor's report; hearing on objections.	24-8-25.	Establishment of lost or destroyed paper in superior court — When continuance granted.
24-8-5.	Establishment of lost records in superior court — Auditor's compensation.	24-8-26.	Establishment of lost or destroyed paper in superior court — Grant of rule absolute.
24-8-6.	Establishment of lost records in superior court — Right to file objections; time of filing same; hearing thereon.	24-8-27.	Establishment of lost or destroyed paper in superior court — Furnishing of certified endorsement of copy.
	Article 2	24-8-28.	Procedure as to action on lost or destroyed note, bill, bond, or other instrument.
	Private Papers	24-8-29.	Joinder of additional party defendants in proceedings to establish lost or destroyed papers.
24-8-20.	Establishment of lost office papers on motion.	24-8-30.	Applicability of article.
24-8-21.	Summary establishment of lost or destroyed evidence of indebtedness in probate court —		

Law reviews. — For article, “An Analysis of Georgia’s Proposed Rules of Evidence,” see 26 Ga. St. B.J. 173 (1990).

ARTICLE 1

PUBLIC RECORDS

24-8-1. Establishment of lost records in superior court — Authorization; use as evidence.

Where any public records have been lost, mutilated, stolen, or destroyed, the superior court of the county where the records belong may establish copies. When so established, such records shall be in all respects evidence as the original records would have been. (Ga. L. 1887, p. 112, § 1; Civil Code 1895, § 5223; Civil Code 1910, § 5810; Code 1933, § 38-614.)

JUDICIAL DECISIONS

Separation of powers not violated by establishing version of law. — Application of O.C.G.A. § 24-8-1 in a county's action to establish a copy of a zoning ordinance that had been lost did not violate the constitutional doctrine of separation of powers because the trial court's decree did not have the effect of either adopting or amending any zoning ordinance when the legislative process was complete, and the ordinance from which the alleged illegality arose was, in fact, a law; the supreme court's authority to reestablish a previously adopted ordinance, like its authority to construe statutes, neither violates the constitutional separation of powers nor constitutes an unconstitutional delegation of legislative authority. *E. Ga. Land & Dev. Co., LLC v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

No violation of zoning procedure law. — Application of O.C.G.A. § 24-8-1 in a county's action to establish a copy of a zoning ordinance that had been lost did not violate the Zoning Procedures Law (ZPL), O.C.G.A. § 36-66-1 et seq., because the trial court's decree did not have the effect of either adopting or amending any zoning ordinance; because it did not constitute final legislative action by a local government resulting in such adoption or amendment, the decree was not a "zoning decision" to which the ZPL applied. *E. Ga. Land & Dev. Co., LLC v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

Copy of zoning ordinance. — Superior court did not err in denying a land and development company's motion for involuntary dismissal pursuant to O.C.G.A.

§ 9-11-41(b) in a county's action under O.C.G.A. § 24-8-1 to establish a copy of a zoning ordinance that had been lost because the superior court thoroughly reviewed the evidence upon which the court relied, including the testimony of the company's forensic expert and several witnesses who were county officials when the ordinance was enacted and their successors in office, as well as the dovetailing of subsequent amendments to the sections and subsections of the proffered copy; that evidence was sufficient to support the superior court's finding that the copy was a true and correct duplicate of the original ordinance adopted at the meeting of the county board of commissioners. *E. Ga. Land & Dev. Co., LLC v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

Superior court did not err in finding that a zoning ordinance was a public record under O.C.G.A. § 24-8-1 and in establishing a copy as an original because the plain language of § 24-8-1 showed that the statute applied to "any public records" and did not include any limitation to court records, and the fact that county ordinances could not normally be proved by parol evidence did not prevent such proof in the proceeding; when a proceeding is instituted to establish a copy of a public record which has been lost for many years, circumstantial evidence must be resorted to, and any circumstance legitimately offering an inference that the record was as contended may be considered, and a lost or destroyed ordinance may be established by parol evidence. *E. Ga. Land & Dev. Co., LLC v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

Cited in *Quinn v. State*, 234 Ga. App. 360, 506 S.E.2d 890 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1271.

24-8-2. Establishment of lost records in superior court — Petition by judge of probate court; when heard; establishment of records in whole or in part.

The judge of the probate court of the county may bring a petition which may be heard and determined at the first term after or during which the same may be filed. The superior court shall give precedence to the case and proceed with the same as speedily as possible. Upon the hearing it shall be discretionary with the court to order the whole or any part of such records established. (Ga. L. 1887, p. 112, § 2; Civil Code 1895, § 5224; Civil Code 1910, § 5811; Code 1933, § 38-615.)

JUDICIAL DECISIONS

Jurisdiction of Supreme Court. — Proceeding which is for the purpose of establishing a copy of a lost record of a will previously probated and admitted to record, and not to probate a copy of a lost or destroyed will, does not fall within the cases of which the Supreme Court has jurisdiction on writ of error. *Bond v. Reid*, 152 Ga. 481, 110 S.E. 281 (1922).

Transcription prevailing over copy of will. — In a proceeding to establish a copy of a lost or destroyed record of a will theretofore

duly probated and admitted to record, a copy which a witness who is neither contradicted nor impeached swears positively was correctly transcribed by the witness from the record of wills in the judge's office, before the will's destruction, must prevail over a copy testified by other witnesses to be a correct copy merely of a will (not of the record thereof), which "will" is not shown to have been probated or recorded. *Bond v. Reid*, 29 Ga. App. 558, 116 S.E. 318 (1923).

24-8-3. Establishment of lost records in superior court — Contents of petition; copies to conform to originals.

The petition shall set forth the fact that some portion of the records has been lost, mutilated, stolen, or destroyed, specifying as nearly as may be possible the books or parts of the books in which they existed, and shall pray for the establishment of the same. The copies so established, as nearly as may be possible, shall specify and conform to the original book and pages of the same on which they originally existed. (Ga. L. 1887, p. 112, § 3; Civil Code 1895, § 5225; Civil Code 1910, § 5812; Code 1933, § 38-616.)

JUDICIAL DECISIONS

Copy of zoning ordinance. — Superior court did not err in finding that a zoning ordinance was a public record under O.C.G.A. § 24-8-1 and in establishing a copy

as an original because the plain language of § 24-8-1 showed that it applied to “any public records” and did not include any limitation to court records, and the fact that county ordinances could not normally be proved by parol evidence did not prevent such proof in the proceeding; when a proceeding is instituted to establish a copy of a

public record which has been lost for many years, circumstantial evidence must be resorted to, and any circumstance legitimately offering an inference that the record was as contended may be considered, and a lost or destroyed ordinance may be established by parol evidence. *E. Ga. Land & Dev. Co., LLC v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

24-8-4. Establishment of lost records in superior court — Appointment of auditor authorized; auditor’s report; hearing on objections.

The court or the judge thereof may appoint an auditor in all cases where he shall deem it proper, who shall hear evidence, summon witnesses, and compel the production of books and papers, under such rules and regulations as are now practiced in the courts. The auditor shall make his report of such copies of such lost, stolen, mutilated, or destroyed records; when such report is filed, it shall be made the judgment of the court, unless objections are filed to the same or some part thereof as being incorrect, which objections, if any, shall be heard and determined by the court without the intervention of a jury. (Ga. L. 1887, p. 112, § 4; Civil Code 1895, § 5226; Civil Code 1910, § 5813; Code 1933, § 38-617.)

JUDICIAL DECISIONS

Discretion of trial court. — In equity cases, the Supreme Court will not interfere with the discretion of a trial judge in overruling exceptions of fact to an auditor’s report, unless it appears that there has been a manifest abuse of such discretion. *Christian v. Bremer*, 199 Ga. 285, 34 S.E.2d 40 (1945).

Copy of zoning ordinance. — Superior court did not err in finding that a zoning ordinance was a public record under O.C.G.A. § 24-8-1 and in establishing a copy as an original because the plain language of § 24-8-1 showed that the statute applied to “any public records” and did not include any limitation to court records, and the fact that county ordinances could not normally be proved by parol evidence did not prevent such proof in the proceeding; when a proceeding is instituted to establish a copy of a public record which has been lost for many

years, circumstantial evidence must be resorted to, and any circumstance legitimately offering an inference that the record was as contended may be considered, and a lost or destroyed ordinance may be established by parol evidence. *E. Ga. Land & Dev. Co., LLC v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

Burden of proof. — When error is assigned upon the refusal of the judge to approve an exception of fact to an auditor’s report in an equity case, the burden is upon the plaintiff in error to show to the satisfaction of the Supreme Court that the finding of the auditor is unsupported by evidence, the presumption being that the finding is correct; and, if it does not distinctly appear that the finding is unsupported, the judgment refusing to approve the exceptions of fact will be affirmed. *Christian v. Bremer*, 199 Ga. 285, 34 S.E.2d 40 (1945).

RESEARCH REFERENCES

ALR. — Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

24-8-5. Establishment of lost records in superior court — Auditor's compensation.

The auditor shall receive for his services such compensation as may be allowed by the court, to be paid out of the public funds of the county. (Ga. L. 1887, p. 112, § 5; Civil Code 1895, § 5227; Civil Code 1910, § 5814; Code 1933, § 38-618.)

24-8-6. Establishment of lost records in superior court — Right to file objections; time of filing same; hearing thereon.

Any person who is adversely interested in the report of the auditor or who claims that there is any mistake in the report shall have the right to file objections thereto as specified in Code Section 24-8-4. Said objections shall be filed within 30 days after the filing of the report and shall be heard and determined in the manner prescribed in Code Section 24-8-4. (Ga. L. 1887, p. 112, § 6; Civil Code 1895, § 5228; Civil Code 1910, § 5815; Code 1933, § 38-619.)

ARTICLE 2

PRIVATE PAPERS

24-8-20. Establishment of lost office papers on motion.

(a) Upon the loss of any original pleading, declaration, bill of indictment, special presentment, or other office paper, a copy may be established *instanter* on motion.

(b) An instrument on which an action has been brought shall be deemed an office paper after the case has gone to trial. (Laws 1799, Cobb's 1851 Digest, p. 463; Code 1863, §§ 3884, 3885; Code 1868, §§ 3904, 3905; Code 1873, §§ 3980, 3981; Code 1882, §§ 3980, 3981; Civil Code 1895, §§ 4743, 4744; Civil Code 1910, §§ 5312, 5313; Code 1933, §§ 63-201, 63-202.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION PARTICULAR INSTRUMENTS

General Consideration

Pleadings presumed correct. — Lost pleadings established by the court on motion are presumed to be correct. *Southern Fertilizer & Chem. Co. v. Kirby*, 52 Ga. App. 688, 184 S.E. 363 (1936); *Salter v. Salter*, 81 Ga. App. 864, 60 S.E.2d 424 (1950).

Papers lost or unrecorded. — Fact that the

papers were not recorded or the record cannot be found is no excuse for not establishing according to law. *Eagle & Phenix Mfg. Co. v. Bradford*, 57 Ga. 249 (1876).

Proof of contents by parol. — Contents may be proved by parol without establishing the lost or destroyed original. *Bridges v. Thomas*, 50 Ga. 378 (1873); *Saffold v. Banks*,

General Consideration (Cont'd)

69 Ga. 289 (1882); *Lewis v. State Bd. of Medical Exmrs.*, 23 Ga. App. 647, 99 S.E. 147 (1919).

Notice not indispensably necessary to be given of a motion to the court to establish copies of office papers. *Doe v. Roe*, 3 Ga. 121 (1847); *Eagle & Phenix Mfg. Co. v. Bradford*, 57 Ga. 249 (1876).

Rule nisi and notice not required. — Copies of lost papers belonging to or pertaining to a suit pending in court may be established *instanter* on motion; and it is not indispensably essential to the validity of an order of court establishing lost papers that a formal rule nisi should issue, or that the opposite party should be served with notice of the proceeding. *Southern Fertilizer & Chem. Co. v. Kirby*, 52 Ga. App. 688, 184 S.E. 363 (1936).

Waiver. — When judgment establishing lost papers rendered in municipal court in a case which had originated in a justice's court and which was transferable to the municipal court, a judgment afterwards rendered in the municipal court against the garnishee on the garnishee's default in answering the summons of garnishment was not illegal and void and subject to be set aside as void on motion in arrest on the ground that the papers had been lost while the case was pending in the justice's court, and before the establishment by the municipal court, and therefore that the municipal court had no jurisdiction to establish the papers, where no attack upon the validity of the order establishing the papers in the municipal court was made by the garnishee on the ground that the papers could not legally have been established in the municipal court. *Southern Fertilizer & Chem. Co. v. Kirby*, 52 Ga. App. 688, 184 S.E. 363 (1936).

Traverse. — When a motion is made to establish a lost paper and the opposite party files a written traverse, denying the existence of the alleged lost original, it is error to refuse that party the right to offer competent evidence in support of the traverse. *Beall v. Patterson*, 146 Ga. 233, 91 S.E. 71 (1916).

Variance between original and copy. — Plaintiff having introduced in evidence a copy of the indictment alleged to have been maliciously procured, together with an order

of the court thereon, establishing the same as an office paper in lieu of the lost original, and an order of nolle prosequi entered upon the established copy, the court did not err in permitting the defendant to know, by parol, that the established copy was prepared by counsel for the accused, that there was a material variance between it and the original indictment, and that, after being so established, it was nolle prosequi solely because of that variance. *O'Berry v. Davis*, 31 Ga. App. 755, 121 S.E. 857 (1924).

When case transferred to new county. — When a case is to be transferred from an old county to a new one, lost court papers in the case must be established, before the transfer, in the old county. *McDougald v. Maitland, Kennedy & Co.*, 30 Ga. 703 (1860).

Paper subsequently found. — Superior court has power to rectify an order establishing a lost paper, by the paper itself, when found. *Phillips v. Behn & Foster*, 19 Ga. 298 (1856).

State as party. — State through its solicitor general (now district attorney) should be a party to all motions to establish lost papers belonging to a state case. *Buchanan v. Beckham*, 18 Ga. 527 (1855).

Particular Instruments

Bill of exceptions deposited in the clerk's officer but not with the clerk, never became an office paper and the court erred in establishing it in a summary manner. *Perry v. Friedin*, 17 Ga. App. 417, 87 S.E. 683 (1916).

Certiorari, though sanctioned, which was never in the office of the clerk of the superior court is not an office paper. *Lovelady v. Hockenhull*, 58 Ga. 469 (1877).

Unfiled certiorari. — Certiorari not marked "filed in office" and which was never in the office of the clerk of the superior court or even in the possession of the clerk at all, is not an office paper so as to be established by copy *instanter* on motion. *Humphries v. Morris*, 179 Ga. 55, 175 S.E. 242 (1934).

Claim affidavit. — Claim affidavit transmitted to the superior court became an office paper and could be established *instanter*. *Crawford v. Crawford*, 139 Ga. 68, 76 S.E. 564 (1912).

Guardian's bond is not an office paper and cannot be established *instanter*. *Bryant v. Owen*, 1 Ga. 355 (1846).

Written sentence in criminal case in the superior court does not cease to be an office paper or record because the sentence has not been recorded in the record book of writs in the office of the clerk of the superior court. *Teasley v. Nelson*, 164 Ga. 242, 138 S.E. 72 (1927).

Summons and pleadings. — After a suit in a justice's court upon a note has proceeded to judgment and execution issued thereon, the summons, service thereof, and pleas, if any, are office papers, and if lost may be established in that court *instantly* on mo-

tion. *Bell v. Bowdoin*, 109 Ga. 209, 34 S.E. 339 (1899).

Transcript. — Copy of an official transcript preserved in the office of the clerk of the Supreme Court, duly certified, is competent and sufficient evidence as to contents. *Eagle & Phenix Mfg. Co. v. Bradford*, 57 Ga. 249 (1876).

Cited in *Paschal v. Turner*, 116 Ga. 736, 42 S.E. 1010 (1902); *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940); *Bainbridge Farm Co. v. Bower*, 194 Ga. 304, 21 S.E.2d 224 (1942).

OPINIONS OF THE ATTORNEY GENERAL

Clerk's certification insufficient. — Clerk's certification that the indictment is lost is not sufficient replacement for a certi-

fied copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61.

RESEARCH REFERENCES

C.J.S. — 54 C.J.S., *Lost Instruments*, §§ 8 et seq.

24-8-21. Summary establishment of lost or destroyed evidence of indebtedness in probate court — Petition; service of notice; hearing and decision; recordation; appeal to superior court.

(a) The owner, agent of the owner, or legal representative of the owner of any bond, bill, note, draft, check, or other evidence of indebtedness which has been lost or destroyed may establish a copy of the same in a summary manner by filing a petition with the judge of the probate court of the county of the residence of the alleged debtor or maker, if he is a resident of this state; and the judge of the probate court is deemed as judicial officer for the purpose of this Code section. The petition shall be sworn to by the party applying and shall contain as full and accurate a description as possible of the lost paper, of the loss and mode of loss, of the inability to find the same and why, along with a prayer for the establishment of a copy setting forth the copy desired to be established.

(b) Upon the filing of a petition, the judge shall issue a citation or notice, to the alleged debtor or maker, requiring him to appear at a day not more than ten days distant and show cause, if he has any, why the copy should not be established in lieu of the lost original. The citation or notice shall be personally served by either the sheriff or bailiff or by a person specially appointed by the judge for the purpose, at least five days before the time of hearing.

(c) If no successful defense is made at the time and place appointed, the judge shall proceed to establish, by an order entered on the petition, the

copy so prayed to be established, which shall have all the effect of the original. The petition, notice, and order shall be entered in a book of record specially prepared for the purpose.

(d) If the debtor or maker so served files a defense under oath to the effect that the original never existed as claimed, the judge shall decide, after giving the parties time for preparation and hearing, not to exceed 20 days, upon the case so made. If the judge's decision is in favor of the applicant and no appeal is entered as provided in subsection (e) of this Code section, the decision shall be entered on the petition and the copy so established shall have the same effect as an original. If the judge's decision is in favor of the alleged debtor or maker, the judge shall also enter his decision on the petition. In all cases the proceedings shall be recorded as provided in subsection (c) of this Code section.

(e) Except as provided in Article 6 of Chapter 9 of Title 15, if either party to the proceedings provided for in this Code section is dissatisfied, he may appeal upon giving the usual bond and security for costs, as in cases of appeal from the probate court to the superior court. The appeal shall be tried in the superior court from all the pleadings and proceedings as were before the judge of the probate court. In the superior court the case shall be tried and determined as provided in Code Sections 24-8-24 through 24-8-27.

(f) This Code section shall not apply to evidences of indebtedness to which Title 11 is applicable. (Ga. L. 1876, p. 101, § 1; Code 1882, § 3995a; Civil Code 1895, § 4757; Civil Code 1910, § 5326; Code 1933, § 63-101; Ga. L. 1986, p. 982, § 8.)

Cross references. — Maintenance of action on lost or destroyed instrument governed by T. 11, the "Uniform Commercial Code," § 11-3-804.

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, § 3.

C.J.S. — 54 C.J.S., Lost Instruments, §§ 8 et seq.

ALR. — Constitutionality, construction,

and effect of statutes in relation to issuance by public body of duplicates of mutilated, lost, or destroyed bonds or warrants, 39 ALR 1246; 63 ALR 388.

24-8-22. Summary establishment of lost or destroyed evidence of indebtedness in probate court — Service of nonresidents; effect.

When the person alleged to be a debtor or maker of a lost or destroyed paper as set forth in Code Section 24-8-21 does not reside in this state, the alleged debtor or maker may be made a party to the proceedings by publication, in a newspaper to be designated by the judge of the probate court, twice a month for two months. When the person has been made a

party, this article shall apply in his case, except as otherwise provided. (Ga. L. 1876, p. 101, § 2; Code 1882, § 3995b; Civil Code 1895, § 4758; Civil Code 1910, § 5327; Code 1933, § 63-102.)

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, §§ 12, 16.

24-8-23. Establishment of lost paper in justice of the peace court; affidavit or other proof; issuance and service of rule nisi; entry of judgment; certified copy.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1855-56, p. 255, § 1; Code 1873, § 3990; Code 1882, § 3990; Civil Code 1895, § 4754; Civil Code 1910, § 5323; Code 1863, § 3894; Code 1868, § 3914; Code 1933, § 63-302.

24-8-24. Establishment of lost or destroyed paper in superior court — Petition and affidavit; issuance and service of rule nisi.

(a) The owner of a lost or destroyed paper which is not an office paper as defined in Code Section 24-8-20 who desires to establish the same shall present to the clerk of the superior court of the county where the maker of the paper resides, if the maker is a resident of this state, a petition in writing, together with a copy, in substance, of the paper lost or destroyed, as nearly as he can recollect, which copy shall be sworn to by the petitioner, his agent, or his attorney.

(b) Thereupon, the clerk shall issue a rule nisi in the name of the judge of the superior court, calling upon the opposite party to show cause, if he has any, why the copy sworn to should not be established in lieu of the lost or destroyed original. The rule shall be served personally upon the respondent by the sheriff, his deputy, or any constable of this state, if the respondent is found in this state, 20 days before the sitting of the court to which the rule nisi is made returnable. If the respondent cannot be found in this state, the rule shall be published in some public newspaper twice a month for two months before the final hearing of the rule. (Ga. L. 1855-56, p. 238, §§ 1, 2; Code 1863, § 3886; Code 1868, § 3906; Code 1873, § 3982; Code 1882, § 3982; Civil Code 1895, § 4745; Civil Code 1910, § 5314; Code 1933, § 63-203; Ga. L. 1983, p. 884, § 3-23.)

Cross references. — Filing of foreign judgments, see § 9-12-132.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Civil Code 1895, §§ 4751, 4754 and former Civil Code 1910, §§ 5314 to 5320 are included in the annotations for this Code section.

Effect of establishment. — When once established, the copy is original evidence and is admissible as such in any controversy where the original would be admissible. *Leggett v. Patterson*, 114 Ga. 714, 40 S.E. 736 (1902) (decided under former Civil Code 1895, §§ 4751, 4754).

Remedy cumulative. — An established copy may thereafter afford a basis for an action at law. This procedure, however, is merely cumulative, and not exclusive of the right of the owner or holder of a lost paper to sue upon a copy of the paper, and prove the existence of the lost original if it is disputed. *Continental Fertilizer Co. v. Pass*, 7 Ga. App. 721, 67 S.E. 1052 (1910) (decided under former Civil Code 1895, §§ 4751, 4754).

Petition. — It is not necessary (though it is the better practice) for the petition to allege the loss; and if the loss is proved, the plaintiff may recover upon sufficient evidence of the contents. *Trice v. Adams*, 33 Ga. App. 257, 125 S.E. 878 (1924) (decided under former Civil Code 1910, §§ 5314 to 5320).

Allegation of jurisdiction. — Petition must allege that the defendants, or one of the defendants, resides in the county in which the application is made, in order to give that court jurisdiction. *Cobb v. Cobb*, 10 Ga. 445 (1851) (decided under former Civil Code 1895, §§ 4751, 4754).

Copy attached to petition. — Something must be presented in the petition, or annexed to the petition, which is claimed to be a copy in substance of the lost volume or document. *Ex parte Calhoun*, 87 Ga. 359, 13 S.E. 694 (1891) (decided under former Civil Code 1895, §§ 4751, 4754).

Copy of entire instrument. — Copy required by this section must be a copy of the entire instrument. *Jefferson v. Bowers*, 33 Ga. 452 (1863) (decided under former Civil Code 1895, §§ 4751, 4754).

Personal service. — Notice of a proceeding to establish a lost or destroyed paper must be served personally on the party, if to

be found within the state; and if a party residing out of the county be served by leaving a copy at the party's residence, the proceeding is void. *Bond v. Whitfield*, 28 Ga. 537 (1859) (decided under former Civil Code 1895, §§ 4751, 4754).

Proper parties. — Law does not contain any provision as to who are proper parties to a suit for the establishment of lost papers. *Bogle & Fields v. Maddox*, 27 Ga. 472 (1859) (decided under former Civil Code 1895, §§ 4751, 4754).

Need not be party. — Procedure need not be by a party but may be by any one who best knows the facts. *Banks v. Dixon*, 24 Ga. 483 (1858) (decided under former Civil Code 1895, §§ 4751, 4754).

Representative of deceased as party. — Legal representatives of deceased makers of a note need not be made parties. *Jefferson v. Bowers*, 33 Ga. 452 (1863) (decided under former Civil Code 1895, §§ 4751, 4754).

Acceptor of draft as party. — If the proceeding be against the drawer of a draft, the acceptors should be made parties. *Bond v. Whitfield*, 28 Ga. 537 (1859) (decided under former Civil Code 1895, §§ 4751, 4754).

Standing of heir. — An heir at law of the grantee in an unrecorded deed conveying land has such an interest in the land as will authorize the heir to maintain an action to establish a copy of the deed after the deed has been lost. *Orr v. Dunn*, 145 Ga. 137, 88 S.E. 669 (1916) (decided under former Civil Code 1910, §§ 5314-5320).

Res judicata. — Judgment establishing a copy of an alleged lost original constitutes a conclusive determination that a genuine original had in fact existed and is binding upon the parties in that proceeding and upon heirs at law of the alleged deceased grantor since the grantor's administrator was a party defendant therein. *Milner v. Allgood*, 184 Ga. 288, 191 S.E. 132 (1937) (decided under former Civil Code 1910, §§ 5314-5320).

Effect of decree. — When in a suit to establish a copy of a lost deed the jury found in favor of the plaintiff's contention as to the character of the deed, and upon such verdict the judge entered a decree that the plaintiff recover the land described, that fee-simple title be vested in the plaintiff, and that the

deed attached to the petition be established as prayed, the only effect of the decree was to establish the deed as prayed by the plaintiff, the provisions therein as to recovery of land and decree of title being surplusage. *Loftin v. Carroll County Bd. of Educ.*, 195 Ga. 689, 25 S.E.2d 293 (1943) (decided under former Civil Code 1910, §§ 5314-5320).

Equitable jurisdiction. — When a petition in equity was consolidated with the petition at law in the same court for the establishment of the lost bond, the fact that law and equity have a concurrent jurisdiction in the establishment of lost instruments would not defeat the equitable jurisdiction of the court or preclude the court from granting all necessary and proper relief to each of the parties. *Bainbridge Farm Co. v. Bower*, 194 Ga. 304, 21 S.E.2d 224 (1942) (decided under former Civil Code 1910, §§ 5314-5320).

Appellate jurisdiction. — When a petition in a superior court to establish a copy of a deed claimed to have been lost alleged only that the debtor resided in the county in which the suit was filed, that the debtor had executed to the plaintiff a certain deed, a true copy of which was attached to the petition, and that the deed had been lost, and in which petition the only prayer was that “the clerk of this court issue a rule nisi calling upon (the defendant) to show cause, if any he has, why the copy deed aforesaid

should not be established in lieu of said lost original,” such petition was a mere statutory proceeding to establish a copy of the deed claimed to have been lost, and was not a suit in equity such as to grant appellate jurisdiction in the Supreme Court. *Loftin v. Carroll County Bd. of Educ.*, 195 Ga. 689, 25 S.E.2d 293 (1943) (decided under former Civil Code 1910, §§ 5314-5320).

Establishment as bar to defense on note. — Establishment of a lost note is no bar to any defense that might be set up to the original note. *Jenkins v. Forbes*, 121 Ga. 383, 49 S.E. 284 (1904) (decided under former Civil Code, 1895, §§ 4751, 4754).

Schedule and plot in homestead. — After the plot and schedule have been approved by the ordinary (now judge of the probate court) and have been recorded those documents are private papers and may be established. *Paschal v. Turner*, 116 Ga. 736, 42 S.E. 1010 (1902) (decided under former Civil Code 1895, §§ 4751, 4754); *Paschal v. Hutchinson*, 119 Ga. 243, 46 S.E. 103 (1903) (decided under former Civil Code 1895, §§ 4751, 4754).

Lost wills. — Superior courts of this state have no jurisdiction to establish copies of lost wills. *Perkins v. Perkins*, 21 Ga. 13 (1857) (decided under former Civil Code 1895, §§ 4751, 4754); *Ponce v. Underwood*, 55 Ga. 601 (1876) (decided under former Civil Code 1895, §§ 4751, 4754).

Cited in *Graham v. Graham*, 137 Ga. 668, 74 S.E. 426 (1912).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments, § 8.

24-8-25. Establishment of lost or destroyed paper in superior court — When continuance granted.

In a proceeding to establish lost papers under Code Section 24-8-24, no continuance shall be granted unless it appears reasonable and just to the court; nor shall a continuance be allowed to the same party more than once, except for providential cause. (Ga. L. 1855-56, p. 238, § 4; Code 1863, § 3887; Code 1868, § 3907; Code 1873, § 3983; Code 1882, § 3983; Civil Code 1895, § 4746; Civil Code 1910, § 5315; Code 1933, § 63-204.)

24-8-26. Establishment of lost or destroyed paper in superior court — Grant of rule absolute.

When a rule nisi has been duly served as provided in Code Section 24-8-24, the court shall grant a rule absolute establishing the copy of the lost or destroyed paper sworn to, unless good and sufficient cause is shown why the rule absolute should not be granted. (Ga. L. 1855-56, p. 238, § 3; Code 1863, § 3888; Code 1868, § 3908; Code 1873, § 3984; Code 1882, § 3984; Civil Code 1895, § 4747; Civil Code 1910, § 5316; Code 1933, § 63-205.)

JUDICIAL DECISIONS

Judgment conclusive. — Judgment establishing a copy of a deed is conclusive, and evidence of nondelivery of the original is excluded. *Graham v. Graham*, 137 Ga. 668, 74 S.E. 426 (1912).

Cited in *Paschal v. Turner*, 116 Ga. 736, 42 S.E. 1010 (1902).

24-8-27. Establishment of lost or destroyed paper in superior court — Furnishing of certified endorsement of copy.

When the copy of the lost or destroyed paper is established, the clerk of the court in which it is done shall furnish the copy to the party who had it established, with a certified endorsement thereon of the day and term of the court when the rule absolute was granted, provided all costs of the proceeding have been paid. (Ga. L. 1855-56, p. 238, § 5; Code 1863, § 3889; Code 1868, § 3909; Code 1873, § 3985; Code 1882, § 3985; Civil Code 1895, § 4748; Civil Code 1910, § 5317; Code 1933, § 63-206.)

24-8-28. Procedure as to action on lost or destroyed note, bill, bond, or other instrument.

(a) If the paper which has been lost or destroyed is a note, bill, bond, or other instrument upon which an action may be brought, the owner may institute an action thereon as soon as the rule nisi has been issued as provided for in Code Section 24-8-24. The complaint shall set forth that the paper upon which the action is based is lost or destroyed. In no case shall a judgment be entered in the action until it is determined whether the application to establish the paper is granted or not. If the application is granted, then judgment shall be entered as in other cases.

(b) In an action as provided for in subsection (a) of this Code section, production of the paper upon which the action is based shall not be demanded until the time for rendition of judgment in the action; at that time, if the plaintiff produces a copy of the paper with a certified endorsement thereon by the clerk of the court in which it was established, as provided in Code Section 24-8-27, it shall be taken and considered as the original.

(c) This Code section shall not apply to instruments to which Title 11, the "Uniform Commercial Code," is applicable. (Ga. L. 1855-56, p. 238, §§ 6-8; Code 1863, §§ 3890, 3891; Code 1868, §§ 3910, 3911; Code 1873, §§ 3986, 3987; Code 1882, §§ 3986, 3987; Civil Code 1895, §§ 4750, 4751; Civil Code 1910, §§ 5319, 5320; Code 1933, §§ 63-208, 63-209; Ga. L. 1995, p. 10, § 24.)

Cross references. — Maintenance of action on lost or destroyed instrument gov-

erned by T. 11, the "Uniform Commercial Code," § 11-3-804.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Civil Code 1895, §§ 4750, 4751 and 4754, and former Code 1933, § 63-207 are included in the annotations for this Code section.

Parol evidence. — It is, on the trial of an action upon a promissory note, after showing the loss or destruction thereof, competent to prove by parol that a paper attached as an exhibit to the plaintiff's declaration is a true and correct copy of the lost original. *Haug v. Riley*, 101 Ga. 372, 29 S.E. 44, 40 L.R.A. 244 (1897) (decided under former Civil Code 1895, § 4750).

Admission of copy. — In answer to a plea of non est factum it is only necessary for the plaintiff to make out a prima facie case to authorize the admission in evidence of the paper alleged to be a substantial copy of the original note. *Brown v. Wilson*, 55 Ga. App. 262, 189 S.E. 860 (1937) (decided under former Code 1933, § 63-207).

Finding original pending suit. — When proceedings are instituted to establish a lost note, and suit is commenced after the rule nisi has issued and, pending the cause, the original note is found, it is not error to allow plaintiff to amend plaintiff's declaration so as to sue upon the original note thus found, even though there may be some immaterial discrepancies between the original note and the copy which it was sought to establish. *Cheney v. Dalton*, 46 Ga. 401 (1872).

Judgment on note. — Suit on a lost note is as effectual as a suit upon an established copy if the only purpose of establishing the copy is to obtain judgment upon the note, and fact that there was a plea of non est factum makes no difference; and a suit upon an established copy of a note is as effectual as a suit upon the original. *Brown v. Wilson*, 55 Ga. App. 262, 189 S.E. 860 (1937) (decided under former Code 1933, § 63-207).

Prior payment on note. — In an action upon an established copy of a lost promissory note, payment made prior to the judgment establishing the copy may be pleaded. *Jenkins v. Forbes*, 121 Ga. 383, 49 S.E. 284 (1904) (decided under former Civil Code 1895, §§ 4751, 4754).

Owner of a lost negotiable promissory note no longer has the option of "establishing" the note. The owner must now bring suit directly on the lost note itself pursuant to O.C.G.A. § 11-3-804. *Ballard v. Frey*, 179 Ga. App. 455, 346 S.E.2d 893 (1986).

Dismissal of action. — Although the petition in an action on a lost note might have been subject to a timely demurrer (now motion to dismiss), still the action could not properly be dismissed on oral motion. *Witherington v. Ware*, 17 Ga. App. 433, 87 S.E. 603 (1916).

Cited in *Jernigan v. Carter*, 60 Ga. 131 (1878).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, § 18.

C.J.S. — 54 C.J.S., Lost Instruments, §§ 21 et seq.

24-8-29. Joinder of additional party defendants in proceedings to establish lost or destroyed papers.

In all cases for the purpose of establishing any lost or destroyed paper other than an office paper as defined in Code Section 24-8-20, any person whose interest will be affected by the establishment of the lost paper shall, upon motion, by order of the court, be made a party respondent in the proceeding and shall be allowed all the rights of defense against the establishment of the paper as fully as if he were the maker of the lost paper. (Ga. L. 1866, p. 139, § 1; Code 1868, § 3916; Code 1873, § 3992; Code 1882, § 3992; Civil Code 1895, § 4756; Civil Code 1910, § 5325; Code 1933, § 63-303.)

JUDICIAL DECISIONS

Cited in *Thomasson v. Hudmon*, 185 Ga. 753, 196 S.E. 462 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, § 6.

C.J.S. — 54 C.J.S., Lost Instruments, §§ 11 et seq.

24-8-30. Applicability of article.

Other than Code Section 24-8-20, this article shall not apply to lost or destroyed papers to which Title 11 is applicable.

CHAPTER 9

WITNESSES GENERALLY

Article 1

Competency

- Sec.
24-9-1. Competency of witnesses — Generally.
24-9-2. Competency of witnesses — In cases of adultery.
24-9-3. Effect of religious belief.
24-9-4. Physical defects; interpreter allowed.
24-9-5. Competency of persons without use of reason.
24-9-6. Drunkenness incapacitates witness.
24-9-7. Competency decided by court; how and when objection to competency considered; restoration of competency.

Article 2

Privilege

PART 1

GENERAL PROVISIONS

- 24-9-20. Testimony of criminal defendant.
24-9-21. Confidentiality of certain communications.
24-9-22. Communications to clergyman privileged.
24-9-23. Compellability of testimony by defendant's spouse.
24-9-24. Client's communications to attorney privileged.
24-9-25. When attorney may testify for or against client.
24-9-26. Law enforcement officers; privilege not to divulge address in criminal proceedings; exception.
24-9-27. Privilege of parties and witnesses; public officials.
24-9-28. Grant of immunity; refusal to testify treated as contempt.
24-9-29. Veterinarians.
24-9-30. Persons, companies, or other entities engaged in gathering or dissemination of news.

PART 2

MEDICAL INFORMATION

- 24-9-40. When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.
24-9-40.1. Confidential nature of AIDS information.
24-9-40.2. Confidentiality of raw research data.
24-9-41. Disclosure of medical records — Terms defined.
24-9-42. Disclosure of medical records — Effect on confidential or privileged character thereof.
24-9-43. Disclosure of medical records — Use of medical matter so disclosed.
24-9-44. Disclosure of medical records — Immunity from liability.
24-9-45. Disclosure of medical records — Use for educational purposes not precluded.
24-9-46. Confidential nature of certain library records.
24-9-47. Disclosure of AIDS confidential information.

Article 3

Examination

- 24-9-60. Oath or affirmation required.
24-9-61. Right to have witnesses sequestered; effect of irregularity.
24-9-61.1. Presence in courtroom of victim of criminal offense.
24-9-62. Treatment of witness.
24-9-63. When leading questions allowed generally; discretion of court.
24-9-64. Right of cross-examination.
24-9-65. When opinion evidence admissible.
24-9-66. Market value as opinion evidence; who may testify as to value.
24-9-67. Opinions of experts admissible in criminal cases.

Sec.

- 24-9-67.1. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.
- 24-9-68. Witness's feelings and relationship to parties provable.
- 24-9-69. Testifying after recollection refreshed; swearing from written memorandum.
- 24-9-70. Objection not waived by cross-examination or introduction of evidence.

Article 4

Credibility

- 24-9-80. Credibility a jury question.
- 24-9-81. Impeachment of witnesses by any party; right to call, examine, and impeach opposite party.
- 24-9-82. How witness impeached — Disproving testimony.
- 24-9-83. How witness impeached — Previous contradictory statements; foundation; proof of good character to sustain witness.
- 24-9-84. How witness impeached — Reputation as bad character; limitations; procedure; how witness sustained; when particular transactions or individual opinions may be inquired of.
- 24-9-84.1. How witness impeached — Prior convictions.
- 24-9-85. Credit of impeached witness for jury generally; when testimony of impeached witness must be corroborated.

Article 5

Use of Sign Language and Intermediary Interpreter in Administrative and Judicial Proceedings

Sec.

- 24-9-100. State policy.
- 24-9-101. Definitions.
- 24-9-102. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings; hearing impaired persons to make requests for interpreters.
- 24-9-103. Procedure for interrogation and taking of statements from hearing impaired persons when arrested; interpreters to be provided upon arrest of hearing impaired persons.
- 24-9-104. Indigent hearing impaired defendants to be provided with interpreters.
- 24-9-105. Waiver of right to interpreter.
- 24-9-106. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters; qualified interpreter list.
- 24-9-107. Oath of interpreters; privileged communications; situation of interpreters during proceedings; taping and filming of hearing impaired persons' testimony.
- 24-9-108. Compensation of interpreters; fee schedule; fee may be assessed as cost in civil proceeding.

Law reviews. — For annual survey of the law of evidence, see 38 Mercer L. Rev. 215

(1986). For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998).

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Impeachment of Witness — Prior Inconsistent Statements, 21 POF2d 101.
Foundation for Offering Deposition or Other Former Testimony in Evidence, 28 POF2d 1.

Contradiction of Expert Witness Through Use of Authoritative Treatise, 31 POF2d 443.
Impeachment of Witness by Prior Criminal Conviction, 36 POF2d 747.
Admission of Character Evidence and Evidence of Other Acts, 21 POF3d 629.
Challenge to Eyewitness Identification Through Expert Testimony, 35 POF3d 1.

Substantive and Procedural Issues in Refreshing Witness Recollection, 88 POF3d 395.

Am. Jur. Trials. — The Daubert Challenge to the Admissibility of Scientific Evidence, 60 Am. Jur. Trials 1.

ALR. — Court's witnesses (other than expert) in state criminal prosecution, 16 ALR4th 352.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction, 16 ALR4th 666.

Competency of nonexpert witness to testify, in criminal case, based upon personal observation, as to whether person was under the influence of drugs, 21 ALR4th 905.

Admissibility of hypnotically refreshed or enhanced testimony, 77 ALR4th 927.

Propriety and prejudicial effect of third party accompanying or rendering support to witness during testimony, 82 ALR4th 1038.

ARTICLE 1

COMPETENCY

RESEARCH REFERENCES

C.J.S. — 97 C.J.S., Witnesses, §§ 88 et seq.

ALR. — Exhibition of child in criminal prosecution, or civil action, for seduction, 1 ALR 622.

Competency of hospital physician or attendant to testify as to condition of patient, 22 ALR 1217.

Competency or qualification of witness who had not seen or examined property before fire to testify as to damage by fire, 33 ALR 297.

Admissibility and probative force, on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 68 ALR 1309.

Right of one against whom testimony is offered to invoke privilege of communication between others, 2 ALR2d 645.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 ALR2d 598.

Effect of voluntary statements damaging to accused, not proper subject of testimony, uttered by testifying police or peace officer, 8 ALR2d 1013.

Alleged incompetent as witness in lunacy inquisition, 22 ALR2d 756.

Court's witnesses (other than expert) in criminal prosecution, 67 ALR2d 538.

Admissibility of evidence of train speed prior to grade-crossing accident, and competency of witness to testify thereto, 83 ALR2d 1329.

Competency of physician or surgeon of school of practice other than that to which defendant belongs to testify in malpractice case, 85 ALR2d 1022.

Validity of indictment where grand jury heard incompetent witness, 39 ALR3d 1064.

Court's witnesses (other than expert) in state criminal prosecution, 16 ALR4th 352.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 ALR4th 368.

Attorney as witness for client in civil proceedings — Modern state cases, 35 ALR4th 810.

Calling and interrogation of witnesses by court under Rule 614 of the Federal Rules of Evidence, 53 ALR Fed. 498.

24-9-1. Competency of witnesses — Generally.

(a) No person offered as a witness shall be excluded by reason of incapacity, for crime or interest or from being a party, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or

before any judge, jury, sheriff, coroner, magistrate, officer, or party having by law or consent of parties authority to hear, receive, and examine evidence; but every person so offered shall be competent and compellable to give evidence on behalf of either or any of the parties to the suit, action, or other proceeding.

(b) This Code section, as revised by an Act approved April 17, 1979 (Ga. L. 1979, p. 1261), shall apply to transactions or occurrences which take place on or after July 1, 1979, and this Code section, as it existed prior to July 1, 1979, shall apply to transactions or occurrences which took place prior to July 1, 1979. (Ga. L. 1866, p. 138, § 1; Code 1868, § 3798; Code 1873, § 3854; Code 1882, § 3854; Ga. L. 1889, p. 85, § 1; Ga. L. 1890-91, p. 107, §§ 1, 2; Ga. L. 1893, p. 53, § 1; Civil Code 1895, §§ 5269, 5270; Ga. L. 1897, p. 53, § 1; Ga. L. 1900, p. 57, § 1; Civil Code 1910, §§ 5858, 5859; Ga. L. 1924, p. 62, § 1; Code 1933, § 38-1603; Ga. L. 1953, Nov-Dec. Sess., p. 319, § 1; Ga. L. 1979, p. 1261, §§ 1, 2; Ga. L. 1992, p. 6, § 24.)

Editor's notes. — Subsection (b) of this Code section was added as a result of Section 2 of Ga. L. 1979, p. 1251, which rewrote Code Section 38-1603 of the 1933 Code, the basis for this Code section.

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's evidence laws, see 31 Mercer L. Rev. 107 (1979). For article surveying developments in Georgia evidence law, see 33

Mercer L. Rev. 129 (1981). For article surveying citing developments in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981). For annual 11th Circuit survey of Evidence Law, see 56 Mercer L. Rev. 1273 (2005); and 58 Mercer L. Rev. 151 (2006). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

JUDICIAL DECISIONS

Admissibility not equated with competency. — An objection on the ground of admissibility of the evidence does not raise the issue as to the competency of the witness. *Sumter County v. Pritchett*, 125 Ga. App. 222, 186 S.E.2d 798 (1971).

Testimony received without objection. — Testimony of an incompetent witness, if it is material, when received without objection, is of probative value, and will be considered and given such weight as the jury deems the testimony entitled to in view of the witness's interest and other circumstances. *Brittain Bros. Co. v. Davis*, 174 Ga. 1, 161 S.E. 841 (1931).

Competency objection must be distinctly raised. — Witness offered may be permitted to testify, unless there is an objection or exception distinctly raising the question of the witness's competency. *Sumter County v. Pritchett*, 125 Ga. App. 222, 186 S.E.2d 798 (1971).

Waiver. — Even though a witness may be

termed incompetent, unless a question of public policy is involved, the incompetency of the witness may be waived. *Williams v. State*, 69 Ga. App. 863, 27 S.E.2d 54 (1943).

Competent claimant's testimony not to be ignored. — There was competent evidence to support an award based on claimant's testimony, considering its interpretation and credibility; the superior court's denial of the award solely because of the claimant's statements was reversed. *Gasses v. Professional Plumbing Co.*, 204 Ga. App. 69, 418 S.E.2d 424 (1992).

Lex fori regulates competency. *Bowers v. Southern Ry.*, 10 Ga. App. 367, 73 S.E. 677 (1912).

Prior conviction of felony. — Person convicted of a felony is a competent witness; the fact of the person's conviction only goes to the person's credit. *Bowers v. Southern Ry.*, 10 Ga. App. 367, 73 S.E. 677 (1912); *Lewis v. State*, 243 Ga. 443, 254 S.E.2d 830 (1979).

Prior adjudication of insanity. — That the

chief witness for the state had been adjudicated insane in another state prior to the commission of the offense charged and testified about does not have the effect of denying probative value to the testimony of such witness: such a person is not incompetent to testify and the proof of the commitment for insanity goes to the credit of the witness only. *Saxe v. State*, 112 Ga. App. 804, 146 S.E.2d 376 (1965).

Impeachment at prior trial. — Fact that a witness for the state had been impeached by the state, as unworthy of belief, in a previous trial of the witness, is not ground for refusing to permit the witness to testify in a present case. *Daniel v. State*, 118 Ga. App. 370, 163 S.E.2d 863 (1968), cert. denied, 394 U.S. 919, 89 S. Ct. 1193, 22 L. Ed. 2d 453 (1969).

Effect of liability for contempt. — Despite the fact that the witness personally, or others, may be subject to punishment for contempt of court, the testimony will not be excluded. *Best v. State*, 176 Ga. 46, 166 S.E. 772 (1932).

Testimony concerning adultery. — O.C.G.A. § 24-9-1 allows a party to be a witness for oneself on all relevant issues; but O.C.G.A. § 24-9-2 creates an exception for proceedings “instituted in consequence of adultery,” with the result that in such proceedings a party is not competent to testify to that party’s or that party’s spouse’s adultery. *Owens v. Owens*, 247 Ga. 139, 274 S.E.2d 484 (1981).

Accountant employed under authority of court. — When the judge appointed an auditor to pass upon all questions arising in a case, and authorized the auditor to employ a certified public accountant to assist in examining books, records, and accounts, an accountant who was thereafter so employed, and who had made an examination of books of the plaintiff upon which the defendant relied in part to establish a defense and counterclaim, was not incompetent as a witness to testify as to what the books showed, either because the accountant was employed under authority of the court to assist the auditor, or because the order referring the case to an auditor had been revoked and the objecting party had never had an opportunity to appear before the auditor. *Bible v. Somers Constr. Co.*, 197 Ga. 761, 30 S.E.2d 623 (1944).

Pre-1979 testimony admissible when not against estate’s interests. — Testimony of a

transaction alleged to have been undertaken with the deceased in 1978 should have been admitted because it was not against the interest of the estate of the deceased. *Bowens v. Holmes*, 262 Ga. 179, 415 S.E.2d 632 (1992).

Pre-1979 statement admissible as to appellee’s parents regarding decedent’s statements. — Appellee’s parents were competent witnesses regarding statements made to the parents by the decedent prior to July 1, 1979 to prove that the decedent contracted to adopt the appellee. *Morgan v. Howard*, 285 Ga. 512, 678 S.E.2d 882 (2009).

Continuing business relationship does not constitute a “transaction” within the meaning of subsection (b) of O.C.G.A. § 24-9-1 and thus testimony as to an alleged oral contract made before July 1, 1979 with a party since deceased, which defined the relationship which extended beyond that date, is not admissible under the former dead man’s statute. *Wilson v. Nichols*, 253 Ga. 84, 316 S.E.2d 752 (1984).

Former dead man’s statute barred testimony regarding a conversation between plaintiff, plaintiff’s mother, and a person since deceased because the plaintiff’s claim was “against the interest” of the deceased, i.e., the interest of the deceased’s estate. *Willis v. Kennedy*, 267 Ga. 165, 476 S.E.2d 246 (1996).

Former dead man’s statute rendered a witness incompetent to testify as to a conversation with a person since deceased regardless of whether the testimony might be admissible under other rules of evidence. *Willis v. Kennedy*, 267 Ga. 165, 476 S.E.2d 246 (1996).

Under former Code 1933, § 38-1603 (see O.C.G.A. § 24-9-1), neither plaintiff nor his wife could testify as to promise of a “contract for life” allegedly made to plaintiff and plaintiff’s spouse by two deceased officers of defendant corporation. *Kitfield v. Henderson, Black & Greene*, 231 Ga. App. 130, 498 S.E.2d 537 (1998).

For application of former dead man’s statute in action seeking cancellation of deed allegedly obtained by fraud, see *McLendon v. Georgia Kaolin Co.*, 782 F. Supp. 1548 (M.D. Ga. 1992); *Garbutt v. Southern Clays, Inc.*, 894 F. Supp. 456 (M.D. Ga. 1995).

Exclusion of expert witness improper. — Trial court abused its discretion in excluding

a homeowner's expert witness solely on the basis of the expert's alleged interest in the outcome of the case, and because the trial court's unauthorized preemptive protection of the homeowner's attorney immediately led to the dismissal of the claim for damages for failure to produce any expert evidence of causation, the homeowner did not have a day in court; although the expert indicated that, at the time of the expert's deposition, the expert intended to decide how much to bill the homeowner after the trial, based on the expert's own evaluation of whether the expert testimony was "usable," there was no evidence in the truncated voir dire of the expert that the homeowner's attorney agreed to that scheme or otherwise agreed that the expert's compensation would be contingent on the outcome of the case. *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009).

Cited in *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981); *Evans v. State*, 161 Ga. App. 504, 288 S.E.2d 629 (1982); *Sams v. Gay*, 161 Ga. App. 31, 288 S.E.2d 822 (1982); *Grant v. Bell*, 161 Ga. App. 878, 288 S.E.2d 907 (1982); *Reno v. Reno*, 249 Ga. 855, 295 S.E.2d 94 (1982); *Jenga v. State*, 166 Ga. App. 26, 303 S.E.2d 170 (1983); *General GMC Trucks, Inc. v. Mercury Freight Lines*, 704 F.2d 1237 (11th Cir. 1983); *Fugitt v. State*, 256 Ga. 292, 348 S.E.2d 451 (1986); *Butts v. Southern Clays, Inc.*, 215 Ga. App. 110, 450 S.E.2d 244 (1994); *Georgia Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 478 S.E.2d 437 (1996); *Foster v. Ramsey*, 245 Ga. App. 118, 536 S.E.2d 550 (2000); *Collins v. State*, 273 Ga. 93, 538 S.E.2d 47 (2000); *Murray v. Stone*, 283 Ga. 6, 655 S.E.2d 821 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses, §§ 160 et seq., 167, 169, 195.

C.J.S. — 97 C.J.S., Witnesses, §§ 196 et seq., 223, 229, 233, 243, 245.

ALR. — Judge as a witness in a cause on trial before him, 157 ALR 315.

Conviction in another jurisdiction as disqualifying witness, 2 ALR2d 579.

Rule as regards competency of husband or wife to testify as to nonaccess, 49 ALR3d 212.

Judge as witness in cause not on trial before him, 86 ALR3d 633.

Trial jurors as witnesses in same state court or related case, 86 ALR3d 781.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 ALR4th 468.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 ALR5th 841.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 ALR5th 319.

Admissibility of expert testimony regarding questions of domestic law, 66 ALR5th 135.

24-9-2. Competency of witnesses — In cases of adultery.

In any civil proceeding a husband and wife shall each be competent to testify to the adultery of the other; and a party shall be competent to testify to his or her innocence of adultery in such proceeding. (Ga. L. 1866, p. 138, § 3; Code 1868, § 3799; Code 1873, § 3855; Code 1882, § 3855; Civil Code 1895, § 5272; Civil Code 1910, § 5861; Code 1933, § 38-1606; Ga. L. 1935, p. 120, § 1; Ga. L. 1951, p. 596, § 1; Ga. L. 1976, p. 1014, § 2; Ga. L. 1982, p. 1187, §§ 1, 2.)

Cross references. — Adultery generally, § 16-6-19. Child abandonment generally, § 19-10-1.

Law reviews. — For article, "The Evidence Code and Cases Instituted in Consequence of Adultery," see 15 Ga. St. B.J. 176 (1979).

For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For article surveying developments in Georgia evidence law, see 33 Mercer L. Rev. 129 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113

(1982). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For note discussing the admissibility of husband and wife's testimony concerning nonaccess in determining the legitimacy of a child, see 6 Ga. St. B.J. 448 (1970).

JUDICIAL DECISIONS

In general. Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981), is no longer applicable in view of the 1982 amendment to O.C.G.A. § 24-9-2 which eliminated language excepting certain adultery cases from the broad competency rules of O.C.G.A. § 24-9-1; consequently, in such cases the competency rules of § 24-9-1 are now applicable. Brown v. Hauser, 249 Ga. 513, 292 S.E.2d 1 (1982).

Offer of proof following introduction of previously suppressed evidence regarding

adulterous conduct. — When spouse obtained a favorable ruling on motion in limine to suppress evidence as to the spouse's adulterous conduct, and abided by that ruling, but nevertheless such evidence was offered at trial, that spouse was entitled to make an offer of proof as to such allegations. Reno v. Reno, 249 Ga. 855, 295 S.E.2d 94 (1982).

Cited in Brown v. Hauser, 249 Ga. 513, 292 S.E.2d 1 (1982).

RESEARCH REFERENCES

ALR. — Insured-insurer communications as privileged, 55 ALR4th 336.

24-9-3. Effect of religious belief.

Religious belief shall go only to the credit of a witness. (Ga. L. 1841, p. 144, § 1; Cobb's 1851 Digest, p. 280; Code 1863, § 3772; Code 1868, § 3797; Code 1873, § 3853; Code 1882, § 3853; Civil Code 1895, § 5268; Civil Code 1910, § 5857; Code 1933, § 38-1602.)

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Belief in supreme being. — Although desirable, it is not essential to the witness's competency that the witness believe in a supreme being, or that the witness be aware of God's existence. Smith v. State, 247 Ga. 511, 277 S.E.2d 53 (1981).

Individual acts of witness. — It is not competent to take up individual acts of a witness and inquire of the witness as to the

significance of such acts when viewed from a religious standpoint. Otherwise, practically every act of a man's life might be taken up and examined into. Eugene v. State, 159 Ga. 604, 126 S.E. 471 (1925).

Cited in Green v. State, 71 Ga. 487 (1883); Jones v. State, 219 Ga. 245, 132 S.E.2d 648 (1963).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 162.

C.J.S. — 97 C.J.S., Witnesses, § 105.

ALR. — Propriety and prejudicial effect of impeaching witness by reference to religious belief or lack of it, 76 ALR3d 539.

24-9-4. Physical defects; interpreter allowed.

No physical defect in any of the senses shall incapacitate a witness. An interpreter may explain the evidence of such witness. (Orig. Code 1863, § 3774; Code 1868, § 3802; Code 1873, § 3858; Code 1882, § 3858; Civil Code 1895, § 5275; Penal Code 1895, § 1014; Civil Code 1910, § 5864; Penal Code 1910, § 1040; Code 1933, § 38-1609.)

JUDICIAL DECISIONS

Purpose. — If a procedure such as provided for by this statute were not permissible, the witness unable to communicate in English or otherwise disabled would never be able to give the witness's testimony. *Hensley v. State*, 228 Ga. 501, 186 S.E.2d 729 (1972) (see O.C.G.A. § 24-9-4).

Questions for court and jury. — Use of an interpreter, and the extent to which the examination will be allowed to proceed through the interpreter must necessarily lie within the sound discretion of the trial judge. Whether the evidence elicited be credible is a question for the jury who were there and who observed the witness, the witness's behavior on the stand and response to the questions and the manner of communication between the witness and the interpreter. *Hensley v. State*, 228 Ga. 501, 186 S.E.2d 729 (1972).

Discretion of trial judge. — Use of an interpreter, and the extent to which the interpreter may be used in the examination of a witness, must necessarily lie within the sound discretion of the trial judge. *Reed v. State*, 249 Ga. 52, 287 S.E.2d 205 (1982).

Court officer as interpreter. — When the witness in a criminal case is unable from the witness's physical condition to speak audibly, the witness's answers may be communicated in the witness's hearing and presence by a sworn officer of the court. *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184 (1858).

Cited in *Schall v. Eisner*, 58 Ga. 190 (1877); *Smith v. State*, 236 Ga. 5, 222 S.E.2d 357 (1976); *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 180.

C.J.S. — 97 C.J.S., Witnesses, § 117.

ALR. — Use of interpreter in court proceedings, 172 ALR 923.

Deaf-mute as witness, 50 ALR4th 1188.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 ALR4th 1102.

24-9-5. Competency of persons without use of reason.

(a) Except as provided in subsection (b) of this Code section, persons who do not have the use of reason, such as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, shall be incompetent witnesses.

(b) Notwithstanding the provisions of subsection (a) of this Code section, in all cases involving deprivation as defined by Code Section 15-11-2, or in criminal cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any crime, any such child shall be competent to testify, and his credibility shall be determined as provided in Article 4 of this chapter. (Ga. L. 1866, p. 138, § 4; Code 1868, § 3800; Code 1873, § 3856; Code 1882, § 3856; Civil Code 1895, § 5273; Penal Code 1895, § 1012; Civil Code 1910, § 5862; Penal Code 1910, § 1038; Code 1933, § 38-1607; Ga. L. 1989, p. 1639, § 1; Ga. L. 1990, p. 1795, § 1.)

Cross references. — Admissibility of child's prior statement to witness regarding sexual or physical abuse, § 24-3-16.

Editor's notes. — Ga. L. 1989, p. 1639, § 2, not codified by the General Assembly, provides that the amendment to this Code section by the Act shall not apply to crimes or offenses which took place prior to April 19, 1989.

Law reviews. — For article, "The Need for a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For annual survey on law of evidence, see 42 Mercer L. Rev. 223 (1990).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 249 (1989).

For note on 1990 amendment of this Code section, see 7 Ga. St. U.L. Rev. 268 (1990). For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U. L. Rev. 367 (1994).

For comment discussing the effect of mental unsoundness on the competency of witnesses, in light of *O'Shea v. Jewel Tea Co.*, 233 F.2d 530 (9th Cir. 1956), see 19 Ga. B.J. 533 (1957). For comment on *Western & A.R.R. v. Hart*, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12 year old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958). For comment on *Bacon v. State*, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CHILDREN

INSANE PERSONS

RETARDED PERSONS

General Consideration

Georgia witness competency statutes present a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and do not violate the equal protection clause. *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989).

State had standing to challenge Georgia witness competency statutes. *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989).

No hearing unless specific ground of incompetency alleged. — When, before the

defendant's first trial, the defendant made the defendant's "motion to exclude the testimony of the victim on grounds of incompetency . . . pursuant to §§ 24-9-5 & 24-9-7" in the broadest of terms without distinctly alleging what category of "persons who do not have the use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to the facts and circumstances of the case, the court did not err in

General Consideration (Cont'd)

refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. *Webb v. State*, 187 Ga. App. 348, 370 S.E.2d 204 (1988).

Trial court determines competency of a witness and jury decides credibility. *Bearden v. State*, 159 Ga. App. 892, 285 S.E.2d 606 (1981).

Nothing in the record to indicate witness could not understand trial oath. — Ruling that a witness was incompetent to testify under O.C.G.A. § 24-9-5(a) failed since there was absolutely nothing in the record to demonstrate that the witness could not understand the nature of the trial oath simply because the witness was originally from Somalia and spoke in halting English. *Trueblood v. State*, 248 Ga. App. 78, 545 S.E.2d 628 (2001).

Cited in *Peacon v. Peacon*, 197 Ga. 748, 30 S.E.2d 640 (1944); *Hobbs v. New England Ins. Co.*, 212 Ga. 513, 93 S.E.2d 653 (1956); *Moore v. Atlanta Transit Sys.*, 105 Ga. App. 70, 123 S.E.2d 693 (1961); *Ashley v. State*, 124 Ga. App. 387, 184 S.E.2d 44 (1971); *Locke v. State*, 229 Ga. 110, 189 S.E.2d 410 (1972); *Hayes v. State*, 152 Ga. App. 858, 264 S.E.2d 307 (1980); *Herron v. State*, 155 Ga. App. 791, 272 S.E.2d 756 (1980); *Sanborn v. State*, 159 Ga. App. 608, 284 S.E.2d 110 (1981); *Holloway v. State*, 164 Ga. App. 506, 296 S.E.2d 744 (1982); *Mackler v. State*, 164 Ga. App. 874, 298 S.E.2d 589 (1982); *McDaniel v. State*, 169 Ga. App. 123, 312 S.E.2d 159 (1983); *Williams v. State*, 173 Ga. App. 523, 327 S.E.2d 526 (1985); *Henry v. State*, 176 Ga. App. 462, 336 S.E.2d 588 (1985); *Keri v. State*, 179 Ga. App. 664, 347 S.E.2d 236 (1986); *In re K.T.B.*, 192 Ga. App. 132, 384 S.E.2d 231 (1989); *Hall v. State*, 196 Ga. App. 523, 396 S.E.2d 271 (1990); *Hunnicut v. State*, 198 Ga. App. 572, 402 S.E.2d 534 (1991); *Alexander v. State*, 199 Ga. App. 228, 404 S.E.2d 616 (1991); *Holsey v. State*, 199 Ga. App. 782, 406 S.E.2d 127 (1991); *Levitt v. State*, 201 Ga. App. 63, 410 S.E.2d 170 (1991); *Black v. State*, 261 Ga. 791, 410 S.E.2d 740 (1991); *Hesler v. State*, 208 Ga. App. 495, 431 S.E.2d 138 (1993); *Nelson v. State*, 242 Ga. App. 63, 528 S.E.2d

844 (2000); *London v. State*, 274 Ga. 91, 549 S.E.2d 394 (2001); *Ochoa v. State*, 252 Ga. App. 209, 555 S.E.2d 857 (2001); *Hayes v. State*, 274 Ga. 875, 560 S.E.2d 656 (2002); *McDaniel v. State*, 261 Ga. App. 360, 583 S.E.2d 141 (2003).

Children

Construed with § 24-3-16. — Child “available to testify” in O.C.G.A. § 24-3-16 means one competent to testify under O.C.G.A. § 24-9-5. For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness is not available to testify and any out-of-court statements are not rendered admissible by § 24-3-16. *Hunnicut v. State*, 194 Ga. App. 714, 391 S.E.2d 790 (1990).

O.C.G.A. §§ 24-9-5 and 24-3-16 must be construed together. *Bright v. State*, 197 Ga. App. 784, 400 S.E.2d 18 (1990); *McGarity v. State*, 212 Ga. App. 17, 440 S.E.2d 695 (1994).

Child is considered “available to testify” under O.C.G.A. § 24-3-16 only if the child is “competent” to testify within the meaning of O.C.G.A. § 24-9-5. *Shaver v. State*, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991).

O.C.G.A. § 24-9-5 does not expand the circumstances under which hearsay statements of a child may be admitted in evidence. *Thornton v. State*, 264 Ga. 563, 449 S.E.2d 98 (1994).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath as required by subsection (a) of O.C.G.A. § 24-9-5. *Woodruff v. Woodruff*, 272 Ga. 485, 531 S.E.2d 714 (2000).

Constitutionality of subsection (b). — Subsection (b) of O.C.G.A. § 24-9-5 does not violate due process; it is not fundamentally unfair to require one accused of child molestation to face one's accuser, even if the accuser is unable to articulate the meaning of an oath, and the defendant has the opportunity to cross-examine the child witness, and test the child's credibility before the jury. *Sims v. State*, 260 Ga. 782, 399 S.E.2d 924 (1991).

Subsection (b) of O.C.G.A. § 24-9-5 applies equally to all those accused of child molestation, and therefore does not violate

the equal protection clause of the federal constitution. *Sims v. State*, 260 Ga. 782, 399 S.E.2d 924 (1991).

No required showing child competent to testify. — For offenses involving child victims occurring after April 19, 1989, a determination that the child victim is competent to testify is not necessary; a child witness is “available” for purposes of the Child Hearsay Statute, O.C.G.A. § 24-3-16, as long as the child is physically available to appear at trial. *Gibby v. State*, 213 Ga. App. 20, 443 S.E.2d 852 (1994).

Statement admissible regardless of child’s age or degree of comprehension. — Out-of-court statements of a victim of child molestation are admissible whenever the victim is available to appear at trial, whether or not the child is capable of understanding the nature of an oath and thus regardless of age or degree of comprehension. *Lang v. State*, 201 Ga. App. 836, 412 S.E.2d 866 (1991).

Oath not required when child does not comprehend oath’s nature. — Under subsection (b) of O.C.G.A. § 24-9-5, which provides that in certain limited categories of cases a child is deemed legally competent to testify, the prerequisite administration of the oath otherwise called for by O.C.G.A. § 24-9-60 has been obviated when the child does not comprehend the oath’s nature. The child simply becomes an unsworn witness, made so because incapable of taking an oath. *Bright v. State*, 197 Ga. App. 784, 400 S.E.2d 18 (1990).

Children who do not understand nature of oath are incompetent. — *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977).

Mentally retarded children subject to competency challenge. — O.C.G.A. § 24-9-5 is construed as subjecting children to a competency challenge based on the allegation the children do not understand the nature of an oath. Children, like adults, are also subject to a competency challenge on the ground that the children do not have the use of reason because of mental retardation. *Sizemore v. State*, 262 Ga. 214, 416 S.E.2d 500 (1992).

Determining factor in deciding competency of a witness to testify is not age but rather the ability to understand the nature of an oath. *Horton v. State*, 35 Ga. App. 493,

133 S.E. 647 (1926); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945).

Standard of intelligence required to qualify child as a witness is not that the child be able to define the meaning of an oath, nor that the child understand the process under which the oath is administered, but rather that the child know and appreciate the fact that as a witness the child assumes a solemn and binding obligation to tell the truth relative to the case and concerning such matters as the child may be interrogated on, and that if the child violates the obligation the child is subject to be punished by the court. *Jones v. State*, 219 Ga. 245, 132 S.E.2d 648 (1963); *Smith v. State*, 247 Ga. 511, 277 S.E.2d 53 (1981); *Alvin v. State*, 253 Ga. 740, 325 S.E.2d 143 (1985), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006).

Knowledge of nature of oath. — It is enough if children know the mere nature of an oath, regardless of knowledge of the oath’s effects, and whether or not the children have such knowledge is to be determined by the court on a preliminary examination. *Peterson v. State*, 47 Ga. 524, later appeal, 50 Ga. 142 (1873); *Moore v. State*, 79 Ga. 498, 5 S.E. 51 (1887); *Young v. State*, 122 Ga. 725, 50 S.E. 996 (1905); *Beebee v. State*, 124 Ga. 775, 53 S.E. 99 (1906); *Young v. State*, 125 Ga. 584, 54 S.E. 82 (1906); *Richardson v. State*, 141 Ga. 782, 82 S.E. 134 (1914); *Reece v. State*, 155 Ga. 350, 116 S.E. 631 (1923).

Challenge for “understanding truth.” — Understanding the truth is one element of understanding the nature of an oath, and as such, subsection (b) of O.C.G.A. § 24-9-5 excepts a child from a competency challenge brought on such basis. *Norton v. State*, 263 Ga. 448, 435 S.E.2d 30 (1993); *Jeffries v. State*, 272 Ga. 510, 530 S.E.2d 714 (2000), cert. denied, 531 U.S. 1116, 121 S. Ct. 864, 148 L. Ed. 2d 777 (2001).

Child should not be held competent when the child does not understand nature of oath. — While questions of this character are to be left largely to the discretion of the trial judge, the judge should not hold a child-witness competent when it does not appear that such witness sufficiently understands the nature and obligation of an oath to testify in the case. *Pace v. State*, 157 Ga. App. 442, 278 S.E.2d 90 (1981).

Children (Cont'd)

It is not necessary for child to understand meaning of the word "oath." *Pace v. State*, 157 Ga. App. 442, 278 S.E.2d 90 (1981); *Raborn v. State*, 192 Ga. App. 99, 383 S.E.2d 650 (1989).

It is not necessary that a child understand the penalties for perjury in order for the trial court to rule the child competent to testify. *Hill v. State*, 251 Ga. 430, 306 S.E.2d 653 (1983).

Age not determinative of competency as a witness. *Johnson v. State*, 146 Ga. 190, 91 S.E. 42 (1916).

Capacity to commit crime not determinative of competency as a witness. *Johnson v. State*, 61 Ga. 35 (1878).

Evidence sufficiently reliable. — Record contained sufficient evidence of indicia of reliability where the two girls, who were 12 and 10 years old, were interviewed separately on at least two different occasions, their statements were consistent with each other over time, the state's witnesses were all professionals trained in interviewing victims of child abuse without asking leading questions, and all three considered the girls credible. *Gibby v. State*, 213 Ga. App. 20, 443 S.E.2d 852 (1994).

Examination sufficient. — When the principal state's witness against a defendant is a child and on examination by the court to determine the child's competency to testify stated the child knew what it meant to tell a lie and that the child was supposed to tell the truth, such examination was sufficient to determine whether the child understood the nature of an oath as required by law. *Turpin v. State*, 121 Ga. App. 294, 173 S.E.2d 455 (1970); *Decker v. State*, 139 Ga. App. 707, 229 S.E.2d 520 (1976).

Since each child testified that the child knew the meaning of an oath, the child's belief in God, that it was wrong to lie, and that the child would tell the truth, the fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. *Bearden v. State*, 159 Ga. App. 892, 285 S.E.2d 606 (1981).

When the record revealed that, during the trial the prosecuting attorney asked the victim, nearly nine years old, a series of questions, the answers to which clearly demon-

strated that the child understood both the difference between truth and falsehood and the importance of telling only the truth, and the record further revealed that the defendant's counsel failed to question the witness following the examination by the state, or to object at that time on competency grounds, counsel's conduct amounted to a waiver of the right to raise the issue of the witness's competency on appeal. *Wood v. State*, 195 Ga. App. 424, 393 S.E.2d 720 (1990).

Since the trial court examined each of three juvenile witnesses at the beginning of his or her testimony to ascertain that the child knew the difference between telling the truth and telling a lie and understood why telling the truth was better than telling a falsehood, and obtained from each witness a promise to tell the truth in response to questions from counsel, it was not an abuse of discretion to allow the children to testify. *Carter v. State*, 195 Ga. App. 489, 393 S.E.2d 746 (1990).

Since the 15-year-old victim of a sexual abuse testified at trial that the victim knew it was bad to tell a lie, that the victim would be punished if the victim did so and that the victim also understood the importance of telling the truth, the trial court did not abuse the court's discretion in refusing to strike the victim's testimony. *Lott v. State*, 206 Ga. App. 886, 426 S.E.2d 667 (1992).

Presumption not conclusive. — Child over 14 is presumed competent to testify, but to hold that this presumption is so conclusive that the court is inhibited from examining the witness on this point unless objection has been specifically made on one of the grounds stated in this statute would be to circumscribe the authority of the court to elicit the truth, and would seriously impede the administration of justice. *Schamroth v. State*, 84 Ga. App. 580, 66 S.E.2d 413 (1951) (see O.C.G.A. § 24-9-5).

It is left to sound discretion of trial court to determine whether or not a child of tender years is a competent witness; and when the court examines a child as to the child's understanding of the nature of an oath and decides that the child is competent to testify, this court will not interfere, if it does not appear that such discretion has been manifestly abused. *Gordon v. State*, 186 Ga. 615, 198 S.E. 678 (1938); *Young v. State*, 72 Ga. App. 811, 35 S.E.2d 321 (1945);

Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264 (1951); Middleton v. State, 194 Ga. App. 815, 392 S.E.2d 293 (1990) (prior to 1989 amendment).

Competency of a child as a witness is within the sound discretion of the court, and the court's ruling will not be disturbed unless there is a manifest abuse of discretion. Adams v. State, 166 Ga. App. 807, 305 S.E.2d 651 (1983).

Trial court has sound discretion to determine whether a child is competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653 (1983).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. Pope v. State, 167 Ga. App. 328, 306 S.E.2d 326 (1983).

Failure of trial court to conduct examination on the issue of whether the witness understands the nature of an oath is reversible error when the witness is under 14 years of age. Bennett v. State, 145 Ga. App. 56, 243 S.E.2d 265 (1978).

Testimony admitted erroneously. — When an examination by the court shows that the child has no knowledge of the nature of an oath, it is error to permit the child to testify over proper objection. Horton v. State, 35 Ga. App. 493, 133 S.E. 647 (1926).

Infant's admission against interest. — While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the child's immaturity and the deleterious effect such admissions would have. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70 (1965).

No error in refusing to give statute in charge. — Since the question of the competency of a victim's ten-year-old brother is one of law for the trial court to determine, the court does not err in refusing to give in charge to the jury the requested language contained in O.C.G.A. § 24-9-5 which was relevant only to that issue. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

Inconsistency in a child's testimony does

not render the child incompetent to testify, but goes to the child's credibility as a witness. Pendergrass v. State, 168 Ga. App. 190, 308 S.E.2d 585 (1983).

Any apparently inconsistent testimony presented by children does not render such children incompetent to testify as a matter of law, but is a matter for consideration by the trial court in making the court's determination of competency and by the jury in determining the credibility of the witnesses. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881 (1983).

When a four-year-old victim expressed the victim's understanding of the difference between the truth and a lie and of the importance of telling the truth, expressed a fear of punishment if the victim did not tell the truth, and stated that the victim would tell the truth, there was no abuse of the trial court's discretion in the court's determination that the child was competent to testify, even though there may have been some inconsistency in the child's responses. Hutton v. State, 192 Ga. App. 239, 384 S.E.2d 446 (1989).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. Byrd v. State, 204 Ga. App. 252, 419 S.E.2d 111 (1992).

Trial court did not abuse the court's discretion in ruling competent to testify children who witnessed a crime since the children testified that to tell the truth means "to tell what really happened" as opposed to "making something up," and also testified that the children understand the signifi-

Children (Cont'd)

cance of their oath to tell the truth while testifying in court and that if the children lied they would "get in big trouble." *Hill v. State*, 251 Ga. 430, 306 S.E.2d 653 (1983).

When a child was examined at length by the court and by counsel, and the court found that the child was inattentive and not responsive, and also found that there were inconsistencies in the testimony of the child, there was no abuse of discretion in the court refusing to allow the child to testify. *Batton v. State*, 260 Ga. 127, 391 S.E.2d 914 (1990).

After two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child qualified to testify, nor in admitting the videotapes. *Frazier v. State*, 195 Ga. App. 109, 393 S.E.2d 262 (1990) (Trial held prior to April 19, 1989).

For illustrations of preliminary examination to test a child's competency, see *Minton v. State*, 99 Ga. 254, 25 S.E. 626 (1896); *Gaines v. State*, 99 Ga. 703, 26 S.E. 760 (1896); *Miller v. State*, 109 Ga. 512, 35 S.E. 152 (1900).

Children held competent in the following cases. — See *Johnson v. State*, 76 Ga. 76 (1885) (child of six); *Marshall v. State*, 74 Ga. 26 (1884) (child of seven); *Minton v. State*, 99 Ga. 254, 25 S.E. 626 (1896) (child of eight); *Hicks v. State*, 105 Ga. 627, 31 S.E. 579 (1898) (child of ten); *Central of Ga. Ry. v. Skandamis*, 40 Ga. App. 78, 149 S.E. 60 (1929) (child of twelve); *Thurmond v. State*, 220 Ga. 227, 138 S.E.2d 372 (1964) (child of eight); *Perryman v. State*, 244 Ga. 720, 261 S.E.2d 588 (1979) (victim's nine-year-old daughter); *Brown v. State*, 167 Ga. App. 245, 306 S.E.2d 361 (1983) (child of seven); *Aleywine v. State*, 169 Ga. App. 805, 315 S.E.2d 35 (1984) (child of eight); *Westbrook v. State*, 186 Ga. App. 493, 368 S.E.2d 131, cert. denied, 186 Ga. App. 919, 368 S.E.2d 131 (1988) (child of five); *Syfrett v. State*, 210 Ga. App. 185, 435 S.E.2d 470 (1993) (child of nine).

Testimony of competent child, not formerly sworn, admitted. — Testimony of a child witness who, in response to questioning by the state, demonstrated that the child

was aware that the child was under an obligation to tell the truth and could have been punished for not doing so, and who was shown to be competent, was properly admitted although the child was not sworn, where, after the preliminary questioning by the state, the defendant failed to request that the child be formally sworn and did not object to the child's testifying. *Hilson v. State*, 204 Ga. App. 200, 418 S.E.2d 784 (1992).

Parent's objection to competency of child rejected. — In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the Child Hearsay Statute, O.C.G.A. § 24-3-16, permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008).

Jury judges child's credibility. — Thrust of the child witness statute, O.C.G.A. § 24-3-16, is to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations. If a child, who has reported child molestation to an adult permitted to testify to the out-of-court statement at trial, is incapable of reiterating the accusation at trial or is unresponsive or evasive during cross-examination, the jury must decide the child's credibility. *Jones v. State*, 200 Ga. App. 103, 407 S.E.2d 85 (1991).

Insane Persons

Rules applicable to idiots and lunatics are analogous to those applicable to children. *Langston v. State*, 153 Ga. 127, 111 S.E. 561 (1922).

An insane person is not always incompetent. *Watkins v. State*, 19 Ga. App. 234, 91 S.E. 284 (1917).

No presumption of incompetency. — There was no presumption that the declarant was so bereft of reason as to forbid the reception of evidence concerning the declarant's declarations, although it was admitted that before the making thereof the declarant had been adjudged insane and

committed to an asylum. *Fountain v. McCallum*, 194 Ga. 269, 21 S.E.2d 610 (1942).

Insane persons not always incompetent. — Person who has been adjudged insane is not, in all cases, incompetent as a witness. The person's testimony is admissible if the person has sufficient understanding to apprehend the obligations of an oath and to be capable of giving a correct account of the matters the person has seen or heard in reference to the questions at issue; and whether the person has that understanding is a question to be determined in each case, the weight to be given to the person's testimony being finally a question for the jury. *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S.E. 983 (1907); *Watkins v. State*, 19 Ga. App. 234, 91 S.E. 284 (1917).

Prior adjudication of insanity. — Mere fact that the declarant had been adjudged insane and placed in a lunatic asylum previously to the time that the declarant is alleged to have been the declarant, the declarant at that time not being in the asylum, was not in itself a reason why the testimony should have been excluded. *Fountain v. McCallum*, 194 Ga. 269, 21 S.E.2d 610 (1942).

Continuation of mental state. — Witness had been previously adjudged insane, and the jury was authorized to find that this mental state still existed, and to reject the witness's testimony for that reason. *Harris v. Folsom*, 17 Ga. App. 676, 87 S.E. 1090 (1916).

Questions for court and jury. — Competency of a witness is a question generally to be determined by the court; the jury may consider such evidence only for the purpose of affecting the credibility of such witness. *Bonner v. State*, 59 Ga. App. 737, 1 S.E.2d 768 (1939).

Question of sanity for jury. — Witness having been examined on interrogatories by commission duly issued, the witness was, *prima facie*, mentally competent to testify, and evidence subsequently taken tending to show that the witness was insane when exam-

ined, was for consideration by the jury under proper instructions from the court, and not for final adjudication by the judge presiding, there being also testimony in favor of insanity. *Formby v. Wood*, 19 Ga. 581 (1856); *Mayor of Gainesville v. Caldwell*, 81 Ga. 76, 7 S.E. 99 (1888).

Statement admitted when no motion to strike made. — When a defendant objected to admitting a statement made to police implicating the defendant in a murder for reason that the defendant was insane at the time the defendant made the statement, but offered no evidence concurrent with the objection to prove insanity, the trial court properly admitted the statement because no motion was made to strike the statement following the statement's introduction into evidence. *Kimbell v. State*, 252 Ga. 65, 311 S.E.2d 465 (1984).

Illustrations. — See *Ray v. State*, 32 Ga. App. 513, 124 S.E. 57 (1924) (woman 21 years old declared incompetent in bastardy proceeding); *Ravenel v. State*, 153 Ga. 130, 111 S.E. 643 (1922) (female victim in rape case held competent).

Retarded Persons

Witness somewhat retarded. — Though there was evidence that the witness was "somewhat retarded," where in response to questions by the court the witness testified that the witness went through the eighth grade in school, attended church and Sunday school, and knew that it was right to tell the truth, the trial court was correct in determining that the witness was competent to testify. *Lee v. State*, 108 Ga. App. 97, 132 S.E.2d 107 (1963).

Evidence of competency. — After the 22-year-old retarded victim indicated the victim knew how to tell the truth and the victim's mother and sister testified the victim knew the difference between right and wrong, such evidence was sufficient to show that the victim had an appreciation for the truth and could testify. *Dumas v. State*, 239 Ga. App. 210, 521 S.E.2d 108 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 78 et seq., 82, 86 et seq.

Am. Jur. Proof of Facts. — Qualifying Child Witness to Testify, 35 POF2d 665.

C.J.S. — 97 C.J.S., Witnesses, §§ 57, 58, 63.

ALR. — Mental condition as affecting competency of witness, 26 ALR 1491; 148 ALR 1140.

Insanity of witness as ground of writ of error coram nobis, 43 ALR 1387.

Infant's admissions out of court as evidence in civil cases, 89 ALR 708; 12 ALR3d 1051.

Refusal to permit an otherwise competent witness to take witness stand because of mental or physical condition not amounting to unsoundness of mind, 97 ALR 893.

Competency of child as witness as affected by fact that his prosecution for perjury is prohibited, 159 ALR 1102.

Testimony of children as to grounds of divorce of their parents, 2 ALR2d 1329.

Admissibility of deposition of child of tender years, 30 ALR2d 771.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Competency of young child as witness in civil case, 81 ALR2d 386.

Declarant's age as affecting admissibility as res gestae, 83 ALR2d 1368; 15 ALR4th 1043.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 ALR3d 1203.

Deaf-mute as witness, 50 ALR4th 1188.

Witnesses: child competency statutes, 60 ALR4th 369.

Validity, construction, and application of child hearsay statutes, 71 ALR5th 637.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 ALR5th 529.

24-9-6. Drunkenness incapacitates witness.

Drunkenness, which dethrones reason and memory, shall incapacitate during its continuance. (Orig. Code 1863, § 3775; Code 1868, § 3801; Code 1873, § 3857; Code 1882, § 3857; Civil Code 1895, § 5274; Penal Code 1895, § 1013; Civil Code 1910, § 5863; Penal Code 1910, § 1039; Code 1933, § 38-1608.)

JUDICIAL DECISIONS

Time of drunkenness. — Evidence that the witness is in a drunken condition when the witness undertakes to testify goes to the witness's competency, while proof that the

witness was drunk on the occasion concerning which the witness testifies goes only to the witness's credit. *Whitus v. State*, 222 Ga. 103, 149 S.E.2d 130 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 161, 181.

C.J.S. — 97 C.J.S., Witness, § 118.

24-9-7. Competency decided by court; how and when objection to competency considered; restoration of competency.

(a) The competency of a witness shall be decided by the court. The court shall by examination decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, insanity, drunkenness, or infancy.

(b) If an objection to competency is known, it shall be taken before the witness is examined at all. It may be proved by the witness himself or by

other testimony. If proved by other testimony, the witness shall be incompetent to explain it away.

(c) Any fact which in the judgment of the court removes the ground of incompetency shall restore the competency of the witness. (Orig. Code 1863, §§ 3772, 3776, 3784, 3785; Code 1868, §§ 3796, 3803, 3804, 3805; Code 1873, §§ 3852, 3859, 3860, 3861; Code 1882, §§ 3852, 3859, 3860, 3861; Civil Code 1895, §§ 5267, 5276, 5277, 5278; Civil Code 1910, §§ 5856, 5865, 5866, 5867; Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION CHILDREN

General Consideration

Georgia witness competency statutes present a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and do not violate the equal protection clause. *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989).

State had standing to challenge Georgia witness competency statutes. *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989).

Everyone is presumed competent to testify, and even if a person is shown to have been insane, or to have been adjudged insane previously and is presently in a state mental hospital, this does not necessarily render the person incompetent to testify. *Redfield v. State*, 240 Ga. 460, 241 S.E.2d 217 (1978).

There is no presumption that a witness is incompetent; and a witness offered may be permitted to testify, unless there is an objection or exception distinctly raising the question of the witness's competency. *Dowdy v. Watson & Lewis*, 115 Ga. 42, 41 S.E. 266 (1902).

Defendant's girlfriend, the victim, was not presumed to be incompetent to testify under O.C.G.A. § 24-9-7 simply because of the victim's mental disability; absent an objection by the defendant, it was not error to allow the victim to testify without first determining the victim's competence. *Austin v. State*, 286 Ga. App. 149, 648 S.E.2d 414 (2007), cert. denied, 2007 Ga. LEXIS 687 (Ga. 2007).

Jurisdiction of court and jury generally. — Questions as to the relevancy and admissibil-

ity of the testimony are properly for the court. Its sufficiency and effect belong exclusively to the jury. *Hotchkiss v. Newton*, 10 Ga. 560 (1851).

Trial court determines the competency of the witness and the jury decides credibility. *Bearden v. State*, 159 Ga. App. 892, 285 S.E.2d 606 (1981).

Competency for court. — Question of competency is one of law for the trial judge to determine in the judge's discretion. *Cooper v. Simmons*, 50 Ga. App. 130, 177 S.E. 263 (1934); *Ellison v. State*, 197 Ga. 129, 28 S.E.2d 453 (1943); *Gilstrap v. State*, 90 Ga. App. 12, 81 S.E.2d 872 (1954); *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977).

After an objection as to the competency of a witness, the duty to examine the witness and determine the witness's competency rests with the trial court. *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

No hearing unless specific ground of incompetency alleged. — When, before the defendant's first trial the defendant made his "motion to exclude the testimony of the victim on grounds of incompetency ... pursuant to §§ 24-9-5 & 24-9-7" in the broadest of terms without distinctly alleging what category of "persons who do not have the use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to

General Consideration (Cont'd)

the facts and circumstances of the case, the court did not err in refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. *Webb v. State*, 187 Ga. App. 348, 370 S.E.2d 204 (1988).

Court may allow attorneys to pose questions to determine competency of witnesses. — Fact that the court allowed the attorneys representing both sides to actually pose the questions in a proceeding to determine competency of witnesses did not diminish the function or abdicate responsibility for making the decision based on evidence produced before the court and the court's observations. *Sprayberry v. State*, 174 Ga. App. 574, 330 S.E.2d 731 (1985); *Vaughn v. State*, 226 Ga. App. 318, 486 S.E.2d 607 (1997).

Parameters of examination by counsel. — When counsel is permitted to examine witness as to issue of competency, parameters of such inquiry rest within broad discretion of trial court. *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

Decision of court will not be overturned. — Decision of the trial court regarding competency will not be overturned in absence of abuse of discretion. *Cooper v. Simmons*, 50 Ga. App. 130, 177 S.E. 263 (1934); *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977); *Whitehead v. State*, 144 Ga. App. 836, 242 S.E.2d 754 (1978), overruled on other grounds, *Miller v. State*, 250 Ga. 436, 298 S.E.2d 509 (1983); *Herron v. State*, 155 Ga. App. 791, 272 S.E.2d 756 (1980).

O.C.G.A. § 24-9-7 vests the trial court with discretion to determine the competency of witnesses, and, absent abuse, that discretion will not be overruled. *Gallagher v. State*, 196 Ga. App. 153, 395 S.E.2d 358 (1990).

Credibility for jury. — Although after a preliminary examination the court may hold a child competent to testify, the credibility of the witness is for the jury; and in determining whether or not the jury will credit the testimony of such witness, the age of the witness and the witness's understanding or lack of understanding as to the nature of an oath, as developed on the examination be-

fore the jury, are matters for the consideration of the jury. *Frasier v. State*, 143 Ga. 322, 85 S.E. 124 (1915).

Jury may not decide competency. — When the trial court without any examination whatever permits the jury to pass upon the competency of a witness who has been objected to as incompetent at the time the witness was offered, on the ground that the witness has been adjudged insane and not restored to sanity, a new trial will be granted. *Gilstrap v. State*, 90 Ga. App. 12, 81 S.E.2d 872 (1954).

Disputed facts. — If the determination of the question as to whether a witness is competent to testify depends upon the decision of disputed facts, the proper practice is for the judge, after a preliminary examination, to decide the questions of fact thus arising; but the judge may in the judge's discretion take the opinion of the jury thereon. *Dowdy v. Watson & Lewis*, 115 Ga. 42, 41 S.E. 266 (1902).

Evidence during trial touching competency. — If a witness has been declared to be competent by the court, and during the progress of the trial evidence should be introduced which would make the witness's competency doubtful, the jury should be instructed to determine this question of fact, and, if the jury should find that the witness is incompetent, not to consider the witness's testimony on the points concerning which the witness was not competent to testify. *Dowdy v. Watson & Lewis*, 115 Ga. 42, 41 S.E. 266 (1902).

When preliminary examination required. — Once an objection is interposed to the calling of a witness to testify as being incompetent on the ground of having been adjudicated insane, the trial judge must conduct a preliminary examination of the witness and then rule upon the witness's competency. *Bryant v. State*, 236 Ga. 790, 225 S.E.2d 309 (1976).

Examination may be unnecessary. — There may be situations where the trial judge would not have to examine the potential witness. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Ex parte statements insufficient. — Trial court erred in making a determination that a prospective witness was incompetent to testify based on ex parte statements made by the administrator of the institution where

the prospective witness was confined. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Partly competent testimony. — If a witness is competent as to some matters and incompetent as to others, the objection may be taken under statute at the time the witness offers to testify as to the matters concerning which the witness is incompetent. *Dowdy v. Watson & Lewis*, 115 Ga. 42, 41 S.E. 266 (1902).

Witness under influence of alcohol or drugs. — Law requires the trial court to determine the competency to testify of a witness who is under the influence of alcohol or other drugs. *Geter v. State*, 231 Ga. 615, 203 S.E.2d 195 (1974).

Expert witness. — Question of qualification as expert witness is one of discretion with the trial court judge. *Wilkie v. State*, 153 Ga. App. 609, 266 S.E.2d 289 (1980).

Witness testifying to market value. — Competency of the witness to testify as to market value is for the court. *Williams v. Colonial Pipeline Co.*, 110 Ga. App. 824, 140 S.E.2d 150 (1964).

Effect of insanity. — One may be medically or metaphysically insane, yet be capable in law of making a contract, a will, or of giving competent testimony in the trial of a case; from a legal standpoint there can be no satisfactory definition of insanity, but each case must be determined from the case's own peculiar facts. The law adopts as a general standard: the ability of the witness to understand the obligation of an oath and the ability to give a correct account of the matters the witness has seen or heard in reference to the questions at issue; the fact that a person has previously been adjudged insane upon an inquisition is by no means conclusive that the person is incompetent to testify. *Bonner v. State*, 59 Ga. App. 737, 1 S.E.2d 768 (1939).

Effect of dissociative state. — Trial court did not abuse court's discretion in admitting the testimony statements of a sexual abuse victim in a dissociative state because their nonvolitional nature rendered statements made while in such a state inherently more reliable than comparable statements made in a hypnotic trance. Moreover, the testimony indicated that the witness was sufficiently competent to understand the witness's obligation to tell the truth, and that in

a dissociative state, the witness could remember what happened to the witness previously in a dissociative state and truthfully relate this material evidence to the jury. *Dorsey v. State*, 206 Ga. App. 709, 426 S.E.2d 224 (1992).

Effect of drunkenness. — Evidence that the witness is in a drunken condition when the witness undertakes to testify goes to the witness's competency, while proof that the witness was drunk on the occasion concerning which the witness testifies goes only to the witness's credit. *Whitus v. State*, 222 Ga. 103, 149 S.E.2d 130 (1966).

Alzheimer's disease. — When an attorney-in-fact sought to enjoin the attorney-in-fact's siblings from enforcing a revocation of their parent's durable health care power of attorney, the trial court did not err in determining that the parent, who had Alzheimer's disease, was not competent, as well as in refusing to allow the siblings to present the ailing parent as a witness, given the evidence of the parent's seriously impaired mental capacity. *Luther v. Luther*, 289 Ga. App. 428, 657 S.E.2d 574 (2008), cert. denied, 2008 Ga. LEXIS 520 (Ga. 2008).

Identity of confidential informant. — Trial court did not err by refusing to allow defendant to learn the identity of the confidential informant on grounds that identity was defendant's sole defense, and the confidential informant was the one who "fingered" defendant as a drug dealer, given the state's interest in retaining the informant's confidentiality because of other, ongoing investigations and the fact that the evidence as to defendant's identity was overwhelming in that two police officers positively identified defendant. *Wilson v. State*, 191 Ga. App. 833, 383 S.E.2d 197 (1989).

Instruction unnecessary. — In the absence of a written request, the trial judge does not ordinarily charge the jury concerning the witness's competency, and it is never error for the judge to omit to instruct the jury concerning the credibility of a witness. *Whitus v. State*, 222 Ga. 103, 149 S.E.2d 130 (1966).

Appointment of guardian. — Trial court did not err by allowing the victim to testify in a prosecution for aggravated assault, notwithstanding the fact that a probate judge had appointed a guardian for the victim's person and property after the victim's inju-

General Consideration (Cont'd)

ries, since the trial court questioned the victim outside the presence of the jury and determined that the victim was competent to testify. *McClain v. State*, 248 Ga. App. 338, 545 S.E.2d 926 (2001).

Physical problems cannot render a witness incompetent to testify. — See *Smith v. State*, 249 Ga. App. 39, 547 S.E.2d 598 (2001).

Cited in *Moore v. State*, 79 Ga. 498, 5 S.E. 51 (1887); *Brunswick & W. Ry. v. Clem*, 80 Ga. 534, 7 S.E. 84 (1888); *Frasier v. State*, 143 Ga. 322, 85 S.E. 124 (1915); *Watkins v. State*, 19 Ga. App. 234, 91 S.E. 284 (1917); *Goodson v. State*, 162 Ga. 178, 132 S.E. 899 (1926); *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934); *Reid v. Moyd*, 186 Ga. 578, 198 S.E. 703 (1938); *Bible v. Somers Constr. Co.*, 197 Ga. 761, 30 S.E.2d 623 (1944); *Schamroth v. State*, 84 Ga. App. 580, 66 S.E.2d 413 (1951); *Howard v. Hall*, 112 Ga. App. 247, 145 S.E.2d 70 (1965); *Brown v. State*, 226 Ga. 114, 172 S.E.2d 666 (1970); *Edwards v. State*, 226 Ga. 811, 177 S.E.2d 668 (1970); *Locke v. State*, 229 Ga. 110, 189 S.E.2d 410 (1972); *Johnson v. State*, 130 Ga. App. 134, 202 S.E.2d 525 (1973); *Johnson v. State*, 232 Ga. 61, 205 S.E.2d 190 (1974); *Smith v. State*, 236 Ga. 5, 222 S.E.2d 357 (1976); *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976); *Citizens & S. Nat'l Bank v. Hodnett*, 139 Ga. App. 839, 229 S.E.2d 792 (1976); *Williams v. State*, 148 Ga. App. 55, 250 S.E.2d 848 (1978); *Sanborn v. State*, 159 Ga. App. 608, 284 S.E.2d 110 (1981); *Haslem v. State*, 160 Ga. App. 251, 286 S.E.2d 748 (1981); *Smallwood v. State*, 165 Ga. App. 473, 301 S.E.2d 670 (1983); *Wyatt v. State*, 167 Ga. App. 703, 307 S.E.2d 516 (1983); *Jordan v. State*, 172 Ga. App. 96, 322 S.E.2d 106 (1984); *Middlebrooks v. State*, 253 Ga. 707, 324 S.E.2d 192 (1985); *Flynn v. State*, 255 Ga. 415, 339 S.E.2d 259 (1986); *Castillo v. State*, 178 Ga. App. 312, 342 S.E.2d 782 (1986); *Pittman v. State*, 178 Ga. App. 693, 344 S.E.2d 511 (1986); *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256 (1988); *Harris v. State*, 189 Ga. App. 21, 375 S.E.2d 122 (1988); *Sosebee v. State*, 190 Ga. App. 746, 380 S.E.2d 464 (1989); *Fields v. State*, 194 Ga. App. 149, 390 S.E.2d 71 (1990); *Cook v. State*, 199 Ga. App. 523, 405 S.E.2d 341 (1991); *Sizemore v. State*, 262 Ga. 214, 416 S.E.2d 500 (1992); *Mitchell v. State*, 263 Ga.

129, 429 S.E.2d 517 (1993); *Knight v. State*, 216 Ga. App. 200, 453 S.E.2d 798 (1995); *Lamunyon v. State*, 218 Ga. App. 782, 463 S.E.2d 365 (1995); *Nelson v. State*, 242 Ga. App. 63, 528 S.E.2d 844 (2000).

Children

Editor's notes. — See also subsection (b) of O.C.G.A. § 24-9-5.

Competency for court. — It is left to the sound discretion of the trial court to determine upon preliminary examination whether or not a child of tender years is a competent witness. *Moore v. State*, 79 Ga. 498, 5 S.E. 51 (1887); *Beebee v. State*, 124 Ga. 775, 53 S.E. 99 (1906); *Young v. State*, 125 Ga. 584, 54 S.E. 82 (1906); *Richardson v. State*, 141 Ga. 782, 82 S.E. 134 (1914). See also *Peterson v. State*, 47 Ga. 524, later appeal, 50 Ga. 142 (1873); *Rogers v. State*, 11 Ga. App. 814, 76 S.E. 366 (1912); *Frasier v. State*, 143 Ga. 322, 85 S.E. 124 (1915); *Holden v. State*, 144 Ga. 338, 87 S.E. 27 (1915); *Reece v. State*, 155 Ga. 350, 116 S.E. 631 (1923); *Bell v. State*, 164 Ga. 292, 138 S.E. 238 (1927); *Gordon v. State*, 186 Ga. 615, 198 S.E. 678 (1938); *Carver v. State*, 60 Ga. App. 593, 4 S.E.2d 474 (1939); *Ellison v. State*, 197 Ga. 129, 28 S.E.2d 453 (1943); *Young v. State*, 72 Ga. App. 811, 35 S.E.2d 321 (1945); *Russell v. State*, 83 Ga. App. 841, 65 S.E.2d 264 (1951); *Askins v. State*, 210 Ga. 532, 81 S.E.2d 471 (1954); *Allen v. State*, 150 Ga. App. 605, 258 S.E.2d 285 (1979); *Wood v. State*, 195 Ga. App. 424, 393 S.E.2d 720 (1990).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. *Pope v. State*, 167 Ga. App. 328, 306 S.E.2d 326 (1983).

Decision of court will not be disturbed. — When the court examines a child as to the child's understanding of the nature of an oath and decides that the child is competent to testify, the appellate court will not interfere, when it does not appear that such discretion has been manifestly abused. *Moore v. State*, 79 Ga. 498, 5 S.E. 51 (1887), see also *Peterson v. State*, 47 Ga. 524, later appeal, 50 Ga. 142 (1873); *Beebee v. State*, 124 Ga. 775, 53 S.E. 99 (1906); *Young v. State*, 125 Ga. 584, 54 S.E. 82 (1906); *Richardson v. State*, 141 Ga. 782, 82 S.E. 134

(1914); *Rogers v. State*, 11 Ga. App. 814, 76 S.E. 366 (1912); *Frasier v. State*, 143 Ga. 322, 85 S.E. 124 (1915); *Shields v. State*, 16 Ga. App. 680, 85 S.E. 1057 (1915); *Holden v. State*, 144 Ga. 338, 87 S.E. 27 (1915); *Reece v. State*, 155 Ga. 350, 116 S.E. 631 (1923); *Bell v. State*, 164 Ga. 292, 138 S.E. 238 (1927); *Gordon v. State*, 186 Ga. 615, 198 S.E. 678 (1938); *Carver v. State*, 60 Ga. App. 593, 4 S.E.2d 474 (1939); *Young v. State*, 72 Ga. App. 811, 35 S.E.2d 321 (1945); *Russell v. State*, 83 Ga. App. 841, 65 S.E.2d 264 (1951); *Askins v. State*, 210 Ga. 532, 81 S.E.2d 471 (1954); *Lashley v. State*, 132 Ga. App. 427, 208 S.E.2d 200 (1974); *Bradley v. State*, 148 Ga. App. 727, 252 S.E.2d 648 (1979); *Allen v. State*, 150 Ga. App. 605, 258 S.E.2d 285 (1979).

Competency of seven-year-old as a witness is decided by the trial court, and an appellate court will overrule that determination only if there is an abuse of discretion. *Lancaster v. State*, 250 Ga. 871, 301 S.E.2d 882 (1983).

Any apparently inconsistent testimony presented by children does not render such children incompetent to testify as a matter of law, but is a matter for consideration by the trial court in making the court's determination of competency and by the jury in determining the credibility of the witnesses. *Thomas v. State*, 168 Ga. App. 587, 309 S.E.2d 881 (1983).

Inconsistency in a child's testimony does not render the child incompetent to testify, nor is it necessary for a child to understand the meaning of the word "oath." *Sprayberry v. State*, 174 Ga. App. 574, 330 S.E.2d 731 (1985).

When the trial court used suggested questions from the Criminal Benchbook for Georgia Superior Courts (p. 166) to examine a seven-year-old as to the child's understanding of the nature of an oath and the necessity for telling the truth and found the child competent, there was no abuse of discretion. *Lancaster v. State*, 250 Ga. 871, 301 S.E.2d 882 (1983).

Failure of trial court to conduct examination on the issue of whether the witness understands the nature of an oath is reversible error if the witness is under 14 years of age. *Young v. State*, 122 Ga. 725, 50 S.E. 996 (1905); *Bennett v. State*, 145 Ga. App. 56, 243 S.E.2d 265 (1978).

Examination during testimony. — When the competency of a child is questioned, the better practice is for the court to make, or cause to be made, a preliminary examination of the child, for the purpose of testing the child's competency; but the failure of the court to do so will not be reversible error since it appears that the witness was fully examined on this point in the presence of the jury during examination on the main issue. *Webb v. State*, 7 Ga. App. 35, 66 S.E. 27 (1909).

When preliminary examination of a 12-year-old witness was made and showed that the witness knew what it was to swear to tell the truth, understood the object of testifying, and the consequences of telling the truth and of telling a lie, the court properly held that the witness was competent. *Central of Ga. Ry. v. Skandamis*, 40 Ga. App. 78, 149 S.E. 60 (1929).

When each child testified that each child knew the meaning of an oath, the child's belief in God, that it was wrong to lie, and the child would tell the truth, the fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. *Bearden v. State*, 159 Ga. App. 892, 285 S.E.2d 606 (1981).

Sufficient evidence to determine child met required standard of intelligence. — Although a child witness said the witness did not know the meaning of the word "oath," there was sufficient evidence, including testimony on direct and cross-examination that the witness knew right from wrong and that the witness had to tell the truth when the witness was in court, to determine that the child met the standard of intelligence required to qualify the child as a witness. *Maynard v. State*, 171 Ga. App. 605, 320 S.E.2d 806 (1984).

Trial court did not err by not conducting a preliminary hearing before determining that two minor witnesses were competent to testify since the record shows that one witness was seventeen years old and the other was fourteen. *Johnson v. State*, 195 Ga. App. 385, 393 S.E.2d 712 (1990).

Insufficient intelligence. — When a child of five years was not shown to possess sufficient intelligence to understand the nature of an oath or the penalty for the oath's violation, it was held that the court erred in

Children (Cont'd)

permitting the witness to testify. *Edwards v. State*, 162 Ga. 204, 132 S.E. 892 (1926).

Mental illness. — Fourteen-year-old witness suffered from hyperactivity, seizures, and schizophrenia, but took medication for these problems; since the trial judge questioned this witness outside of the jury's presence about the witness's understanding of the difference between the truth and a lie, and there was no basis to inquire further into the witness's competency, allowing the witness to testify was not an abuse of discretion. *Simmons v. State*, 251 Ga. App. 682, 555 S.E.2d 59 (2001).

Infant's admission against interest. — While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the infant's immaturity and the deleterious effect such admissions would have. *Howard v. Hall*, 112 Ga. App. 247, 145 S.E.2d 70 (1965).

Trial court did not err by allowing the victim, a five-year-old child, to testify since although the child was unable to define the meaning of an oath or of the truth, it was demonstrated that the child appreciated the difference between the truth and a lie and that the child knew the child was obligated to tell the truth on the witness stand. *Akers v.*

State, 179 Ga. App. 529, 346 S.E.2d 861 (1986).

Fact that five-year-old victim may have testified inconsistently did not render the victim incompetent to testify as a matter of law. *Akers v. State*, 179 Ga. App. 529, 346 S.E.2d 861 (1986).

Court did not err in finding nine-year-old child competent to testify, since where the child testified as to the child's grade in school, the child's teacher's name, that it was good to tell the truth and bad to tell a lie, that the child would get a whipping if the child told a lie, and that the child was going to tell the truth in court. *Hester v. State*, 187 Ga. App. 873, 371 S.E.2d 684 (1988).

No error in refusing to charge jury that child's testimony should be corroborated. — When competency of victim's ten-year-old brother has been determined as a matter of law by the trial court, there is no error in the trial court's refusal to charge the jury that testimony of a child of such tender age should be corroborated by other testimony. *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981).

Failure to object to incompetency at trial waives issue on appeal. — When defendant contends that the complaining witnesses, two girls, ages nine and 13, were incompetent to testify due to their infancy, but there was no objection on that ground in the trial court, no issue regarding the witness's competency is properly before the Court of Appeals. *Keasler v. State*, 165 Ga. App. 561, 301 S.E.2d 915 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 165, 170 et seq., 203, 204.

C.J.S. — 97 C.J.S., Witnesses, §§ 87, 90 et seq., 108 et seq., 118, 122 et seq., 127 et seq., 132 et seq., 143, 144 et seq., 174 et seq., 372 et seq.

ALR. — Competency of witness to testify as to his own age, 39 ALR 376.

May question as to qualification or competency of witness be raised by or upon motion for nonsuit or for directed verdict, absent objection on that ground when testimony was given, 93 ALR 788.

Refusal to permit an otherwise competent witness to take witness stand because of mental or physical condition not amounting to unsoundness of mind, 97 ALR 893.

Competency of testimony as to one's mental condition, based upon handwriting, 103 ALR 900.

Review on appeal of decision of trial court as to qualification or competency of expert witnesses, 166 ALR 1067.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Power of court to control evidence or witnesses going before grand jury, 52 ALR3d 1316.

Judge as witness in cause not on trial before him, 86 ALR3d 633.

Appealability of state criminal court order

requiring witness other than accused to undergo psychiatric examination, 17 ALR4th 867.

Compelling testimony of opponent's expert in state court, 66 ALR4th 213.

ARTICLE 2

PRIVILEGE

Cross references. — Testimony exemption for spouses not invokeable under Uniform Child Custody Jurisdiction and Enforcement Act, § 19-9-90. Privileged nature of utterances by members of Professional Practices Commission, § 20-2-794. Privileged nature of matters produced or presented during proceedings of peer review

groups for physicians, nurses, etc., § 31-7-133. Protection of persons against self-incrimination in proceedings under T. 34, C. 8, pertaining to employment security, § 34-8-253. Certain communications for which libel or slander action will not lie, § 51-5-7.

RESEARCH REFERENCES

ALR. — Evidence: privilege of communications to tax officers, 2 ALR 1421.

Evidence: privilege of communication made to public officers, 9 ALR 1099; 59 ALR 1555.

Testimonial or evidentiary privilege in respect of business transactions between banker or broker and customer, 109 ALR 1450.

Evidence: statement or report by servant or agent to master or principal, in respect of matters then or afterward involved in litigation, as a privileged communication, 146 ALR 977.

Constitutionality, construction, and effect of statute or regulation relating specifically to divulgence of information acquired by public officers or employees, 165 ALR 1302.

Privilege of communications or reports

between liability or indemnity insurer and insured, 22 ALR2d 659.

Testamentary capacity as affected by use of intoxicating liquor or drugs, 9 ALR3d 15.

Communications by corporation as privileged in stockholders' action, 34 ALR3d 1106.

Communications to social worker as privileged, 50 ALR3d 563.

Payroll records of individual government employees as subject to disclosure to public, 100 ALR3d 699.

Insured-insurer communications as privileged, 55 ALR4th 336.

Compelling testimony of opponent's expert in state court, 66 ALR4th 213.

Invasion of privacy by a clergyman, church, or religious group, 67 ALR4th 1086.

PART 1

GENERAL PROVISIONS

24-9-20. Testimony of criminal defendant.

(a) No person who is charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction shall be compellable to give evidence for or against himself.

(b) If a defendant in a criminal case wishes to testify and announces in open court his or her intention to do so, the defendant may so testify in his or her own behalf. If a defendant testifies, he or she shall be sworn as any other witness and may be examined and cross-examined as any other witness. The failure of a defendant to testify shall create no presumption against him or her, and no comment shall be made because of such failure. (Ga. L. 1866, p. 138, § 2; Ga. L. 1868, p. 24, § 1; Code 1868, § 3798; Code 1873, §§ 3854, 4637; Ga. L. 1874, p. 22, § 1; Ga. L. 1878-79, p. 53, § 1; Code 1882, §§ 3854, 4637; Penal Code 1895, §§ 1010, 1011; Penal Code 1910, §§ 1036, 1037; Code 1933, §§ 38-415, 38-416; Ga. L. 1962, p. 133, § 2; Ga. L. 1973, p. 292, § 2; Ga. L. 2005, p. 20, § 14/HB 170.)

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI. Testimony by defendant in pretrial hearing, § 17-7-28.

Editor's notes. — Ga. L. 2005, p. 20, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all trials which commence on or after July 1, 2005.

Law reviews. — For article on the effect of a conviction that is based on a *nolo contendere* plea, see 13 Ga. L. Rev. 723 (1979). For article surveying Georgia cases in the area of criminal law from June 1979 through May 1980, see 32 Mercer L. Rev. 35 (1980). For article, "Court Ordered Surgery to Retrieve Evidence in Georgia in Light of the Supreme Court Decision in *Winston v. Lee*," see 37 Mercer L. Rev. 1005 (1986). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey on

criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005); and 58 Mercer L. Rev. 83 (2006). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

For note, "Defendant as a Witness in a Criminal Proceeding," see 3 Mercer L. Rev. 335 (1952). For note on constitutionality of former Georgia practice forbidding questioning of accused by his own attorney during unsworn statement, see 13 Mercer L. Rev. 265 (1961). For note discussing the unsworn statement formerly provided for in Georgia criminal trials, see 14 Mercer L. Rev. 412 (1963). For note discussing the unsworn statement in Georgia law (prior to its abolition in 1973), see 16 Mercer L. Rev. 441 (1965). For note on the Georgia right against self-incrimination, see 15 Ga. L. Rev. 1104 (1981).

For comment criticizing *Lovett v. State*, 108 Ga. App. 478, 133 S.E.2d 595 (1963), as to right of accused to assistance of counsel in making an unsworn statement, see 15 Mercer L. Rev. 512 (1964).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SELF-INCRIMINATION

1. IN GENERAL
2. COMPELLING EVIDENCE
3. COMMENTS

EVIDENCE OF CHARACTER OR OTHER CRIMES

1. IN GENERAL
2. PUTTING CHARACTER IN ISSUE
3. USE OF EVIDENCE OF OTHER CRIMES

ARGUMENT TO JURY

TREATMENT OF DEFENDANT AS WITNESS

General Consideration

Editor's notes. — Prior to the 1962 amendment of former Code 1933, § 38-415, a defendant in a criminal case could not give sworn testimony but could make an unsworn statement in the defendant's behalf. Between 1962 and 1973, a defendant had the option of making an unsworn statement or giving sworn testimony. Effective July 1, 1973, unsworn statements were abolished. Although many of the cases noted below pertain to the making of unsworn statements, the notes have been retained as those cases seem to have continued validity under the present law.

Constitutionality. — See *Williams v. State*, 220 Ga. 766, 141 S.E.2d 436 (1965).

Grand jury proceedings. — Grand jury has no lawful right to call the accused before the grand jury while considering the bill of indictment against the accused, and swear or question the accused regarding such charge. It is against the public policy of this state. *Jenkins v. State*, 65 Ga. App. 16, 14 S.E.2d 594 (1941).

Statute is not relevant to a probation revocation hearing since such a hearing is not a criminal trial. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

Statute not implicated when defendant not in police custody. — Because the defendant was not in police custody at the time of the defendant's secretly taped telephone conversation with a coconspirator, O.C.G.A. § 24-9-20 was not implicated. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

Unsworn statements. — Although a crime is alleged to have been committed prior to the effective date (July 1, 1973) of the law abolishing unsworn statements, the abolition can be applied to defendant without violating the prohibition against ex post facto laws. *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974); *Eades v. State*, 232 Ga. 735, 208 S.E.2d 791 (1974).

Testimony not under oath. — Defendant should not have testified without being under oath; however, because the defendant could not show that the defendant was harmed, the error did not require a new trial. *Bell v. State*, 226 Ga. App. 271, 486 S.E.2d 422 (1997).

If defendant chose to testify in an effort to make defendant's prima facie case of justification, the defendant was subject to cross

examination as are other witnesses. *Walden v. State*, 267 Ga. 162, 476 S.E.2d 259 (1996).

When a defendant voluntarily testifies to matters on direct examination, the defendant can be cross-examined, and required to give a physical demonstration concerning the matters to which the defendant testified on direct examination. *Scott v. State*, 270 Ga. 93, 507 S.E.2d 728 (1998).

Sobriety test. — Defendant was not in custody nor compelled by force or threats to perform roadside sobriety tests in violation of the defendant's right against self incrimination. *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998).

Prosecutor's improper comments during closing is not automatically reversible error.

— Even though prosecutorial errors in closing arguments may have occurred, including commenting on defendant's failure to testify and references to matters not in evidence, defendant was not entitled to reversal because curative instructions were given and there was overwhelming evidence from eye-witnesses and other physical evidence of defendant's guilt to shooting at deputies, killing one and injuring another. Georgia does not follow a cumulative error rule of prejudice, so the number of errors committed was not reversible error. *Al-Amin v. State*, 278 Ga. 74, 597 S.E.2d 332, cert. denied, 543 U.S. 992, 125 S. Ct. 509, 160 L. Ed. 2d 380 (2004).

Cited in *Sanders v. State*, 113 Ga. 267, 38 S.E. 841 (1901); *Cook v. State*, 40 Ga. App. 125, 149 S.E. 79 (1929); *Wash v. State*, 41 Ga. App. 451, 153 S.E. 376 (1930); *Jeffords v. State*, 41 Ga. App. 618, 154 S.E. 201 (1930); *Darden v. State*, 171 Ga. 160, 155 S.E. 38 (1930); *Hatcher v. State*, 176 Ga. 454, 168 S.E. 278 (1933); *Bell v. State*, 47 Ga. App. 216, 169 S.E. 732 (1933); *Sims v. State*, 177 Ga. 266, 170 S.E. 58 (1933); *Cowart v. State*, 177 Ga. 377, 170 S.E. 253 (1933); *Henderson v. State*, 50 Ga. App. 16, 176 S.E. 811 (1934); *Melton v. State*, 180 Ga. 140, 178 S.E. 477 (1935); *Trammell v. State*, 183 Ga. 711, 189 S.E. 529 (1937); *Brooks v. State*, 55 Ga. App. 227, 189 S.E. 852 (1937); *Booker v. State*, 183 Ga. 822, 190 S.E. 356 (1937); *Williford v. State*, 56 Ga. App. 40, 192 S.E. 93 (1937); *Douberly v. State*, 184 Ga. 573, 192 S.E. 223 (1937); *Douberly v. State*, 184 Ga. 577, 192 S.E. 226 (1937); *Broughton v. State*, 186 Ga. 588, 199 S.E. 111 (1938); *Sheffield v. State*,

General Consideration (Cont'd)

188 Ga. 1, 2 S.E.2d 657 (1939); *Heller v. State*, 60 Ga. App. 552, 4 S.E.2d 413 (1939); *Roberts v. State*, 189 Ga. 36, 5 S.E.2d 340 (1939); *Adams v. State*, 64 Ga. App. 439, 13 S.E.2d 521 (1941); *Bryant v. State*, 65 Ga. App. 523, 16 S.E.2d 241 (1941); *Collins v. State*, 66 Ga. App. 325, 18 S.E.2d 24 (1941); *Taylor v. Georgia*, 315 U.S. 25, 62 S. Ct. 415, 86 L. Ed. 615 (1942); *Smith v. State*, 66 Ga. App. 669, 19 S.E.2d 168 (1942); *Holley v. Lawrence*, 194 Ga. 529, 22 S.E.2d 154 (1942); *Toney v. State*, 69 Ga. App. 331, 25 S.E.2d 85 (1943); *Russell v. State*, 196 Ga. 275, 26 S.E.2d 528 (1943); *Thurmond v. State*, 198 Ga. 410, 31 S.E.2d 804 (1944); *Boyers v. State*, 198 Ga. 838, 33 S.E.2d 251 (1945); *Watkins v. State*, 199 Ga. 81, 33 S.E.2d 325 (1945); *Hayes v. State*, 199 Ga. 251, 34 S.E.2d 97 (1945); *Todd v. State*, 75 Ga. App. 711, 44 S.E.2d 275 (1947); *Burke v. State*, 76 Ga. App. 612, 47 S.E.2d 116 (1948); *Townsend v. State*, 78 Ga. App. 385, 50 S.E.2d 801 (1948); *Grizzle v. State*, 78 Ga. App. 802, 52 S.E.2d 561 (1949); *Wilcox v. State*, 79 Ga. App. 151, 53 S.E.2d 127 (1949); *Heughan v. State*, 82 Ga. App. 640, 61 S.E.2d 685 (1950); *Eaton v. State*, 83 Ga. App. 82, 62 S.E.2d 677 (1950); *Garner v. State*, 83 Ga. App. 178, 63 S.E.2d 225 (1951); *Chadwick v. State*, 87 Ga. App. 900, 75 S.E.2d 260 (1953); *Smith v. State*, 88 Ga. App. 778, 77 S.E.2d 831 (1953); *Gatliff v. State*, 90 Ga. App. 869, 84 S.E.2d 588 (1954); *Foster v. State*, 213 Ga. 601, 100 S.E.2d 426 (1957); *Morris v. State*, 100 Ga. App. 457, 111 S.E.2d 655 (1959); *Gardner v. State*, 216 Ga. 146, 114 S.E.2d 852 (1960); *Ferguson v. Georgia*, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961); *Hansel v. State*, 104 Ga. App. 318, 121 S.E.2d 696 (1961); *Riddle v. State*, 104 Ga. App. 856, 123 S.E.2d 325 (1961); *Frashier v. State*, 217 Ga. 593, 124 S.E.2d 279 (1962); *Taylor v. State*, 105 Ga. App. 842, 125 S.E.2d 708 (1962); *Carter v. State*, 107 Ga. App. 571, 130 S.E.2d 806 (1963); *Leverette v. State*, 107 Ga. App. 712, 131 S.E.2d 782 (1963); *McCann v. State*, 108 Ga. App. 316, 132 S.E.2d 813 (1963); *Price v. State*, 108 Ga. App. 581, 133 S.E.2d 916 (1963); *McConley v. State*, 109 Ga. App. 646, 136 S.E.2d 927 (1964); *Kern v. State*, 111 Ga. App. 551, 142 S.E.2d 269 (1965); *Williams v. State*, 111 Ga. App. 588, 142 S.E.2d 409 (1965); *Hogan v. State*, 221 Ga. 9, 142 S.E.2d 778 (1965); *Waldrop v. State*, 221 Ga. 319, 144 S.E.2d 372 (1965); *Anthony v. State*, 112 Ga. App. 444, 145 S.E.2d 657 (1965); *Gunnin v. State*, 112 Ga. App. 720, 146 S.E.2d 131 (1965); *Huff v. State*, 113 Ga. App. 257, 147 S.E.2d 840 (1966); *Roberts v. Dutton*, 368 F.2d 465 (5th Cir. 1966); *Prather v. State*, 223 Ga. 721, 157 S.E.2d 734 (1967); *Lackey v. State*, 116 Ga. App. 789, 159 S.E.2d 188 (1967); *Crowe v. State*, 117 Ga. App. 648, 161 S.E.2d 514 (1968); *Worts v. Dutton*, 395 F.2d 341 (5th Cir. 1968); *Harris v. State*, 118 Ga. App. 848, 166 S.E.2d 94 (1969); *Hatley v. State*, 119 Ga. App. 371, 167 S.E.2d 217 (1969); *Hunsinger v. State*, 225 Ga. 426, 169 S.E.2d 286 (1969); *Jenkins v. State*, 121 Ga. App. 103, 172 S.E.2d 845 (1970); *Scott v. State*, 121 Ga. App. 458, 174 S.E.2d 243 (1970); *Mitchell v. State*, 226 Ga. 450, 175 S.E.2d 545 (1970); *Harris v. State*, 226 Ga. 442, 175 S.E.2d 560 (1970); *Bryant v. State*, 121 Ga. App. 806, 175 S.E.2d 924 (1970); *Harris v. Stynchcombe*, 227 Ga. 763, 183 S.E.2d 205 (1971); *Hammond v. State*, 124 Ga. App. 523, 184 S.E.2d 512 (1971); *Highland v. State*, 127 Ga. App. 518, 194 S.E.2d 332 (1972); *Fulton v. State*, 127 Ga. App. 711, 194 S.E.2d 615 (1972); *Hilliard v. State*, 128 Ga. App. 157, 195 S.E.2d 772 (1973); *Upton v. State*, 128 Ga. App. 547, 197 S.E.2d 478 (1973); *White v. Henry*, 232 Ga. 64, 205 S.E.2d 206 (1974); *Culpepper v. State*, 132 Ga. App. 733, 209 S.E.2d 18 (1974); *Griffin v. State*, 133 Ga. App. 126, 210 S.E.2d 174 (1974); *Donnelly v. State*, 133 Ga. App. 391, 211 S.E.2d 19 (1974); *Wray v. Hopper*, 377 F. Supp. 653 (M.D. Ga. 1974); *Pittman v. State*, 133 Ga. App. 902, 212 S.E.2d 505 (1975); *Brown v. Ricketts*, 233 Ga. 809, 213 S.E.2d 672 (1975); *Scott v. State*, 233 Ga. 815, 213 S.E.2d 676 (1975); *Zarick v. State*, 134 Ga. App. 548, 215 S.E.2d 311 (1975); *Thomas v. State*, 136 Ga. App. 165, 220 S.E.2d 736 (1975); *Hewell v. State*, 136 Ga. App. 420, 221 S.E.2d 219 (1975); *Rolland v. State*, 235 Ga. 808, 221 S.E.2d 582 (1976); *Joiner v. State*, 236 Ga. 580, 224 S.E.2d 414 (1976); *Jones v. State*, 137 Ga. App. 612, 224 S.E.2d 473 (1976); *Reid v. State*, 137 Ga. App. 495, 224 S.E.2d 482 (1976); *Barrett v. State*, 138 Ga. App. 26, 225 S.E.2d 483 (1976); *Carter v. State*, 238 Ga. 446, 233 S.E.2d 201 (1977); *Gamble v. State*, 141 Ga. App. 304, 233 S.E.2d 264 (1977); *Hall v. State*, 143 Ga. App. 706, 240

S.E.2d 125 (1977); *Felker v. State*, 144 Ga. App. 458, 241 S.E.2d 576 (1978); *Eubanks v. State*, 240 Ga. 544, 242 S.E.2d 41 (1978); *Futch v. State*, 145 Ga. App. 485, 243 S.E.2d 621 (1978); *Harris v. State*, 145 Ga. App. 675, 244 S.E.2d 620 (1978); *Bryant v. State*, 146 Ga. App. 43, 245 S.E.2d 333 (1978); *Key v. State*, 147 Ga. App. 800, 250 S.E.2d 527 (1978); *Pennewell v. State*, 148 Ga. App. 611, 251 S.E.2d 832 (1979); *Jackson v. State*, 149 Ga. App. 496, 254 S.E.2d 739 (1979); *Sweatt v. State*, 149 Ga. App. 717, 256 S.E.2d 28 (1979); *Thompson v. State*, 150 Ga. App. 567, 258 S.E.2d 180 (1979); *Turner v. State*, 152 Ga. App. 354, 262 S.E.2d 618 (1979); *Wilson v. State*, 155 Ga. App. 560, 271 S.E.2d 694 (1980); *Mitchell v. State*, 158 Ga. App. 628, 281 S.E.2d 260 (1981); *Wood v. State*, 159 Ga. App. 221, 283 S.E.2d 79 (1981); *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981); *White v. State*, 159 Ga. App. 545, 284 S.E.2d 76 (1981); *Chambers v. State*, 159 Ga. App. 669, 284 S.E.2d 682 (1981); *Pritchard v. State*, 160 Ga. App. 105, 286 S.E.2d 338 (1981); *Biggers v. State*, 162 Ga. App. 163, 290 S.E.2d 159 (1982); *Turner v. State*, 162 Ga. App. 806, 293 S.E.2d 67 (1982); *Williams v. State*, 249 Ga. 822, 295 S.E.2d 293 (1982); *Santamaria v. State*, 165 Ga. App. 288, 299 S.E.2d 758 (1983); *Jenga v. State*, 166 Ga. App. 26, 303 S.E.2d 170 (1983); *Conner v. State*, 251 Ga. 113, 303 S.E.2d 266 (1983); *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984); *Campbell v. State*, 253 Ga. 11, 315 S.E.2d 902 (1984); *Head v. State*, 170 Ga. App. 324, 316 S.E.2d 791 (1984); *Mosley v. State*, 171 Ga. App. 219, 319 S.E.2d 77 (1984); *W.G.C. v. State*, 173 Ga. App. 528, 327 S.E.2d 522 (1985); *Hart v. State*, 174 Ga. App. 134, 329 S.E.2d 178 (1985); *Scott v. State*, 178 Ga. App. 222, 343 S.E.2d 117 (1986); *Miller v. State*, 179 Ga. App. 100, 345 S.E.2d 647 (1986); *James v. State*, 180 Ga. App. 7, 348 S.E.2d 502 (1986); *Lee v. State*, 256 Ga. 410, 349 S.E.2d 711 (1986); *Sablon v. State*, 182 Ga. App. 128, 355 S.E.2d 88 (1987); *Smith v. State*, 182 Ga. App. 740, 356 S.E.2d 723 (1987); *Renz v. State*, 183 Ga. App. 108, 357 S.E.2d 843 (1987); *Russell v. State*, 184 Ga. App. 657, 362 S.E.2d 392 (1987); *McBride v. State*, 185 Ga. App. 271, 363 S.E.2d 802 (1987); *Johnson v. State*, 257 Ga. 731, 363 S.E.2d 540 (1988); *Crews v. State*, 185 Ga. App. 494, 364

S.E.2d 625 (1988); *Garcia v. State*, 187 Ga. App. 166, 369 S.E.2d 776 (1988); *Osborne v. State*, 193 Ga. App. 276, 387 S.E.2d 383 (1989); *Johnson v. State*, 193 Ga. App. 618, 388 S.E.2d 866 (1989); *Jackson v. State*, 193 Ga. App. 636, 388 S.E.2d 881 (1989); *Turner v. State*, 194 Ga. App. 878, 392 S.E.2d 256 (1990); *Story v. State*, 196 Ga. App. 590, 396 S.E.2d 547 (1990); *Standridge v. State*, 196 Ga. App. 697, 396 S.E.2d 804 (1990); *McCarthy v. State*, 196 Ga. App. 839, 397 S.E.2d 178 (1990); *Walker v. State*, 197 Ga. App. 265, 398 S.E.2d 217 (1990); *Sleeth v. State*, 197 Ga. App. 349, 398 S.E.2d 298 (1990); *Grant v. State*, 197 Ga. App. 878, 399 S.E.2d 743 (1990); *Jackson v. State*, 198 Ga. App. 447, 402 S.E.2d 279 (1991); *Wells v. State*, 261 Ga. 282, 404 S.E.2d 106 (1991); *Anderson v. State*, 200 Ga. App. 29, 406 S.E.2d 791 (1991); *Belcher v. State*, 201 Ga. App. 139, 410 S.E.2d 344 (1991); *Bacon v. State*, 201 Ga. App. 639, 411 S.E.2d 783 (1991); *Williams v. State*, 201 Ga. App. 866, 412 S.E.2d 586 (1991); *Rogers v. State*, 205 Ga. App. 739, 423 S.E.2d 435 (1992); *Roberts v. State*, 208 Ga. App. 64, 430 S.E.2d 175 (1993); *Ragan v. State*, 264 Ga. 190, 442 S.E.2d 750 (1994); *Sullivan v. State*, 213 Ga. App. 308, 444 S.E.2d 392 (1994); *Durant v. State*, 222 Ga. App. 872, 476 S.E.2d 641 (1996); *Manker v. State*, 223 Ga. App. 3, 476 S.E.2d 785 (1996); *Alford v. State*, 224 Ga. App. 451, 480 S.E.2d 893 (1997); *Cosby v. State*, 234 Ga. App. 723, 507 S.E.2d 551 (1998); *Billups v. State*, 234 Ga. App. 824, 507 S.E.2d 837 (1998); *Brady v. State*, 270 Ga. 574, 513 S.E.2d 199 (1999); *Caldwell v. State*, 237 Ga. App. 568, 515 S.E.2d 868 (1999); *Braswell v. State*, 245 Ga. App. 602, 538 S.E.2d 492 (2000); *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000); *Scruggs v. State*, 273 Ga. 752, 545 S.E.2d 888 (2001); *McGee v. State*, 255 Ga. App. 708, 566 S.E.2d 431 (2002); *Harris v. State*, 257 Ga. App. 42, 570 S.E.2d 353 (2002); *Roadrick v. State*, 257 Ga. App. 73, 570 S.E.2d 382 (2002); *Taylor v. State*, 264 Ga. App. 665, 592 S.E.2d 148 (2003); *Sammons v. State*, 279 Ga. 386, 612 S.E.2d 785 (2005); *Madison v. State*, 281 Ga. 640, 641 S.E.2d 789 (2007); *Chandler v. State*, 281 Ga. 712, 642 S.E.2d 646 (2007); *Burton v. State*, 293 Ga. App. 822, 668 S.E.2d 306 (2008); *Daniel v. State*, 285 Ga. 406, 677 S.E.2d 120 (2009); *Mullins v. State*, 298 Ga.

General Consideration (Cont'd)

App. 368, 680 S.E.2d 474 (2009).

Self-Incrimination**1. In General**

Failure to give Miranda warnings. — Since the driver was only given a breath test, but was not given Miranda warnings while the driver was in custody, evidence of the driver's refusal to undergo additional testing was inadmissible. *State v. Warmack*, 230 Ga. App. 157, 495 S.E.2d 632 (1998).

An arrestee is not, under Georgia constitutional or statutory law, entitled to Miranda warnings before deciding whether to submit to the state's request for an additional test of breath, blood, or urine. *State v. Coe*, 243 Ga. App. 232, 533 S.E.2d 104 (2000), overruling *State v. Warmack*, 230 Ga. App. 157, 495 S.E.2d 632 (1998).

Trial court's suppression of urine test results could not be sustained on the ground that Miranda warnings were not given to a DUI arrestee before the arrestee decided to submit to a urine test after taking a breath or blood test. *State v. Coe*, 243 Ga. App. 232, 533 S.E.2d 104 (2000), overruling *State v. Warmack*, 230 Ga. App. 157, 495 S.E.2d 632 (1998).

Officer's comment to defendant that "I'm just going to shut your car door so some other drunk doesn't take it off," was insufficient to cause a reasonable person to believe that defendant's detention would not have been temporary, and a trial court erred in excluding on the basis of a Miranda violation evidence of the results of roadside sobriety tests performed on defendant thereafter. *State v. Pierce*, 266 Ga. App. 233, 596 S.E.2d 725 (2004).

Noncustodial defendant. — Defendant whose license was taken and who was placed temporarily in a patrol car for the defendant's own safety was not in custody and, therefore, evidence of the defendant's statements was admissible as was evidence of the defendant's refusals to submit to alco-sensor and HGN tests and of the defendant's failure of other tests administered before the defendant's arrest. *Turner v. State*, 233 Ga. App. 413, 504 S.E.2d 229 (1998).

After defendant was stopped for a traffic violation and before defendant's Miranda

rights were read defendant was told that a DUI task force officer had been called because defendant was under suspicion of DUI, defendant was allowed to walk around, and was not placed in the back of the police car nor handcuffed, defendant's detention had not ripened into an arrest before the sobriety tests were conducted. *Harper v. State*, 243 Ga. App. 705, 534 S.E.2d 157 (2000).

Striking testimony after claim. — When the defendant asserted a possessory interest in a suit case, the ownership of the suit case was not a collateral matter and was a proper subject of cross-examination but once the defendant claimed the defendant's privilege against self-incrimination, it was proper to strike testimony concerning the case. *Rasnake v. State*, 164 Ga. App. 765, 298 S.E.2d 42 (1982), cert. denied, 462 U.S. 1132, 103 S. Ct. 3114, 77 L. Ed. 2d 1368 (1983).

Refusal to consent to urine test inadmissible. — In a prosecution for driving under the influence, when defendant was deprived by the totality of the inaccurate, misleading, and/or inapplicable information given to the defendant by the arresting officer of making an informed choice under the implied consent statute, the defendant's refusal to consent to a urine test was rendered inadmissible. *State v. Leviner*, 213 Ga. App. 99, 443 S.E.2d 688 (1994).

Use of substances excreted from the body. — Use of a substance naturally excreted by the human body does not violate a DUI suspect's constitutional rights, and therefore there is no requirement that the suspect be informed of the suspect's right against self-incrimination by a police officer giving the suspect the implied consent notice. *Nawrocki v. State*, 235 Ga. App. 416, 510 S.E.2d 301 (1998).

Evidence voluntarily produced from body cavity. — After a small piece of plastic containing cocaine residue was produced by defendant from a body cavity in acquiescence to a search warrant for the defendant's person while the defendant was in lawful detention, the evidence was admissible. *Scott v. State*, 216 Ga. App. 692, 455 S.E.2d 609 (1995).

Implied consent warnings administered. — Implied consent warnings administered to motorists suspected of driving under the

influence need not inform the motorists of the privilege against self-incrimination. *Heller v. State*, 234 Ga. App. 630, 507 S.E.2d 518 (1998).

Field sobriety tests given to a person under arrest, without first giving a Miranda warning, were inadmissible under O.C.G.A. § 24-9-20. *State v. O'Donnell*, 225 Ga. App. 502, 484 S.E.2d 313 (1997).

After defendant agreed to submit to field sobriety tests, which defendant understood to be voluntary, defendant was not therefore under arrest and the results of the officer's investigation should not be suppressed because defendant was not given the Miranda warnings prior to the tests. *Lyons v. State*, 244 Ga. App. 658, 535 S.E.2d 841 (2000).

Defendant was not in custody when the officer administered field sobriety tests, nor was defendant compelled by force or threats to perform roadside field sobriety tests in violation of defendant's right against self-incrimination; the officer's admonishment as defendant left the bar that defendant would be arrested if defendant drove was insufficient to turn the subsequent stop into a custody situation. *State v. Foster*, 255 Ga. App. 704, 566 S.E.2d 418 (2002).

Breath test results. — Admission into evidence of the defendant's consent to a chemical breath test and the results of that test did not violate the statute since, although the defendant was in custody, the defendant was not charged in a criminal proceeding when the defendant consented to take and took the chemical breath test. *Scanlon v. State*, 237 Ga. App. 362, 514 S.E.2d 876 (1999), cert. denied, 528 U.S. 1078, 120 S. Ct. 795, 145 L. Ed. 2d 671 (2000).

DNA tests. — In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, use of evidence comparing DNA on lip balm found at the crime scene with defendant's blood sample and with evidence retained from a prior rape prosecution that resulted in defendant's acquittal pursuant to O.C.G.A. § 24-4-60 et seq., did not violate defendant's right against self-incrimination under O.C.G.A. § 24-9-20(a). *Fortune v. State*, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

Waiver of privilege. — Allowing a codefendant to give testimony regarding the substance of defendant's prior testimony at a

probation revocation hearing, after defendant elected not to take the stand at trial, did not violate the defendant's privilege against self-incrimination since defendant waived the privilege by testifying voluntarily on the defendant's behalf at the prior hearing. *Bobbitt v. State*, 215 Ga. App. 131, 449 S.E.2d 674 (1994).

Corporate document not protected by self-incrimination privilege. — Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. *Thompson v. State*, 294 Ga. App. 363, 670 S.E.2d 152 (2008).

2. Compelling Evidence

Courts should liberally construe provision against compelling the accused to be a witness against oneself, and refuse to permit any first or doubtful steps which may invade one's rights in this respect. *Underwood v. State*, 13 Ga. App. 206, 78 S.E. 1103 (1913).

Law embodies constitutional right against self-incrimination. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), vacated as to sentence sub nom., 243 Ga. 244, 253 S.E.2d 707 (1979).

Law is governed by same standards as U.S. Const., amend. 5. *Jordan v. State*, 239 Ga. 526, 238 S.E.2d 69 (1977); *Classic Art Corp. v. State*, 245 Ga. 448, 265 S.E.2d 577 (1980).

Scope of statute. — Constitutional guarantee protects one from being compelled to furnish evidence against oneself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against one's will which is incriminating in its nature. *Day v. State*, 63 Ga. 667 (1879); *Calhoun v. State*, 144 Ga. 679, 87 S.E. 893 (1916); *Smith v. State*, 17 Ga. App. 693, 88 S.E. 42 (1916); *Walter v. State*, 131 Ga. App. 667, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974).

Self-Incrimination (Cont'd)**2. Compelling Evidence (Cont'd)**

Compelled evidence is inadmissible. — Evidence of guilt which a defendant, either directly or indirectly, is compelled to disclose is not admissible in a criminal prosecution against the defendant. *Hughes v. State*, 2 Ga. App. 29, 58 S.E. 390 (1907); *Davis v. State*, 4 Ga. App. 318, 61 S.E. 404 (1908).

Forcing defendant to submit to act permitted. — Although evidence may be compulsorily adduced from an accused, it is constitutionally impermissible to compel an accused to perform an act which results in the production of incriminating evidence; the distinction is between forcing an accused to do an act against the accused's will and requiring an accused to submit to an act; the latter "takes evidence from the defendant" and is constitutionally acceptable, the former compels defendant, in essence, to give evidence which violates an individual's right not to incriminate oneself. *State v. Armstead*, 152 Ga. App. 56, 262 S.E.2d 233 (1979).

Although evidence may be compulsorily adduced from an accused, it is constitutionally impermissible to compel an accused to perform an act which results in the production of incriminating evidence. The distinction is between forcing an accused to do an act against one's will and requiring an accused to submit to an act. *Hambrick v. State*, 204 Ga. App. 668, 420 S.E.2d 308, cert. denied, 204 Ga. App. 921, 420 S.E.2d 308 (1992).

Direct tendency to incriminate not required. — Protection is not limited to cases where the question or answer has a direct tendency to incriminate defendant, or to expose the defendant to a penalty or forfeiture; the defendant is protected from answering any question which may form a link in the chain by which such cases are to be established. *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974).

Provision applies where fine, forfeiture, or penalty involved. — In a proceeding against road commissioners for neglect of duty, it is error to compel the defendants to answer under oath questions, the answer to which may subject the defendants to a fine, forfeiture, or penalty. *Bryan v. State*, 40 Ga. 688 (1870).

Right applies during pendency of new trial motion. — In the trial of a codefendant, it was not error for the court to refuse to require a defendant who had been previously tried and convicted, and whose motion for new trial was then pending, to answer a question tending to incriminate that defendant. *Stallings v. State*, 136 Ga. 131, 70 S.E. 1015 (1911).

Fact defendant had a pending motion for new trial which, if granted by the trial court or required by the appellate court, would have subjected the defendant to the self-incrimination choice once again, did not preclude compelled testimony via immunity in the codefendant's trial. *Lee v. State*, 191 Ga. App. 882, 383 S.E.2d 366 (1989).

Use of incriminating statement on second trial. — When a witness was informed that the witness would not be required to give any answer that would tend to incriminate the witness in reference to a given transaction, and the circumstances were such as to indicate that the witness appreciated the prejudicial effect that might result from an answer to a given question, the statement in the answer was admissible against the witness in a subsequent trial, although it tended to connect the witness with the transaction which was the foundation of the indictment upon which the witness was being tried. *Davis v. State*, 122 Ga. 564, 50 S.E. 376 (1905).

Witness decides whether question is incriminating. — When the witness is otherwise competent, the witness may decline to answer questions which tend to incriminate the witness; and in this event the witness, and not the judge, is to determine whether the answer to the question propounded to the witness will have the effect of subjecting the witness to punishment for crime. *Empire Life Ins. Co. v. Einstein*, 12 Ga. App. 380, 77 S.E. 209 (1913). See also *Wilburn v. State*, 141 Ga. 510, 81 S.E. 444 (1914).

Defendant compelled to reenact crime. — It was erroneous to admit testimony that the accused, while in the custody of the sheriff under arrest made without a warrant, was carried by the sheriff to the house alleged to have been burglarized, and there placed by the sheriff in a position at a window through which the house had been entered, and in which position an occupant of the house claimed to be able to identify the accused as

the burglar, although the occupant was unable to do so before the accused was placed in this position, and that the sheriff placed the accused there at the occupant's request, for the purpose of enabling the occupant to identify the accused as the burglar. *Aiken v. State*, 16 Ga. App. 848, 86 S.E. 1076 (1913), later appeal, 17 Ga. App. 721, 88 S.E. 210 (1916).

To compel handwriting exemplar is to impermissibly compel the defendant to do an act, not to submit to an act. *State v. Armstead*, 152 Ga. App. 56, 262 S.E.2d 233 (1979).

When defendant was asked to submit to a handwriting exemplar act, which defendant readily agreed to do and was not compelled to do so, there was no violation of the Georgia constitutional right nor of subsection (a) of O.C.G.A. § 24-9-20. *Hambrick v. State*, 204 Ga. App. 668, 420 S.E.2d 308, cert. denied, 204 Ga. App. 921, 420 S.E.2d 308 (1992).

Removal of bullet from defendant. — Constitutional rights of defendant were not violated by the state in requiring removal of a bullet from the defendant's body. *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972), cert. dismissed, 410 U.S. 975, 93 S. Ct. 1454, 35 L. Ed. 2d 709 (1973).

Compulsion by threat of force. — When a police officer compels defendant to produce, against the will of defendant, illegal lottery tickets by threat and by placing the officer's hand on a pistol, the method of forcing defendant to produce this evidence violates defendant's constitutional rights in that it compels the defendant to produce evidence to incriminate oneself. *Grant v. State*, 85 Ga. App. 610, 69 S.E.2d 889 (1952).

Drug testing provision of probationary sentence. — Defendant's probation officer was authorized to request defendant to produce a blood specimen for analysis under the terms of a drug testing provision of defendant's probationary sentence. *Toth v. State*, 213 Ga. App. 247, 444 S.E.2d 159 (1994).

Submitting to blood-alcohol tests. — Since, under the Constitution of Georgia, the state may constitutionally take a blood sample from a defendant without the defendant's consent, O.C.G.A. §§ 40-5-55 and 40-6-392 grant, rather than deny, a right to a defendant by providing for refusal to take

such a test. *Allen v. State*, 254 Ga. 433, 330 S.E.2d 588 (1985).

Choice provided to a DUI defendant under Georgia law—submitting to a blood-alcohol test or refusing to submit, with resultant sanctions—is not so painful, dangerous, or severe, or so violative of religious beliefs, that no choice actually exists, and does not amount to compulsion on behalf of the state or a violation of due process. *Allen v. State*, 254 Ga. 433, 330 S.E.2d 588 (1985).

Field sobriety tests may be asked of noncustodial defendant. — There was no violation of defendant's right against self-incrimination since the defendant was not formally arrested until after the field sobriety test. *Lankford v. State*, 204 Ga. App. 405, 419 S.E.2d 498 (1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993); *State v. Sumlin*, 224 Ga. App. 205, 480 S.E.2d 260 (1997).

Driver could not assert right against self-incrimination to suppress results of field sobriety test, since the driver was not a person "charged in a criminal proceeding" at the time the test was given, the driver was not in police custody at that time, and no force or threat of penalty was used against the driver. *Montgomery v. State*, 174 Ga. App. 95, 329 S.E.2d 166 (1985); *Keenan v. State*, 263 Ga. 569, 436 S.E.2d 475 (1993); *Bravo v. State*, 249 Ga. App. 433, 548 S.E.2d 129 (2001).

Alco-sensor screening. — Defendant's refusal to submit to the alco-sensor screening could be admitted without proof that the device had been approved by the Georgia Bureau of Investigation. *Johnson v. State*, 268 Ga. App. 426, 602 S.E.2d 177 (2004).

Alphabet test and physical dexterity tests are not inadmissible under the fifth amendment of the United States Constitution because those tests are not evidence of a testimonial or communicative nature. *Smith v. State*, 202 Ga. App. 701, 415 S.E.2d 495 (1992); *Lankford v. State*, 204 Ga. App. 405, 419 S.E.2d 498 (1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993).

Defendant who entered plea of nolo contendere could not be forced to testify in the sentencing hearing. *Fuller v. State*, 244 Ga. App. 618, 536 S.E.2d 296 (2000).

Nontestifying defendant need not be advised of right. — Since defendant did not

Self-Incrimination (Cont'd)**2. Compelling Evidence (Cont'd)**

testify and was not cross-examined, there was no harm in the trial court's failure to advise defendant of the defendant's right not to be compelled to testify under oath. *Coonce v. State*, 171 Ga. App. 20, 318 S.E.2d 763 (1984).

Grand jury testimony. — Trial court committed reversible error by granting defendant's plea in abatement to an indictment charging defendant with reckless conduct, based on the ground that defendant was forced by the grand jury to give testimony against oneself, where the only proposed indictment before the grand jury at the time defendant was called as a witness was for the offense of feticide, allegedly committed by defendant's spouse, and the defendant did not claim defendant's privilege against self-incrimination. *State v. Butler*, 177 Ga. App. 594, 340 S.E.2d 214 (1986).

Burden on defendant to show self-incrimination. — When three defendants, one of whom was plaintiff in error, were charged in the indictment with arson, and that defendant's name along with six other names appeared on back of the indictment, there was no presumption that defendant was examined against oneself, and the burden was on the defendant to show that the defendant gave evidence to incriminate oneself. *Cowart v. State*, 51 Ga. App. 199, 179 S.E. 823 (1935).

Jury instructions. — It is proper for the court to give a charge on defendant's failure to testify without a request and it is not reversible error to fail to give the charge if defendant does not request the charge. *Stapleton v. State*, 235 Ga. 513, 220 S.E.2d 269 (1975).

Waiver. — If a defendant is fully apprised of the defendant's fifth amendment rights by the trial judge and by the defendant's attorney prior to the defendant's taking the stand for cross-examination, any objection to the procedure must be considered as waived at trial. *Everett v. State*, 238 Ga. 80, 230 S.E.2d 882 (1976).

3. Comments

It is error for prosecutor to comment to the jury on defendant's exercise of the defendant's constitutional right to remain si-

lent. *Marlow v. State*, 152 Ga. App. 218, 262 S.E.2d 460 (1979).

Rigid adherence to rule. — Rule that defendant's failure to make a statement cannot be commented upon has been rigidly adhered to since it was laid down in *Bennet v. State*, 86 Ga. 401, 12 S.E. 806, 22 Am. St. R. 465, 12 L.R.A. 449 (1890); *Moore v. State*, 10 Ga. App. 805, 74 S.E. 315 (1912).

Rule applies to judge as well as prosecutor. — Law prohibits any comment on the failure of defendant to testify in a criminal case; this inhibition applies to both prosecutor and judge. *Thomas v. State*, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975).

Comment by prosecutor cuts down on privilege against self-incrimination by making its assertion costly. *Gosha v. State*, 239 Ga. 37, 235 S.E.2d 527 (1977).

Rule applies only if defendant fails to testify. — Statutory prohibitions upon comment on defendant's failure to testify are applicable only when defendant fails to testify. *Gosha v. State*, 239 Ga. 37, 235 S.E.2d 527 (1977).

Statute plainly prohibits any attempt to discredit defendant in the eyes of the jury by the making of any comment upon the exercise of defendant's right not to be sworn. *Ward v. State*, 123 Ga. App. 216, 180 S.E.2d 280 (1971).

What is prohibited is a comment on the failure to testify. *Roberts v. State*, 231 Ga. 395, 202 S.E.2d 43 (1973).

What is prohibited is a comment that the defendant could have denied, explained, or otherwise disputed the state's case against the defendant. *Woodard v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975); *Graham v. State*, 156 Ga. App. 538, 275 S.E.2d 114 (1980).

Remarks made by the court to defendant in presence of jury which serve to invite attention and emphasize the defendant's failure to defend oneself under oath are precisely what the statute prohibits, even if the remarks are intended to insure that defendant understands defendant's rights. *Roberts v. State*, 231 Ga. 395, 202 S.E.2d 43 (1973).

Indirect reference to defendant's silence. — When the district attorney directly refers to silence as an indication of guilt, error has obviously been committed; when an indirect reference to this fact is made a more mar-

ginal question is involved. *Redding v. State*, 151 Ga. App. 140, 259 S.E.2d 146 (1979).

Reference to defendant's contentions through counsel or by defendant's plea is not a comment on defendant's failure to testify. *Bailey v. State*, 142 Ga. App. 202, 235 S.E.2d 650 (1977).

Comment on failure to rebut incriminating evidence. — Prosecution is not permitted to refer to the fact that defendant has not made a statement, but may properly comment upon the fact that defendant has failed to adduce testimony in rebuttal of evidence introduced by the state, tending to show defendant's guilt. *Saffold v. State*, 11 Ga. App. 329, 75 S.E. 338 (1912). See also *Caesar v. State*, 125 Ga. 6, 53 S.E. 815 (1906); *Battle v. State*, 155 Ga. App. 541, 271 S.E.2d 679 (1980).

It is not error for the prosecutor to reflect upon failure of the defense to present any evidence to rebut the proof adduced by the state. *Brown v. State*, 157 Ga. App. 473, 278 S.E.2d 31 (1981).

Trial judge does not violate O.C.G.A. § 24-9-20 where the court's instruction given prior to the closing statements by either side merely informs the jury of the general procedure to be followed and does not amount to a comment on the defendant's failure to testify and defendant raises no objection. *Fletcher v. State*, 157 Ga. App. 707, 278 S.E.2d 444 (1981).

Comment on failure of defendant as witness to rebut evidence. — When defendant testifies in defendant's own behalf, there is no violation of U.S. Const., amend. 5 when the district attorney comments upon defendant's failure, when the defendant testified, to explain or deny the testimony of particular witnesses. *Gosha v. State*, 239 Ga. 37, 235 S.E.2d 527 (1977).

Prosecutor's statement that defendant had no excuse constituted an impermissible comment upon defendant's failure to testify. *Spann v. State*, 126 Ga. App. 370, 190 S.E.2d 924 (1972).

Prosecutor's statement that only two people knew what went on in the room where an assault occurred, the victim and defendant, did not violate defendant's rights against self-incrimination. *Neal v. State*, 198 Ga. App. 518, 402 S.E.2d 114 (1991).

Prosecutor's comment that defendant "didn't take the stand" was an improper

comment on defendant's failure to testify, under O.C.G.A., § 24-9-20(b). *Raheem v. State*, 275 Ga. 87, 560 S.E.2d 680 (2002), cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429 (2002); overruled on other grounds, *Patel v. State*, 282 Ga. 412, 651 S.E.2d 55 (2007).

Impermissible comment mitigated by ample alternative evidence. — Since defendant offered no evidence on a robbery trial and the statement of the district attorney in closing argument was that the testimony of the victim stood unrefuted, this language did not constitute reversible error if other evidence was ample to support a guilty verdict. *Redding v. State*, 151 Ga. App. 140, 259 S.E.2d 146 (1979).

Comment that defendant's testimony would exculpate codefendant. — Statement by counsel for codefendant when counsel sought to call defendant as a witness after objection was sustained was not a prohibited comment since counsel said that nothing would come from counsel's questions that would do anything other than exculpate the codefendant. *Graham v. State*, 156 Ga. App. 538, 275 S.E.2d 114 (1980).

Prosecutor's acknowledgement that defendant had the right to present evidence and subpoena witnesses was not a comment upon defendant's failure to testify. *Hutchinson v. State*, 179 Ga. App. 485, 347 S.E.2d 315 (1986).

Prosecutor's questions constituted improper comment upon criminal defendant's failure to produce evidence. *Creamer v. State*, 168 Ga. App. 790, 310 S.E.2d 560 (1983); *Brewster v. State*, 205 Ga. App. 770, 424 S.E.2d 8 (1992).

Comment on failure to take test proper. — Prosecutor's comment on the defendant's failure to take a chemical test at the time of defendant's arrest was not an impermissible reference to the defendant's right to remain silent under the fifth amendment and was a proper subject for comment in closing argument. *Givens v. State*, 199 Ga. App. 709, 405 S.E.2d 898 (1991).

Proper instructions. — Charge that the jury is to make no assumption or draw any conclusions from defendant's failure to testify would not have been error. *Woodard v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975).

It is permissible for the trial court to charge that the jury is to make no assump-

Self-Incrimination (Cont'd)**3. Comments (Cont'd)**

tion or draw any conclusions from defendant's failure to testify. Also permissible would be a charge that defendant's failure to testify creates no presumption against the defendant and the burden of proving defendant's guilt beyond a reasonable doubt cannot be presumed to be carried because of the defendant's failure to testify. *Marlow v. State*, 152 Ga. App. 218, 262 S.E.2d 460 (1979).

It is error for court to deny defendant's request for a charge that the defendant's failure to testify creates no presumption against the defendant. *Marlow v. State*, 152 Ga. App. 218, 262 S.E.2d 460 (1979).

Impermissible comment cured by instructions. — While counsel for the state should not argue to the jury from the omission of defendant to make a statement, the effect of such impropriety may be obviated by an appropriate charge from the court. *Robinson v. State*, 82 Ga. 535, 9 S.E. 528 (1889). See also *Minor v. State*, 120 Ga. 490, 48 S.E. 198 (1904).

After one of the state's counsel remarked that defendant did not even make a statement in the defendant's own behalf, and the court immediately rebuked counsel and thereafter during the charge instructed the jury that it should not take into consideration the fact that the defendant did or did not make a statement, the refusal of the trial court to grant a mistrial would not be reversed. *Parks v. State*, 208 Ga. 508, 67 S.E.2d 716 (1951).

Evidence of Character or Other Crimes**1. In General**

Nature of good character defense. — Defense of good character, which the law designates as a substantive fact, and which may itself alone be sufficient to generate a reasonable doubt, is that reputation for good character which surrounds the defendant previous to the transaction under consideration; it is the reputation for previous good character. *Eidson v. State*, 66 Ga. App. 765, 19 S.E.2d 373 (1942).

Probative connection required. — Evidence of prior difficulties between defendant and the alleged victim was not admissi-

ble because the evidence did not have a probative connection with the incident giving rise to the case being tried. *Carr v. State*, 267 Ga. 701, 482 S.E.2d 314 (1997). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Character evidence generally inadmissible. — Evidence regarding the character of a defendant is generally inadmissible unless the defendant puts the defendant's character in issue, and evidence of independent offenses committed by a defendant is generally inadmissible due to its inherently prejudicial nature and minimal probative value. *Henderson v. State*, 204 Ga. App. 884, 420 S.E.2d 813 (1992).

In criminal trials, state cannot introduce evidence of defendant's character unless the defendant has personally first put it in issue; the state may then disprove or rebut, by competent evidence, that which the defendant has seen cause to assert. *Clarke v. State*, 52 Ga. App. 254, 183 S.E. 92 (1935); *Robinson v. State*, 62 Ga. App. 355, 7 S.E.2d 758 (1940); *Posey v. State*, 152 Ga. App. 216, 262 S.E.2d 541 (1979).

In a criminal case, the state cannot rebut or question the presumption of the defendant's good character unless the defendant discards the presumption thus afforded and elects to put the defendant's actual character in issue by evidence or by the defendant's statement to the jury. *Murray v. State*, 157 Ga. App. 596, 278 S.E.2d 2 (1981).

State cannot rebut or question the presumption of a defendant's good character unless the defendant first chooses to place the defendant's character in issue. *Arnold v. State*, 193 Ga. App. 206, 387 S.E.2d 417 (1989).

Unless and until the accused introduces evidence of the accused's own character or reputation, the state may not show that the accused's general reputation for peaceableness and violence was bad, and evidence of the accused's general reputation for violence is legally irrelevant and the testimony is inadmissible. *Ledford v. State*, 202 Ga. App. 694, 415 S.E.2d 693 (1992).

Impeachment by cross-examination. — Use of cross-examination in a good faith attempt to impeach a defendant, who on direct examination has voluntarily given testimony on direct examination obviously calculated to impress the jury as to certain traits

of defendant's character, is not prohibited. *Butts v. State*, 193 Ga. App. 824, 389 S.E.2d 395 (1989).

Even though defendant did not, merely by volunteering that defendant had been incarcerated, put defendant's character "in issue" within the meaning of subsection (b) of O.C.G.A. § 24-9-20 so as to permit rebuttal by the state, defendant nevertheless raised an issue which could be fully explored by the state on cross-examination. *Wilkey v. State*, 215 Ga. App. 354, 450 S.E.2d 846 (1994); *Roman v. State*, 245 Ga. App. 225, 537 S.E.2d 684 (2000).

Testimony of defendant on direct examination regarding prior criminal conduct did not place defendant's character in issue, but did raise issues which could be fully explored by the state on cross-examination. *Franklin v. State*, 224 Ga. App. 578, 481 S.E.2d 852 (1997).

Evidence that defendant knew that defendant would be incarcerated for 90 days beginning one week after the offense charged contradicted defendant's testimony that defendant expected to be steadily employed in the weeks following the offense; accordingly, the trial court did not abuse the court's discretion in allowing the evidence to impeach defendant's testimony. *Cooper v. State*, 272 Ga. App. 209, 612 S.E.2d 42 (2005).

Proof of other crimes to show bad character generally. — Proof of other crimes is never admissible (except in cases where defendant has personally put one's character in issue) where its chief or only probative value consists in showing that defendant is, by reason of defendant's bad character (demonstrated through a criminal career), more likely to have committed the crime than defendant otherwise would have been; to admit such evidence, it must have relevancy and probative value from some other point of view. *Chambers v. State*, 76 Ga. App. 269, 45 S.E.2d 724 (1947); *Carroll v. State*, 155 Ga. App. 514, 271 S.E.2d 650 (1980).

Good character is a substantive fact, like any other fact tending to establish defendant's innocence, and ought to be so regarded by the court and jury; like all other facts proved in the case, it should be weighed and estimated by the jury, for it may render that doubtful which otherwise would be clear. *Sims v. State*, 84 Ga. App. 753, 67 S.E.2d 254 (1951).

Good character may of itself generate reasonable doubt in the minds of the jury as to defendant's guilt, and for this reason defendant is allowed when defendant sees fit to offer defendant's good character in issue. *Clarke v. State*, 52 Ga. App. 254, 183 S.E. 92 (1935); *Walker v. State*, 199 Ga. 418, 34 S.E.2d 446 (1945); *Sims v. State*, 84 Ga. App. 753, 67 S.E.2d 254 (1951).

Evidence admissible despite tendency to introduce character. — Evidence showing intent, motive, plan, scheme, and bent of mind is admissible although such evidence may also place in issue character of defendant. *Causey v. State*, 154 Ga. App. 76, 267 S.E.2d 475 (1980).

Evidence admissible to show motive is not rendered inadmissible because it incidentally places the defendant's character in issue. *Brock v. State*, 179 Ga. App. 519, 347 S.E.2d 230 (1986).

Defendant's response about whether it took a long time to make a drug transaction did not place defendant's character in issue, since the defendant only hypothetically referred to a criminal act; such testimony was relevant to the alibi defense maintained by the defendant at hearing and was not evidence of general bad character admitted in violation of subsection (b) of O.C.G.A. § 24-9-20. *Johnson v. State*, 204 Ga. App. 277, 419 S.E.2d 118 (1992).

Evidence that is material in explaining the conduct of the witness does not become inadmissible simply because defendant's character is incidentally put in issue. *Hall v. State*, 264 Ga. 85, 441 S.E.2d 245 (1994).

In a prosecution for simple assault, rape and battery, although defendant did not place defendant's character in question when defendant testified on cross-examination that "it wasn't in my nature to hurt [the victim]," testimony of a police officer that the officer had dealt with defendant two or three times, and that one time it took four officers to control defendant without their getting hurt, was admissible to prove the falsity of defendant's specific testimony. *Height v. State*, 214 Ga. App. 570, 448 S.E.2d 726 (1994).

Testimony of the only witness who could identify defendant that the witness had spent time in jail with defendant was admissible. *Kellibrew v. State*, 239 Ga. App. 783, 521 S.E.2d 921 (1999).

Evidence of Character or Other**Crimes (Cont'd)****1. In General (Cont'd)**

Testimony of victim that, before shooting the victim, defendant stated that defendant "can't go back to jail" was clearly admissible as part of the *res gestae* even if such evidence incidentally placed defendant's character in evidence. *Kellibrew v. State*, 239 Ga. App. 783, 521 S.E.2d 921 (1999).

Evidence of defendant's financial problems and money mismanagement was admissible to show defendant's alleged financial motive for the murders of defendant's children by burning down defendant's trailer, and evidence about defendant's marital problems and romantic relationships was admissible to show that defendant viewed the children as a source of friction between defendant and a girlfriend and to establish how defendant's wife and previous live-in girlfriend were able to see the relationship with the girlfriend, hear defendant's threats towards the children, and see how defendant treated the children; testimony as to prior difficulties between defendant and defendant's children, such as threats to kill the children made to other people and defendant's indifference to the children's welfare, was admissible to show motive and intent. *Riley v. State*, 278 Ga. 677, 604 S.E.2d 488 (2004).

Trial court did not err in denying defendant's motion in limine to exclude evidence of defendant's prior incarceration in a criminal trial on new charges, although evidence of prior conviction or general bad character was generally inadmissible under O.C.G.A. § 24-9-20(b), as the criminal history record was redacted, and the evidence was submitted for the relevant purpose of establishing a timeline in order to refute defendant's alibi that defendant was in another state at the time of the new incident, and further, to show that defendant was called by an alias name, which was used during the incident as well. *Copprue v. State*, 279 Ga. 771, 621 S.E.2d 457 (2005).

Evidence of specific acts to show bad character. — When defendant puts defendant's general good character in issue, the state may rebut it by evidence as to defendant's general bad character but not by specific acts apart from proof of prior con-

victions. *Folds v. State*, 90 Ga. App. 849, 84 S.E.2d 584 (1954); *Smith v. State*, 91 Ga. App. 360, 85 S.E.2d 623 (1955) (giving certain exceptions).

When defendant puts defendant's character in issue in defendant's statement regarding a specific transaction and place, the state can then rebut a statement regarding such transaction and place referred to. *Folds v. State*, 90 Ga. App. 849, 84 S.E.2d 584 (1954).

While the impeachment of a defendant's general credibility by proof of general bad character and of prior convictions is prohibited, impeachment of the specific testimony of a criminal defendant (e.g., "I never hurt nobody") may be accomplished by testimony that defendant did, in fact, hurt another, or by a certified copy of a conviction for a crime of physical violence. *Williams v. State*, 257 Ga. 761, 363 S.E.2d 535 (1988).

Evidence showing intent, bent of mind, and disposition. — Evidence of defendant's lawful consensual sexual relationship with a minor could be used as similar transaction evidence to establish defendant's intent, bent of mind, and lustful disposition. *Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998).

General reputation of one held by community in which one lives is of the best evidence going to show general character. *Clarke v. State*, 52 Ga. App. 254, 183 S.E. 92 (1935).

Good character may be proved only by testimony of a witness as to the reputation of the person whose character is in issue; subject to minor exceptions, the opinion of a witness as to character based on personal observation is not an approved way of introducing evidence of character. *Taylor v. State*, 176 Ga. App. 567, 336 S.E.2d 832 (1985).

Voluntary statement by defendant. — Regardless of whether a statement by the defendant about defendant's sexual relationship with someone not connected with the case was voluntarily given, since the evidence was not relevant nor admissible for impeachment or for any other proper purpose (e.g., to show motive, scheme, or plan), its only purpose was to attempt to show bad character, and, in the absence of interjection of the issue of character by the defendant, this evidence was inadmissible and the admission required reversal. *Duke v. State*, 256 Ga. 671,

352 S.E.2d 561 (1987).

Defendant's testimony regarding never being in trouble. — It was not error to admit evidence of defendant's prior assault conviction because the conviction was offered as impeachment evidence rather than as evidence of bad character after defendant testified, and defendant's counsel emphasized, that defendant had "never been in trouble." *Walker v. State*, 260 Ga. App. 241, 581 S.E.2d 295 (2003).

When the defendant testified that the defendant had previously been convicted of theft by receiving because the defendant was an innocent victim of circumstance, the defendant opened the door to the prosecution's cross examination concerning the defendant's other convictions for giving a false name and entering an auto. *Cobb v. State*, 251 Ga. App. 697, 555 S.E.2d 79 (2001).

Statement by ex-wife/victim's mother inadmissible. — In a child molestation prosecution, testimony by defendant's ex-wife, who was also the victim's mother, regarding her fear of defendant was not evidence of similar transactions as provided in O.C.G.A. § 24-9-20. *Keanum v. State*, 212 Ga. App. 662, 442 S.E.2d 790 (1994).

Conduct of family members. — Trial court erred in allowing the state's attorney to cross-examine the defendant, who was accused of possession of marijuana, as to whether other members of the defendant's family had "been in trouble for marijuana." *Hill v. State*, 176 Ga. App. 509, 336 S.E.2d 276 (1985).

State's reference in the opening statement to defendant's wife's employment as an exotic dancer was followed with testimony about that employment, which was relevant to the question of the couple's need for money, and therefore, the apparent motive for the crimes, which the state was authorized to present even if the evidence directly involved the defendant's wife's participation in an unsavory activity. *Thomas v. State*, 274 Ga. 156, 549 S.E.2d 359 (2001).

Testimony concerning marital status. — Trial court did not abuse court's discretion by allowing testimony concerning defendant's marital status, the number of times the defendant was divorced, and the fact that the defendant did not maintain a checking account. *Grady v. State*, 212 Ga. App. 118, 441 S.E.2d 253 (1994).

Statement in defendant's pretrial statement that defendant had a "drinking problem" and that defendant had been "busted for burglary" did not violate the prohibition in subsection (b) of O.C.G.A. § 24-9-20 against admission of evidence of a defendant's general bad character unless the defendant puts defendant's character in issue. *Stitt v. State*, 256 Ga. 156, 345 S.E.2d 578 (1986).

District attorney's reference to an indictment was an inappropriate means of impeaching, by contradictory evidence, defendant's statement that defendant had never hurt anyone. *Williams v. State*, 257 Ga. 761, 363 S.E.2d 535 (1988).

Gang membership. — Prosecutor's questions to an officer regarding defendant's gang affiliation and attire worn in committing the crime was properly allowed as such was relevant to the issue of identity and defendant's gang membership was admissible to show motive. *Johnson v. State*, 261 Ga. App. 98, 581 S.E.2d 715 (2003).

Duty to instruct when character evidence wrongly admitted. — It is error in a criminal case for the state to place the defendant's character in issue when the defendant has not voluntarily chosen to do so. If the prosecutor solicits excluded testimony, the trial court is, upon objection and if it chooses not to declare a mistrial, required to direct the jury to disregard such testimony. *Harris v. State*, 251 Ga. App. 879, 555 S.E.2d 485 (2001).

Proper instruction should be given in every case where defendant puts his character in issue; but in the absence of a timely request, an omission to give a specific charge on the subject will not require a new trial. It is only in exceptional cases where the court fails to charge relatively to the good character of defendant that a new trial should be granted. *Widner v. State*, 197 Ga. 542, 30 S.E.2d 97 (1944); *Mangrum v. State*, 155 Ga. App. 334, 270 S.E.2d 874 (1980) (further holding that if defendant asserted another defense, denial of the instruction on character was not error).

Written request to charge. — Barring exceptional circumstances, there must be a written request to charge on principles of law regarding good character; otherwise, the failure to do so will not require a new trial. *Taylor v. State*, 176 Ga. App. 567, 336 S.E.2d 832 (1985).

Evidence of Character or Other Crimes (Cont'd)

1. In General (Cont'd)

Trial court did not err in denying defendant's motion for mistrial after witness made statements about defendant dealing in drugs on previous occasions as the statements were unsolicited, the trial court gave immediate instructions to disregard the testimony, the witness did not tell the jury anything it did not already know about defendant, and defendant did not show the harm necessary to require the reviewing court to reverse based on the failure to grant the motion for mistrial. *McCollum v. State*, 258 Ga. App. 574, 574 S.E.2d 561 (2002).

Instructions when defendant's character evidence is uncontradicted. — When defendant puts the defendant's character in issue and offers testimony in support thereof, and the state offers no evidence in contradiction, and no contradiction has arisen from within defendant's testimony, it is error for the court to charge the jury that "the state has introduced evidence to the contrary." *Eidson v. State*, 66 Ga. App. 765, 19 S.E.2d 373 (1942).

Even if the denial of mistrial was error, it was highly probable that the complained-of character evidence did not contribute to the verdict because the evidence against defendant was overwhelming; the state presented two police officer witnesses who identified defendant as the gunman shown in the videotape of the armed robbery and the state introduced defendant's statement, wherein defendant admitted that defendant robbed the store. *Torres v. State*, 258 Ga. App. 393, 574 S.E.2d 438 (2002).

2. Putting Character in Issue

In general. — Only when the defendant makes an election to place defendant's good character in issue may the state offer evidence of the defendant's general bad character or defendant's prior convictions. *Jones v. State*, 257 Ga. 753, 363 S.E.2d 529 (1988).

When the defendant offers testimony of a witness as to defendant's general good reputation in the community, the state may prove the defendant's general bad reputation in the community and may additionally offer evidence that the defendant has been

convicted of prior offenses. *Jones v. State*, 257 Ga. 753, 363 S.E.2d 529 (1988).

When the defendant testifies in the defendant's own behalf and "falsely denies past criminal conduct or past misdeeds," the state may introduce evidence reflecting negatively on the defendant's character only insofar as that evidence proves the falsity of specific testimony of the defendant. *Jones v. State*, 257 Ga. 753, 363 S.E.2d 529 (1988).

When the defendant elects to place defendant's character in evidence within the meaning of subsection (b) of O.C.G.A. § 24-9-20, the state may offer evidence of the defendant's prior convictions. *Strong v. State*, 263 Ga. 587, 436 S.E.2d 213 (1993).

Character not "put in issue" by inadvertent statements. — Trial court did not err in failing to give a jury charge on the defendant's good character. Character was not "put in issue," within the meaning of subsection (b) of O.C.G.A. § 24-9-20 by inadvertent statements regarding the defendant's good conduct. Character, in order to be charged, should have been placed in evidence as an affirmative defense. *Johnson v. State*, 261 Ga. 419, 405 S.E.2d 686 (1991); *Keef v. State*, 220 Ga. App. 134, 469 S.E.2d 318 (1996).

Trial court correctly refused to allow defendant to impeach codefendants by proof of the codefendants' prior convictions since the codefendants had not placed the codefendants' own character into evidence. *Morris v. State*, 204 Ga. App. 437, 419 S.E.2d 733 (1992).

It was not necessary to determine whether defendant's testimony on direct examination had "opened the character door," since it was defendant who introduced the defendant's character into evidence by discussing the defendant's criminal record in the response defendant chose to give to the prosecutor's proper cross-examination as to defendant's direct examination testimony. *Mitchell v. State*, 193 Ga. App. 214, 387 S.E.2d 425 (1989).

When reference to defendant's criminal history was fleeting and incomplete, and the trial court immediately instructed the jurors to disregard the reference, the court did not abuse the court's discretion in electing to give curative instructions rather than granting a mistrial. *Smith v. State*, 244 Ga. App. 165, 534 S.E.2d 903 (2000).

It was error under earlier provisions of O.C.G.A. § 24-9-20(b) to question the defendant about the defendant's history of misdemeanor arrests as the defendant's remark that the defendant was not a violent person was at best an inadvertent statement of the defendant's good character, not an election to place the defendant's character in evidence; furthermore, the defendant had not testified untruthfully about the defendant's criminal record and had not testified that the defendant had no prior arrests. *Lindsey v. State*, 282 Ga. 447, 651 S.E.2d 66 (2007).

Defendant was not entitled to a mistrial simply because a state's witness, in a nonresponsive answer, mentioned that defendant did not want to go back to jail. The mere mention that the defendant had been in jail did not place defendant's character at issue, and a nonresponsive answer to a question impacting negatively on the defendant's character did not place the defendant's character in issue under O.C.G.A. § 24-9-20(b). *Mathis v. State*, 299 Ga. App. 831, 684 S.E.2d 6 (2009).

Testimony of previous "trouble" did not place character in issue. — Defendant's testimony on direct examination that defendant had previously been in "some trouble" did not place defendant's character in issue. *Richardson v. State*, 173 Ga. App. 695, 327 S.E.2d 813 (1985).

Subsequent conduct did not place character in issue. — Trial court erred in admitting detective's testimony that, when the detective questioned defendant seven weeks after the shooting, defendant appeared "to be high" and told the detective that the defendant had been smoking marijuana-laced cigars. *Weems v. State*, 269 Ga. 577, 501 S.E.2d 806 (1998).

Evidence used to impeach specific testimony. — There are numerous instances when the state may offer evidence of prior crimes or bad acts committed by a defendant for a purpose other than to show that the defendant is a person of bad character, including instances when such evidence is necessary and relevant to impeach the defendant's specific testimony. *Crane v. State*, 263 Ga. 518, 436 S.E.2d 216 (1993).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to

impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions is generally irrelevant unless defendant first puts defendant's character in issue, pursuant to O.C.G.A. §§ 24-2-2 and 24-9-20(b), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to O.C.G.A. § 24-9-82. *Lockaby v. State*, 265 Ga. App. 527, 594 S.E.2d 729 (2004).

Since, in cross-examining a friend of the defendant, defense counsel engaged in questioning about the defendant's church attendance, and since the only purpose of these questions was to elicit testimony about the defendant's character, the trial court properly allowed evidence of defendant's previous license suspensions and insurance cancellations as rebuttal evidence on the same subject. *Donaldson v. State*, 279 Ga. App. 407, 631 S.E.2d 443 (2006).

Negative impact of nonresponsive answer. — Even when a witness's nonresponsive answer impacts negatively on the defendant's character, it does not place the defendant's character in issue under subsection (b) of O.C.G.A. § 24-9-20. *Williams v. State*, 214 Ga. App. 834, 449 S.E.2d 532 (1994); *Williams v. State*, 269 Ga. 827, 504 S.E.2d 441 (1998); *Watkins v. State*, 241 Ga. App. 251, 526 S.E.2d 155 (1999).

Evidence of prior difficulties between defendant and victim is admissible to show the relationship between the defendant and the victim, and does not place the defendant's character in evidence within the meaning of O.C.G.A. § 24-9-20. *McKissick v. State*, 263 Ga. 188, 429 S.E.2d 655 (1993). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Eliciting evidence on direct examination that defendant had been "ripped off" by the victim in previous drug dealings was not an improper introduction of bad character evidence, but was evidence of motive for the crimes committed. *Holcomb v. State*, 268 Ga. 100, 485 S.E.2d 192 (1997).

Testimony that a photograph is a "mug shot" from the files of the police department does not put the defendant's character in issue. *Seals v. State*, 176 Ga. App. 67, 335 S.E.2d 306 (1985).

Evidence of Character or Other Crimes (Cont'd)

2. Putting Character in Issue (Cont'd)

Admission of photograph from website.

— In a defendant's trial for vehicular homicide, for which the defendant was convicted, the trial court did not abuse the court's discretion in permitting the state to introduce photographs of the defendant in jail clothing, playfully posing for the camera from a website created by the defendant as the defendant testified how remorseful the defendant was for killing the victim and referenced the specific date that the website photographs were taken; therefore, the defendant opened the door for the state to admit the photographs of the defendant. *Merritt v. State*, 288 Ga. App. 89, 653 S.E.2d 368 (2007).

Evidence that an accused is presently confined or was in jail does not place the accused's character in evidence. *Fields v. State*, 176 Ga. App. 122, 335 S.E.2d 466 (1985).

Copies of sexually oriented magazines were not inadmissible at defendant's trial for child molestation and sodomy on grounds the magazines placed defendant's character in issue since the evidence was admitted to show defendant's motive generally and defendant's state of mind and lustful disposition. *Stamey v. State*, 194 Ga. App. 305, 390 S.E.2d 409 (1990), cert. denied, 194 Ga. App. 912, 390 S.E.2d 409 (1990), 498 U.S. 843, 111 S. Ct. 123, 112 L. Ed. 2d 91 (1990).

Defendant's character incidentally put in issue. — When testimony of a witness for the state of what defendant stated to the witness shortly after the homicide was admissible to show the state of mind and intentions of defendant toward the deceased, the fact that such testimony incidentally put defendant's character in issue did not render the testimony inadmissible. *Tiller v. State*, 196 Ga. 508, 26 S.E.2d 883 (1943).

In prosecution of defendant for the shooting death of his wife, testimony of defendant's sister-in-law to effect that she had seen defendant strike victim on two separate occasions was relevant to issue of defendant's motive in killing his wife, and was not rendered inadmissible because it incidentally placed defendant's character in issue. *Hales v. State*, 250 Ga. 112, 296 S.E.2d 577 (1982).

Defendant, in prosecution for armed robbery, injected defendant's character into issue after defendant stated defendant did not commit "wrong" which, viewed in the totality of defendant's testimony, was a general declaration of defendant's own good character. *Johnson v. State*, 169 Ga. App. 102, 311 S.E.2d 537 (1983).

Armed robbery defendant's statement that the reason defendant took a car was because defendant thought there was a warrant for defendant and defendant would "disappear for a while" was relevant to motive, intent, and course of conduct and was not rendered inadmissible because the statement incidentally placed the defendant's character in issue. *Millis v. State*, 196 Ga. App. 799, 397 S.E.2d 71 (1990).

In prosecution for armed robbery and related crimes, evidence of defendant's prior negotiations about the sale of a machine gun only incidentally placed defendant's character in evidence. *Samuels v. State*, 223 Ga. App. 275, 477 S.E.2d 414 (1996).

Trial court did not violate O.C.G.A. § 24-9-20 by admitting evidence which suggested that defendant had lied to friends about age and background and that defendant failed to grieve for the victim, because the evidence was relevant to the case and was not rendered inadmissible by the fact that the evidence incidentally placed defendant's character in issue. *Mullinax v. State*, 273 Ga. 756, 545 S.E.2d 891 (2001).

Trial court properly admitted evidence of defendant's conversations with a police officer, wherein the defendant related that the defendant was carjacked, in an attempt to retrieve the defendant's car that had been involved in a high speed chase with police after robbery and other crimes had been committed, as the conversations were relevant to show that the defendant had given a false account to police; although character evidence that reflected poorly on the defendant was also admitted with those statements, such as the defendant's admission to police that the defendant spent a night with a female who was not defendant's wife, such admission was proper despite the fact that the defendant had not first put the defendant's character in issue, pursuant to O.C.G.A. § 24-9-20(b). *Nashid v. State*, 271 Ga. App. 202, 609 S.E.2d 106 (2004).

Evidence admissible as part of res gestae. — A rape victim's statement, in response to

a prosecutor's question regarding whether the defendant had threatened to kill the victim during the attack, that "He told me that he was going to kill me. He told me that he'd done it before and that he had no problem doing it," was admissible as part of the *res gestae*. Even if it placed the defendant's character in issue, the defendant's counsel agreed to a curative instruction, and it was highly probable that the statement did not contribute to the verdict. *Dixon v. State*, No. A10A0085, 2010 Ga. App. LEXIS 381 (Apr. 7, 2010).

Character questioned by drug evidence.

— Improper admission of witness's character evidence indicating that defendant was a "source" of cocaine was harmless error in light of evidence that defendant was observed giving the witness a package containing cocaine. *Baptiste v. State*, 190 Ga. App. 451, 379 S.E.2d 165, cert. denied, 190 Ga. App. 897, 379 S.E.2d 165 (1989).

Although defendant did not put defendant's character into issue within the meaning of O.C.G.A. § 24-9-20, it was proper to allow evidence of defendant's prior drug possession charge to disprove statements that the defendant did not use drugs. *King v. State*, 203 Ga. App. 287, 416 S.E.2d 842 (1992).

While it was error to allow reference by a witness to defendant's purported need for cocaine after committing a crime, in view of the unintentional nature of the statement and overwhelming evidence of defendant's guilt, the motion for mistrial was properly denied. *White v. State*, 268 Ga. 28, 486 S.E.2d 338 (1997).

Fact that the defendant possessed a bag of marijuana at the time of defendant's arrest was admissible in defendant's prosecution for robbery and kidnapping, even though this evidence incidentally put the defendant's character in evidence. *Reynolds v. State*, 234 Ga. App. 884, 508 S.E.2d 674 (1998).

Defendant's testimony that "I don't carry no drugs" clearly implied that defendant was neither in possession of drugs at the time in question nor on other occasions and, thus, defendant's prior convictions involving possession of cocaine were properly admitted as impeachment evidence. *Porter v. State*, 240 Ga. App. 554, 524 S.E.2d 259 (1999).

Admission of evidence relevant to every aspect of crime charged. — Custodial statement in which the defendant admitted having turned over an electric meter used in the manufacture of drugs was properly admitted at the defendant's trial and did not improperly introduce character evidence against the defendant since even though a defendant is not charged with every crime committed during a criminal transaction, every aspect relevant to the crime charged may be presented at trial. *Ward v. State*, 285 Ga. App. 574, 646 S.E.2d 745 (2007).

Defense counsel opening door. — When defense counsel first opened door pertaining to circumstances surrounding appellant's purchase of vehicle from witness by first asking the latter whether or not the vehicle had been stolen, the state's inquiry on rebuttal as to whether appellant knew that the vehicle had been stolen simply informed jury of true nature of that transaction, and the fact that this testimony may have incidentally placed appellant's character in issue did not render the testimony inadmissible. *Mulkey v. State*, 250 Ga. 444, 298 S.E.2d 487 (1983).

When defense counsel initiated the issue of defendant's propensity for violence during cross-examination of a witness, the prosecution was authorized to further explore that area. *Jordan v. State*, 267 Ga. 442, 480 S.E.2d 18 (1997).

Trial court did not err when the court allowed the admission of evidence of the defendant's bad character since the defendant opened the door to such evidence when, during cross-examination of the witness, defense counsel introduced three letters from the witness to the defendant and one of those letters referred to the defendant having stolen a car. *Thomas v. State*, 247 Ga. App. 798, 545 S.E.2d 354 (2001).

Defense counsel opened the door to the prosecution exploring defendant's criminal history at trial based on the cross-examination of an investigating officer in which counsel asked the officer if defendant had ever been convicted of child molestation previous to the allegations of child molestation that were then pending against defendant; the exploration was not limited to defendant's criminal history with respect to sex crimes. *Kimmons v. State*, 267 Ga. App. 790, 600 S.E.2d 783 (2004).

Evidence of Character or Other

Crimes (Cont'd)

2. Putting Character in Issue (Cont'd)

Defense of entrapment. — Defendant's assertion of defense of entrapment, in and of itself, does not have effect of placing defendant's character in issue. *Johns v. State*, 164 Ga. App. 133, 296 S.E.2d 638 (1982).

Character put in issue. — Defendant in prosecution for illegal possession of alcohol in defendant's statement injected defendant's character into issue after defendant stated: "I work for a living and I don't now fool with the liquor business." *Dukes v. State*, 90 Ga. App. 50, 81 S.E.2d 864 (1954).

After a witness testified that the witness had identified appellant to police from the witness's picture in "some mug books," and after the prosecutor thereafter asked the police officer to explain what "mug books" were, defendant's character was placed in evidence. *Stanley v. State*, 250 Ga. 3, 295 S.E.2d 315 (1982).

Trial court did not err by allowing the state to introduce evidence of two prior convictions of defendant after defendant testified that defendant was in Tallahassee, Florida, purchasing drugs to sell, at the time the offenses charged were committed, although defendant argued that this was alibi evidence, not character evidence, and was not offered to show that defendant was of such good character that defendant could not have committed the offense charged. *Laidler v. State*, 180 Ga. App. 213, 348 S.E.2d 739 (1986).

When a defendant admits any prior criminal conduct less than all defendant's criminal offenses, defendant has put defendant's character in issue within the meaning of O.C.G.A. § 24-9-20, with the result that the prosecutor may cross-examine the defendant as to such conduct and may prove other prior convictions. *Spencer v. State*, 180 Ga. App. 498, 349 S.E.2d 513 (1986).

When during counsel's cross-examination of the victim, defense counsel elicited testimony from the victim that when the victim was two years old the victim's family's house caught on fire because the victim's father had been sniffing gas, and the victim and the victim's mother then left him, and where, in cross-examining defendant, the prosecuting attorney began asking him about the victim's

testimony in regard to his sniffing gas, defendant opened the door to such evidence through defense counsel's cross-examination of the victim and the testimony given by the defendant on direct. *Atwell v. State*, 204 Ga. App. 187, 419 S.E.2d 77 (1992).

When prior to the state's questioning of defendant about defendant's demotion, defendant's trial counsel, upon inquiry by the trial court, told the court that counsel anticipated putting defendant's character into evidence, the facts demonstrated that defendant, by way of counsel's statements voluntarily elected to place defendant's character in issue prior to any introduction of character evidence on the part of the state. *Canup v. State*, 216 Ga. App. 828, 456 S.E.2d 215 (1995).

Defendant cannot intentionally testify regarding defendant's community volunteer work with the youth and the elderly in the community and then argue that defendant did not intentionally put defendant's character in issue. *Campbell v. State*, 221 Ga. App. 105, 470 S.E.2d 503 (1996).

With numerous questions to the state's and defendant's own witnesses, defendant opened the door to defendant's character; thus, the state was permitted to respond with evidence of the prior conviction. *Hill v. State*, 243 Ga. App. 124, 532 S.E.2d 491 (2000).

Trial court did not err in permitting the admission of evidence during cross-examination of the defendant about a prior conviction based on a nolo contendere plea to the offense of giving false information to an officer since, on direct examination, the defendant stated that the defendant had the "most respect for police officers" and that the defendant used to be a corrections officer. *Payne v. State*, 248 Ga. App. 158, 545 S.E.2d 336 (2001).

When defendant testified that defendant never confronted anyone, always walked away from violent confrontations, and was known in the community as a nonviolent person, defendant placed defendant's character in issue, allowing the admission of defendant's prior convictions for violent crimes under O.C.G.A. § 24-9-20(b). *Carswell v. State*, 263 Ga. App. 833, 589 S.E.2d 605 (2003).

By stating that the defendant was a person

who tried not to hurt anyone, the defendant put the defendant's character into issue under former O.C.G.A. § 24-9-20(b). Accordingly, it was not error to allow the state to introduce evidence of the defendant's armed robbery convictions. *Allen v. State*, 292 Ga. App. 133, 663 S.E.2d 370 (2008), *aff'd*, 286 Ga. 273, 687 S.E.2d 417 (2009).

Mistrial required. — Trial court erred in denying a mistrial for the injection of character after a state's witness was allowed to state that defendant told the witness that the defendant had been in court "too many times before." *Ochle v. State*, 218 Ga. App. 69, 459 S.E.2d 560 (1995).

Jury instruction on good character. — While testimony as to specific acts may not always be used to raise the character issue, after a defendant personally provides such testimony and is available to the state for cross-examination as to the defendant's own actions and disposition, the defendant's testimony is admissible to show the defendant's good character. As the testimony was admissible and sufficient to raise the character issue, a substantive issue in the case, the trial court should have given a jury charge, following the defendant's request, to consider evidence of the defendant's good character in reaching the jury's decision. *State v. Braddy*, 254 Ga. 366, 330 S.E.2d 338 (1985).

Character not put in issue. — Testimony by one of the officers who had a search warrant that the officer was there because complaints had been made against defendant was not harmful to defendant, and did not tend to put defendant's character in issue. *Lester v. State*, 90 Ga. App. 43, 81 S.E.2d 894 (1954).

Defendant's statement that defendant lived in a certain county all defendant's life and had not had any whisky trouble there, that defendant had never been arrested for whisky, never been searched, and defendant's house had never been searched, did not put defendant's general character in issue. *Folds v. State*, 90 Ga. App. 849, 84 S.E.2d 584 (1954).

Since defendant did not by defendant's statement put defendant's character in issue but merely denied guilt of the crime with which defendant was charged, the introduction into evidence of defendant's prior guilty pleas was error. *Smith v. State*, 141 Ga. App. 64, 232 S.E.2d 401 (1977).

Defendant's character was not impermissibly placed in issue when a police officer testified at trial that the officer found an available photograph of the subject to show to certain potential witnesses for purposes of identifying defendant, on grounds that such testimony indicated that defendant's photograph was already in police records, implying that defendant had been previously arrested or convicted of another crime. *Woodard v. State*, 155 Ga. App. 533, 271 S.E.2d 671 (1980).

Detective's testimony that the police identified defendant's fingerprint by comparing the fingerprint to a print that the police already had on file did not inject defendant's character into evidence. *Lewis v. State*, 255 Ga. 681, 341 S.E.2d 434 (1986).

During a trial for possession of cocaine, the state offered the defendant's prior conviction for forgery into evidence, arguing that defendant's admission of possessing a gun was illegal by a convicted felon, which was prior criminal conduct and defendant had thus placed defendant's character in issue, but no criminal conduct could be shown until after the prior conviction was admitted into evidence over the objection of the defense counsel, because possession of a gun is presumptively lawful, allowing the prior conviction into evidence in order to place the defendant's character in issue demanded circular logic and defied even the broad parameters of the "simple rule" that when a defendant admits any prior criminal conduct, the prosecutor may cross-examine the defendant as to such conduct and may prove other prior convictions. *Hall v. State*, 180 Ga. App. 210, 348 S.E.2d 736 (1986).

Prosecution did not place a rape defendant's character in issue by questioning the defendant about information in a police accident report on which defendant relied and based defendant's alibi but merely exercised the prosecution's right to cross-examine and attempt to impeach defendant as any other witness could be impeached. *Middlebrooks v. State*, 184 Ga. App. 791, 363 S.E.2d 39 (1987).

When the defendant testifies and admits prior criminal conduct, defendant has not placed defendant's character "in issue" within the meaning of subsection (b) of O.C.G.A. § 24-9-20. Rather, the defendant has raised an issue which may be fully ex-

Evidence of Character or Other**Crimes (Cont'd)****2. Putting Character in Issue (Cont'd)**

plored by the state on cross-examination. *Jones v. State*, 257 Ga. 753, 363 S.E.2d 529 (1988); *Weston v. State*, 216 Ga. App. 806, 456 S.E.2d 214 (1995); *Warren v. State*, 232 Ga. App. 488, 502 S.E.2d 336 (1998).

It is only when a defendant has "put his character in issue," as that term is defined in the context of O.C.G.A. §§ 24-2-2 and 24-9-20(b), that the court is required to give a charge on good character, and when, in a trial for aggravated battery, the defendant's statement that defendant never shot anybody was not responsive to the direct question relating to defendant's defenses of accident and self-defense, which the court did fully charge, the volunteered additional statement, merely repeated on redirect, was not legally sufficient to put defendant's character in issue. *Williams v. State*, 187 Ga. App. 355, 370 S.E.2d 210 (1988).

Defendant's statement that defendant was "not that kind of person" did not operate to place defendant's character in issue so as to open the door to proof of defendant's past criminal record at defendant's trial for rape and aggravated sodomy. *McGuire v. State*, 188 Ga. App. 891, 374 S.E.2d 816 (1988).

When, on direct examination, defendant attempted to explain that defendant possessed marijuana for medicinal purposes, and that defendant smoked marijuana on occasion to relieve headaches and eye problems, this testimony did not place defendant's character in issue within the meaning of subsection (b) of O.C.G.A. § 24-9-20. *Houston v. State*, 192 Ga. App. 73, 383 S.E.2d 571 (1989).

Defendant's testimony that defendant had smoked marijuana and that "I ain't done no burglary. I never have." did not put defendant's character in issue at defendant's trial for burglary so as to permit the introduction of convictions for shoplifting and marijuana-related violations. *Hurst v. State*, 189 Ga. App. 748, 377 S.E.2d 519 (1989).

When defendant appeals convictions of possession of cocaine, possession of less than one ounce of marijuana, and driving under the influence of alcohol, the trial court erred in allowing the state to introduce

evidence that the defendant had been convicted, some three years previously, of the offense of possession of marijuana with intent to distribute, since the state asserted that the prior conviction was admissible to impeach the defendant's testimony, elicited both on direct and on cross-examination, that defendant did not smoke marijuana, despite defendant's objection. *Moses v. State*, 190 Ga. App. 699, 379 S.E.2d 819 (1989).

Witnesses' testimony of prior difficulties between defendant and the victim may have reflected negatively on defendant, but did not place defendant's character in evidence within the meaning of O.C.G.A. § 24-9-20. *Rotino v. State*, 259 Ga. 295, 380 S.E.2d 261 (1989).

In prosecution for armed robbery, questioning directed at defendant's reasons for defendant's "flight" was not rendered improper by the defendant's disclosure that defendant was on parole. *Jones v. State*, 205 Ga. App. 711, 423 S.E.2d 393 (1992).

Because defendant had not placed defendant's character "in issue" within the meaning of O.C.G.A. § 24-9-20, the state properly introduced evidence of a prior drug conviction to negate defendant's specific testimony that defendant had never been in the drug business. *Howard v. State*, 206 Ga. App. 610, 426 S.E.2d 181 (1992).

In a trial for sex offenses, denial of the defendant's motion for a mistrial was proper since the motion was based upon the improper placement of defendant's character in issue when a detective testified about one victim's speculation that the defendant devised defendant's plan to molest the victim while the defendant was in jail. *Shropshire v. State*, 210 Ga. App. 241, 435 S.E.2d 700 (1993).

When defendant did not testify either on direct- or cross-examination in such a way as to admit prior criminal conduct and did not testify in a manner implying that the defendant had no criminal record, the defendant did not place the defendant's character in issue and the trial court erred in admitting the records of defendant's previous convictions. *Hancock v. State*, 210 Ga. App. 528, 437 S.E.2d 610 (1993).

When the apparent intent of the questioning was not to impugn defendant's character but rather to cast doubt on the witness's

credibility, including the witness's denial that any money bag was brought into the witness's apartment, by showing the witness's bias in favor of the witness's brother and the witness's history of coming to the brother's aid, the defendant's character was not put in issue; moreover, even if the jury could infer from the colloquy that defendant had a prior brush with the law, it did not improperly place defendant's character in evidence. *Norman v. State*, 212 Ga. App. 105, 441 S.E.2d 94 (1994).

Defendant did not open the door to evidence of prior convictions when, in a rambling, somewhat unresponsive answer to a question about the defendant having enough money to live on defendant's own, defendant said defendant didn't "convert himself to a criminal life." *Stinson v. State*, 221 Ga. App. 758, 472 S.E.2d 538 (1996).

In a prosecution for trafficking in cocaine, defendant's character was not placed in issue when a police officer was asked if it would have been unusual to find a razor blade in defendant's pocket and the officer replied "No, not in this particular incident." *Menefee v. State*, 226 Ga. App. 725, 487 S.E.2d 489 (1997).

When the defendant testifies and admits prior criminal conduct, the defendant has not placed defendant's character in issue within the meaning of subsection (b) of O.C.G.A. § 24-9-20; rather, defendant has raised an issue which may be fully explored by the state on cross-examination. *Davidson v. State*, 231 Ga. App. 605, 499 S.E.2d 697 (1998).

In a prosecution for Medicaid fraud, testimony of defendant's employee that defendant put too much pressure on the employee and didn't respect the employee as a person did not rise to the level of general bad character evidence. *Bullard v. State*, 242 Ga. App. 843, 530 S.E.2d 265 (2000).

Police officer's testimony that the officer understood an informant's reference to defendant as "Man" to be the use of defendant's street name did not place defendant's character in evidence as there was no evidence indicating how the officer knew defendant's nickname or that defendant had any history with the officer's drug task force, and, thus, did not require the mistrial defendant requested. *Carter v. State*, 261 Ga. App. 204, 583 S.E.2d 126 (2003).

Defendant claimed that another person agreed to pay defendant to take that person to an informant's home, and denied that drugs found in the defendant's cell phone cover belonged to the defendant or that the defendant went to the informant's home to sell drugs; these responses at trial did not raise the question of the defendant's character, and the trial court improperly admitted defendant's prior convictions. *King v. State*, 270 Ga. App. 399, 606 S.E.2d 616 (2004).

Jury was improperly charged that a witness could be impeached by proof that the witness had been convicted of a crime involving moral turpitude since the defendant was the only witness for whom a certified copy of a previous conviction was introduced into evidence and the defendant's conviction should not have been admitted as the defendant had not placed the defendant's character into issue. However, there was not reversible error as the defendant requested the charge on impeachment that included the language the defendant challenged. *Miller v. State*, 281 Ga. App. 354, 636 S.E.2d 60 (2006), cert. denied, 2007 Ga. LEXIS 106 (Ga. 2007).

Child molestation defendant did not put the defendant's good character into issue so as to require a jury charge; the defendant's testimony regarding the defendant's attempts to help the victim was more reasonably construed as an explanation for the inordinate amount of time the defendant spent with the victim than as evidence of good character, and the defendant's testimony regarding the defendant's two part-time jobs only inadvertently placed the defendant's good character into issue. *Kurtz v. State*, 287 Ga. App. 823, 652 S.E.2d 858 (2007), cert. denied, 2008 Ga. LEXIS 184 (Ga. 2008).

In a joint trial wherein a defendant and two codefendants were convicted of armed robbery, the trial court did not err by denying the defendant's motion for a new trial based on the trial court allegedly erroneously admitting character evidence of the defendant as the mere mention that the defendant had been in jail fell short of placing the defendant's character at issue, and a witness's nonresponsive answer to a question did not impact negatively on the defendant's character nor placed defendant's character in issue. *Mathis v. State*, No.

Evidence of Character or Other**Crimes (Cont'd)****2. Putting Character in Issue (Cont'd)**

A09A0215; No. A09A0308; No. A09A0358, 2009 Ga. App. LEXIS 586 (May 20, 2009).

Character not in issue but allowed admission of prior conviction. — Defendant's statement that defendant did not sell drugs did not place defendant's character in issue, but did provide a basis for the admission of evidence of defendant's prior conviction for possession of cocaine with intent to distribute. *Jester v. State*, 229 Ga. App. 490, 494 S.E.2d 284 (1997).

Defendant's character put in issue by prosecution witness. — Rule which permits the prosecution to rebut evidence adduced for the purpose of proving defendant's good character is not affected by the fact that the witness used for the purpose of showing good character was called to the stand by the state. *Johnson v. State*, 84 Ga. App. 745, 67 S.E.2d 246 (1951).

Defendant placing character in issue. — When, during cross-examination, defendant described defendant's characteristics and testified to the lack of past misdeeds, the state was entitled to explore the truth of the statements regardless of whether defendant had placed defendant's character in issue within the meaning of subsection (b) of O.C.G.A. § 24-9-20. *Bryant v. State*, 226 Ga. App. 135, 486 S.E.2d 374 (1997).

Defendant's statement on cross-examination that defendant "didn't rob nobody" opened the door to defendant's character and inquiries about defendant's prior armed robbery convictions. *Morrison v. State*, 232 Ga. App. 846, 502 S.E.2d 470 (1998).

Because defendant admitted to using drugs on direct examination, the state was entitled to fully explore this issue on cross-examination and was entitled to explore the possibility of defendant's desire for drugs as a motive for robbery, even if it incidentally put defendant's character in issue. *Maddox v. State*, 238 Ga. App. 598, 521 S.E.2d 581 (1999).

Trial court did not err in allowing evidence of defendant's prior conviction into evidence because the fact that defendant was on probation was brought out on direct examination by defendant's own attorney

and the defense informed the court that they would call the probation officer as a witness. *Williams v. State*, 246 Ga. App. 347, 540 S.E.2d 305 (2000).

Questions and responses alluding to prior arrests impermissibly placed defendant's character in issue, and when the trial court failed to take any corrective action in fulfillment of the court's duty, the defendant was denied a fair trial. *Richardson v. State*, 199 Ga. App. 10, 403 S.E.2d 877 (1991).

Trial court erred in allowing the state's attorney to question the defendant regarding several previous occasions on which defendant had been arrested on the theory that defendant's character had been placed in issue during an exchange between the state's attorney and the defendant's grandfather. *Parker v. State*, 198 Ga. App. 838, 403 S.E.2d 897 (1991).

Instructions. — It is reversible error for the court to charge the jury that defendant has "undertaken" to put defendant's character in issue, when as a matter of fact defendant in defendant's statement did put defendant's character in issue. *Spikes v. State*, 72 Ga. App. 537, 34 S.E.2d 561 (1945).

Charge on impeachment by proof of conviction was not reversible error even though defendant had not placed defendant's character in issue because of the overwhelming evidence of the appellant's guilt. *Peterson v. State*, 212 Ga. App. 147, 441 S.E.2d 481 (1994).

Whenever there is evidence to support a charge on good character and defendant requests that such a charge be given, the jury must be instructed that the jury may consider good character evidence in the jury's deliberations. *Sapp v. State*, 271 Ga. 446, 520 S.E.2d 462 (1999).

Tendency to put character in issue mitigated by instructions. — Upon the trial of one accused of murder, it was not error to admit signatures to pleas of guilty on two indictments admittedly signed by defendant as a standard for comparison with handwriting on an envelope and letter also introduced in evidence by the state and contended by the state to be in the handwriting of defendant, but denied by defendant, over the objection that this evidence would put defendant's character in issue, even though the indictments themselves also went out to the jury, since the jury was instructed that

the jury were not to consider anything in the two indictments other than signatures of defendant appearing thereon, and only for the purpose of comparison, and that the indictments and pleas of guilty should not be considered by the jury as affecting the character or reputation of defendant. *Hyde v. State*, 196 Ga. 475, 26 S.E.2d 744 (1943).

It was not erroneous for the trial judge to overrule a motion for a mistrial, when, in answer to a question propounded by the prosecution, evidence was elicited from a witness (regarding a prior shooting by the accused) which tended to put the character of the accused in issue, when, upon objection by counsel for the accused, such evidence was excluded and the jury was instructed to disregard the question and the responsive answer. *Joyner v. State*, 208 Ga. 435, 67 S.E.2d 221 (1951).

When during cross-examination counsel for defendant asked a question, the answer to which was complained of as tending to put defendant's character in evidence, and the trial judge, acting immediately, ruled out the evidence, thereby removing the evidence from consideration of the jury, court would not say, under the circumstances, that this action by the trial judge did not afford defendant all the protection to which defendant was entitled under law. *Hubbard v. State*, 208 Ga. 472, 67 S.E.2d 562 (1951).

Evidence of victim's character. — In a homicide prosecution, defendant can introduce proof that deceased was a person of violent and turbulent character only when it is shown *prima facie* that defendant had been assailed by deceased and was honestly seeking to defend oneself. *Robertson v. State*, 124 Ga. App. 119, 183 S.E.2d 47 (1971).

Victim's violent character and general reputation for violence were admissible after the codefendant arguably made a showing that the defendant was honestly seeking to defend oneself rather than to act as the aggressor. *Smith v. State*, 267 Ga. 372, 477 S.E.2d 827 (1996).

Harmless error. — Evidence showing that defendant was willing to be a "bigtime" cocaine dealer was erroneously admitted, but, when the evidence of defendant's guilt was ample and it was highly probable that the placing of defendant's character in issue did not contribute to the jury's verdict, the

error was not harmful. *Hargrove v. State*, 188 Ga. App. 336, 373 S.E.2d 44 (1988).

Failure to give defendant's requested charge on good character was harmless error since it was likely that the jury would not have relied upon defendant's good character to acquit defendant since the state presented evidence of defendant's prior convictions and the evidence of defendant's guilt was overwhelming. *Duvall v. State*, 259 Ga. 801, 387 S.E.2d 880 (1990).

Improper admission of testimony placing defendant's character in evidence was not reversible error since the trial judge gave adequate curative instructions, and the evidence against defendant was overwhelming. *Ayers v. State*, 194 Ga. App. 301, 390 S.E.2d 432 (1990).

When a defendant did not voluntarily place defendant's character in issue, the particular facts and circumstances of this case made it highly probable that testimony regarding the defendant's violent character when drinking did not contribute to the verdict. The erroneously-admitted evidence was cumulative of a fact which had already been established beyond a reasonable doubt. *Washington v. State*, 194 Ga. App. 756, 391 S.E.2d 718 (1990).

Although the defendant's prior burglary conviction, admitted by stipulation of counsel for the purpose of establishing *modus operandi*, could not be considered by the jury for purposes of impeaching the defendant's testimony, the error did not require reversal due to the overwhelming evidence of the defendant's guilt. *Howard v. State*, 202 Ga. App. 574, 415 S.E.2d 45 (1992).

Any error in instructing the jury that a witness could be impeached upon proof of general bad character was harmless as the only person possibly impeached was defendant, who testified that defendant had been admitted to a club although defendant was underage because defendant knew the bouncer; the testimony was so innocuous as to not amount to evidence of bad character as defendant did not state that defendant lied to get in, cheated to get in, or broke any laws. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

In the absence of evidence connecting the defendant to the injuries depicted in a photograph of the defendant's love interest, the photo was not appropriate impeachment

Evidence of Character or Other

Crimes (Cont'd)

2. Putting Character in Issue (Cont'd)

evidence, and the trial court erred in admitting it; however, the error was harmless because eyewitness testimony identified the defendant as the person who shot the victim multiple times while the victim lay on the ground partially paralyzed, and it was highly probable that the erroneous admission of the photograph into evidence did not contribute to the jury's verdict and the judgment of conviction entered against the defendant. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

3. Use of Evidence of Other Crimes

Evidence of codefendant's transactions admissible. — There was no call for a mistrial based on evidence of similar transactions since the state never suggested, nor would it be inferable from any of the evidence, that defendant was implicated in any way in the second count in which defendant's codefendant was charged. *Ealy v. State*, 203 Ga. App. 219, 416 S.E.2d 559 (1992).

Prior conviction admissible to rebut specific testimony. — Although the defendant did not put the defendant's "character into issue" within the meaning of subsection (b) of O.C.G.A. § 24-9-20, it was proper to allow evidence of a prior drug possession charge to disprove defendant's statement that the defendant did not use drugs. The introduction of the prior conviction was permissible since the state was rebutting specific testimony. *Sanders v. State*, 199 Ga. App. 671, 405 S.E.2d 727 (1991); *Thrasher v. State*, 243 Ga. App. 702, 534 S.E.2d 439 (2000).

Evidence of independent crimes is admissible for limited purposes if two conditions are met: first, there must be evidence that the defendant was in fact the perpetrator of the independent crime. Second, there must be sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tends to prove the latter. If these conditions are satisfied, evidence concerning the independent crimes may be admitted for the purposes of showing, among other things, identity, motive, plan, scheme, bent of mind, intent, and course of conduct. *Kilgore v.*

State, 251 Ga. 291, 305 S.E.2d 82 (1983); *Lord v. State*, 199 Ga. App. 814, 406 S.E.2d 137 (1991).

Evidence of independent offenses may be admitted if the state introduces the evidence for a proper purpose, if there is sufficient evidence to establish that the defendant actually committed the independent offenses, and if there is sufficient similarity between the charged offense and the independent offenses. *Henderson v. State*, 204 Ga. App. 884, 420 S.E.2d 813 (1992).

Conviction improperly admitted for impeachment. — Defendant's prior conviction was improperly admitted as the timing of defendant's prior conviction was not inconsistent with defendant's trial testimony that defendant was "in the Persian Gulf" at the time of the codefendant's prior drug offense; the error was not harmless as the evidence of defendant's cocaine trafficking conviction, while sufficient, was not overwhelming. *Patten v. State*, 275 Ga. App. 574, 621 S.E.2d 550 (2005).

Use of evidence of other crimes held proper. — Question to one of defendant's witnesses who had testified as to defendant's good character, on cross-examination by counsel for the state, as to whether it would affect the witness's opinion of defendant's reputation if the witness knew that the defendant carried a pistol in defendant's bosom since there was evidence by at least one witness that defendant was carrying a pistol around in the bosom of the defendant's dress prior to the homicide, was a proper one under the circumstances in which it was asked. *Jones v. State*, 88 Ga. App. 330, 76 S.E.2d 810 (1953).

When defendant was on trial for the offense of murder, and there was evidence tending to show that the defendant killed the deceased in the commission of a robbery, and also that on the occasion in question the defendant came to the home of the deceased in an automobile and left by the same conveyance, evidence that the defendant later admitted stealing the automobile in a different county tended to illustrate defendant's state of mind at the time of the homicide, and to corroborate the other evidence tending to show robbery as the motive, and was not subject to objection on the grounds that it was irrelevant and prejudicial, and placed defendant's character in

issue. *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 2d 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976).

In the defendant's prosecution for the murder of his present wife, evidence that the defendant had shot his former wife in the shoulder with a pistol was admissible to show malice, intent, motive, and bent of mind and did not impermissibly place the defendant's character in issue. *Clark v. State*, 255 Ga. 370, 338 S.E.2d 269 (1986).

Evidence of similar crimes held to be properly admitted. — See *Anderson v. State*, 184 Ga. App. 293, 361 S.E.2d 270 (1987); *Flowers v. State*, 191 Ga. App. 396, 381 S.E.2d 768 (1989).

When a defendant, on trial for trafficking in cocaine, volunteered that the defendant tried to flee in a prior similar transaction case because the defendant was on parole, the trial court did not err in permitting the state to ask what crime the defendant had been paroled from, once the defendant had interjected the fact. *Head v. State*, 195 Ga. App. 445, 393 S.E.2d 730 (1990).

When defendant was prosecuted for a drug offense arising out of defendant's attempt to deliver cocaine concealed in a box of toothpaste to a jail inmate, evidence of a similar transaction involving the defendant's codefendant at the jail five months later was admissible. *Riley v. State*, 196 Ga. App. 148, 395 S.E.2d 394 (1990).

In a prosecution for driving under the influence, failure to stop at a stop sign, violating the open container law, and improper lane usage, evidence that defendant previously drove while under the influence of alcohol, and with an open container in the car, was admissible as circumstantial evidence of the defendant's bent of mind and course of conduct on the night in question. *McCullough v. State*, 230 Ga. App. 98, 495 S.E.2d 338 (1998).

Mistrial was not required in a prosecution for selling and trafficking in cocaine since the defendant testified at length on direct examination that the defendant arranged numerous drug buys for the police and that the defendant was threatened and attacked by individuals who were arrested as a result of the defendant's aid and such testimony opened the door to the prosecutor's ques-

tions about how the defendant was able to arrange those drug buys and whether any danger the defendant faced could have come from the defendant's involvement in other drug transactions. *Satterfield v. State*, 248 Ga. App. 479, 546 S.E.2d 859 (2001).

Because defendant's prior guilty pleas were made with assistance of counsel and were voluntary, the trial court did not err in admitting the pleas to show aggravating circumstances during sentencing. *Sampson v. State*, 271 Ga. App. 206, 609 S.E.2d 110 (2004).

Evidence of more convictions than defendant testified to. — When defendant testified to three prior convictions, the court properly allowed evidence of a fourth conviction as impeachment. *Bounds v. State*, 207 Ga. App. 665, 428 S.E.2d 673 (1993). But see *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Evidence of incarceration admissible. — Evidence introduced regarding defendant's incarceration under another name was relevant to the charge of giving a false name and was not objectionable based upon O.C.G.A. § 24-9-20. *Agony v. State*, 226 Ga. App. 330, 486 S.E.2d 625 (1997).

Evidence of parole status. — Assuming that defendant did not, merely by volunteering that defendant was on parole, place defendant's character "in issue" within the meaning of subsection (b) of O.C.G.A. § 24-9-20 so as to permit rebuttal by the state, defendant nevertheless subjected oneself to a through and sifting cross-examination by the state on that point. *Wilson v. State*, 231 Ga. App. 525, 499 S.E.2d 911 (1998).

Similarity to previous offenses. — There is no requirement that a previous offense be absolutely identical to the one being prosecuted so as to make the offense admissible. *Blige v. State*, 205 Ga. App. 133, 421 S.E.2d 547 (1992), aff'd, 263 Ga. 244, 430 S.E.2d 761 (1993).

Similarity to other conduct. — Showing excerpt of a videotape found in defendant's possession which depicted the conduct with which defendant was charged was not error since it was relevant to defendant's bent of mind and modus operandi. *Rushin v. State*, 269 Ga. 599, 502 S.E.2d 454 (1998).

Trial court did not err in admitting the similar transaction evidence as the evidence

Evidence of Character or Other Crimes (Cont'd)
3. Use of Evidence of Other Crimes (Cont'd)

described acts remarkably similar to those with which defendant was charged; the victims' older sister testified that defendant had forced her to have intercourse with him in a manner similar to that testified to by the victims, and defendant's wife testified that he performed the same deviant sexual act upon her that the victims testified he performed upon them, thus, the evidence was admissible to show defendant's bent of mind, course of conduct, and lustful disposition with respect to the offenses alleged against him. *Beck v. State*, 263 Ga. App. 256, 587 S.E.2d 316 (2003).

Remoteness in time. — Testimony concerning a prior shooting incident (six years before the killing) involving the defendant and the defendant's subsequent murder victim is not too remote in time to have been admissible. *Thurman v. State*, 255 Ga. 286, 336 S.E.2d 746 (1985).

Permitting the prosecutor to ask defendant if the defendant had been arrested on a sex charge subsequent to the incident in question at defendant's trial for child molestation and enticing a child for indecent purposes was reversible error since the sole issue in the case was the credibility of defendant and the alleged victim. *Thomas v. State*, 178 Ga. App. 674, 344 S.E.2d 496 (1986).

Proof of forgery conviction prejudicial. — When evidence of defendant's prior conviction of forgery was admitted during defendant's trial for possession of a controlled substance, since forgery is a crime of moral turpitude which goes directly to the defendant's truthfulness and veracity, the Court of Appeals could not say with certainty that the defendant's conviction for possession of a controlled substance was not unduly influenced by inadmissible evidence of defendant's prior criminal record, and the judgment was reversed. *Hall v. State*, 180 Ga. App. 210, 348 S.E.2d 736 (1986).

Relevance of evidence concerning a previous altercation between defendant and defendant's subsequent murder victim wherein defendant cut the victim with a knife many times on the face and arm (for which defendant was convicted of simple battery) out-

weighs the possible prejudicial effect of such evidence since it sheds light on the defendant's conduct toward the victim. *Cooper v. State*, 256 Ga. 234, 347 S.E.2d 553 (1986).

Possession of firearm by convicted felon. — It is proper under O.C.G.A. § 24-9-20 to try a firearms possession charge, which requires evidence of a prior felony conviction, together with a marijuana and a burglary charge. *State v. Santerfeit*, 163 Ga. App. 627, 295 S.E.2d 756 (1982).

In a prosecution for assault and possession of a pistol by a convicted felon, the testimony of an officer to show defendant's possession of the pistol prior to the date of the assault was admissible. *Fulton v. State*, 232 Ga. App. 898, 503 S.E.2d 54 (1998).

Evidence of defendant's narcotic use admissible to show motive for burglaries. — When a defendant is charged with the robbery or burglary of a pharmacy or drug store, evidence that the defendant used narcotics is admissible since that evidence is relevant to the defendant's motive for committing the crime. *Brock v. State*, 179 Ga. App. 519, 347 S.E.2d 230 (1986).

Court's admission of evidence of prior sexual contact was not error since both the prior incident and the charged crime involved nonconsensual sexual conduct related to younger females in defendant's household, and the prior incident occurred in the same time frame as the onset of the charged crimes. *Yelverton v. State*, 199 Ga. App. 41, 403 S.E.2d 816 (1991).

Proof of crimes involving moral turpitude is admissible to impeach witness who places the witness's character in issue through testimony given by the witness on direct examination. *Emmett v. State*, 199 Ga. App. 650, 405 S.E.2d 707, cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991).

Admission of fingerprint card was error. — In a prosecution for possession of marijuana, it was reversible error to introduce a fingerprint card of defendant that showed the date of a prior arrest and listed charges against the defendant. *Jinks v. State*, 229 Ga. App. 18, 493 S.E.2d 214 (1997).

Parole records admissible. — It was not error to allow the state to introduce into evidence defendant's parole documents after these were taken from defendant's person upon arrest. *Dowdy v. State*, 209 Ga. App. 95, 432 S.E.2d 827 (1993).

Evidence of probation violation. — Record did not support defendant's claim that the state violated O.C.G.A. § 24-9-20 by introducing the issue of defendant's probation violation during cross-examination to show that defendant had prior convictions, and the appellate court found that the trial court did not abuse the court's discretion by denying defendant's motion for a mistrial. *Fernandez v. State*, 263 Ga. App. 750, 589 S.E.2d 309 (2003).

Admissible in cross-examination when defendant raised probation status on direct. — When defendant admitted that defendant was on probation for prior criminal conduct during defendant's direct testimony, it was admissible for the trial court to allow the state, on cross-examination, to explore the nature of defendant's prior probation, including the fact that defendant was on probation for having previously fled from the police, which was what the present trial was about; accordingly, there was no error in this admission of evidence pursuant to O.C.G.A. § 24-9-20(b). *Dyer v. State*, 261 Ga. App. 289, 585 S.E.2d 81 (2003).

No cross-examination on unproved crimes, violent acts. — When the state cross-examines a character witness, the prosecutor may not ask questions as to unproved crimes or acts of violence which are inflammatory, prejudicial, and suggestive of facts not in evidence. *Chisholm v. State*, 199 Ga. App. 746, 406 S.E.2d 112 (1991).

Evidence of specific acts to rebut defendant's character evidence held harmless error. — When defendant's character has been put in issue, it is not permissible in rebuttal to prove specific acts of bad character, except on cross-examination for the purpose of testing the witness's knowledge or to impeach defendant's statement; nevertheless, admission of evidence that the police officer had received reports concerning liquor violations by defendant in rebuttal of evidence that defendant had never been previously arrested for liquor violations, the defendant conceding that the defendant had placed defendant's character in issue as to liquor violations, was not such error as to require reversal. *Johnson v. State*, 84 Ga. App. 745, 67 S.E.2d 246 (1951).

Because the trial court did not commit reversible error when the court erroneously allowed the state to introduce evidence of

defendant's prior misdemeanor convictions under O.C.G.A. §§ 24-2-2 and 24-9-20(b), defendant failed to show that counsel's trial strategies constituted ineffective assistance. *Harris v. State*, 279 Ga. 522, 615 S.E.2d 532 (2005).

Argument to Jury

Editor's notes. — See editor's note at beginning of Judicial Decisions.

Rules generally applicable. — Defendant in a criminal case has the right to make, without interruption, such statement to the jury in the defendant's defense as the defendant sees fit and proper to make. Defendant is not circumscribed, governed, or restricted by the rules controlling admissibility of evidence. It is error to interrupt the defendant and exclude from consideration of the jury a portion of defendant's statement, so long as the defendant confines oneself to the transaction under investigation. The court may, however, prevent the defendant from making wholly irrelevant statements entirely inapplicable to the case. *Bradford v. State*, 67 Ga. App. 462, 21 S.E.2d 108 (1942), later appeal, 69 Ga. App. 856, 26 S.E.2d 848 (1943).

Right to make a statement in the defendant's behalf is a personal right granted to defendant by law, and extends no further than to permit defendant personally to make to the court and jury such statement as defendant deems proper in the defendant's defense. Defendant's counsel has no right to ask the defendant questions while defendant is making defendant's statement. The trial judge, however, in the judge's discretion can permit the defendant's counsel to ask the defendant questions or make suggestions to defendant relating to the defendant's statement, while defendant is making it or when the defendant has concluded it. *Williams v. State*, 220 Ga. 766, 141 S.E.2d 436, answer conformed to, 111 Ga. App. 588, 142 S.E.2d 409 (1965).

Failure of a defendant's wife to testify is not a legitimate subject matter of argument for counsel for the state; although such a comment does not constitute reversible error when the trial court rebukes the prosecuting attorney immediately in the presence of the jury, instructs the jury that it is not necessary for any defendant or the defendant's spouse ever to take the stand, and that

Argument to Jury (Cont'd)

the burden is always upon the state to prove a defendant's guilt beyond a reasonable doubt. *Casey v. State*, 167 Ga. App. 437, 306 S.E.2d 683 (1983).

Denial of right is reversible error. — Making of a statement by defendant, where the defendant introduces no other evidence, entitles the defendant to conclude the argument in the case. This is an important right, and the right's denial will generally cause a reversal of the decision of the lower court. The presumption arising from denial of the right is that the party thus deprived has been injured. *Kelly v. State*, 149 Ga. App. 388, 254 S.E.2d 737 (1979).

Denying defendant the right to make the closing argument was not error since a codefendant had tendered an exhibit into evidence that was admitted without objection during cross-examination of a police officer. *Boston v. State*, 185 Ga. App. 740, 365 S.E.2d 885 (1988).

Defendants may not suggest in argument what defendants saw fit not to put on stand, that there was other witness testimony favorable to their defense, and to nevertheless have benefit of privilege to open and conclude argument to jury. *Sanders v. State*, 156 Ga. App. 44, 274 S.E.2d 88 (1980).

Suggestion that defendants sacrificed testimony to preserve argument. — It would not be proper to intimate to jury that defendants had sacrificed valuable defense witness testimony to preserve procedural right to open and conclude argument to jury. *Sanders v. State*, 156 Ga. App. 44, 274 S.E.2d 88 (1980).

Comment on lack of remorse. — Because there was sufficient evidence for a rational trier of fact to find defendant guilty and a prosecutor's closing argument simply made a reasonable inference based on defendant's lack of remorse, there was no prosecutorial misconduct under O.C.G.A. § 24-9-20(b). *Smith v. State*, 279 Ga. 48, 610 S.E.2d 26 (2005).

In charging jury upon defendant's right to make statement, it is preferable to confine the instruction to the language of the statute. *Garrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948).

Treatment of Defendant as Witness

Defendants' testimony should be given the same weight and credit and be considered on the same basis and under the same rules as any other witness in the case. *Burgan v. State*, 59 Ga. App. 524, 1 S.E.2d 603 (1939).

Sworn testimony of defendant has same evidentiary value as testimony of any other witness. *Robertson v. State*, 124 Ga. App. 119, 183 S.E.2d 47 (1971); *Black v. State*, 230 Ga. 614, 198 S.E.2d 314 (1973); *Jester v. State*, 131 Ga. App. 269, 205 S.E.2d 444 (1974) (further holding that instruction on weight to be given defendant's testimony is unnecessary).

Jury is authorized to believe part of defendant's statement, though the whole statement is not credible to the jury; and the same thing is true as to the testimony of each and every witness who appears before the jury. *Gray v. State*, 77 Ga. App. 747, 49 S.E.2d 829 (1948); *Stembridge v. State*, 82 Ga. App. 214, 60 S.E.2d 491 (1950); *King v. State*, 151 Ga. App. 762, 261 S.E.2d 485 (1979).

Cross-examination generally. — Statute specifically permits a defendant to be cross-examined as any other witness except as to general bad character or prior convictions. Such cross-examination may be thorough and sifting. *Leonard v. State*, 146 Ga. App. 439, 246 S.E.2d 450 (1978).

Permissible questions. — In a shoplifting prosecution, the trial court did not err in permitting the state's attorney, over an objection that the state shifted the burden of proof, to ask defendant whether the defendant attempted to contact anyone at the store who could corroborate the defendant's testimony that the defendant entered the store with a stolen CD player in order to return the CD player. *Singleton v. State*, 240 Ga. App. 240, 522 S.E.2d 734 (1999).

Permitting cross-examination of defendant before defendant testifies is not necessarily error. *Everett v. State*, 238 Ga. 80, 230 S.E.2d 882 (1976).

Defendant may offer to subject oneself to cross-examination. — While the prosecution may refuse to cross-examine defendant and defendant has the right to refuse to answer any questions asked of the defendant, defendant, nevertheless, has the right to offer to subject oneself to cross-examination. *Smith*

v. State, 215 Ga. 51, 108 S.E.2d 688 (1959).

Impeachment generally. — While a criminal defendant is not subject to impeachment by proof of general bad character or prior convictions until defendant puts defendant's

general good character in evidence, defendant is subject to impeachment the same as any other witness. Favors v. State, 145 Ga. App. 864, 244 S.E.2d 902 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 715.

Am. Jur. Proof of Facts. — Involuntary Confession — Psychological Coercion, 22 POF2d 539.

Custodial Interrogation Under Miranda v. Arizona, 23 POF2d 713.

Invalidity of Suspect's Waiver of Miranda Rights, 42 POF2d 617.

Invalidity of Confession or Waiver of Miranda Rights by Mentally Retarded Person, 42 POF3d 147.

ALR. — Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 ALR 749.

Admissibility of evidence of refusal of accused to comply with order or request to do an act which might aid in establishing his guilt, 35 ALR 1236.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 ALR 991.

Privilege against self-incrimination as applicable to answer to pleadings, 52 ALR 143.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 ALR 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 ALR 1503.

Waiver of immunity from testifying and constitutional provision against self-incrimination, by accomplice testifying for prosecution, 87 ALR 882.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 ALR 389.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 ALR 911.

Right to cross-examine accused as to previous prosecution for or conviction of crime as affecting his credibility, 103 ALR 350; 161 ALR 233.

Admissibility of plea of guilty at preliminary hearing, 141 ALR 1335.

Disclosure by witness of fact or transaction as waiver of his privilege against self-incrimination in respect of details and particulars which will elucidate it, 147 ALR 255.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 ALR 1208.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Constitutional or statutory provision permitting comment on failure of defendant in criminal case to explain or deny by his testimony, evidence or facts against him, 171 ALR 1267.

Suppression before indictment or trial of confession unlawfully obtained, 1 ALR2d 1012.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 ALR2d 631.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 ALR2d 1404.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 ALR2d 1438.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 ALR2d 388.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury, 36 ALR2d 1403.

Privilege against self-incrimination as to testimony before grand jury, 38 ALR2d 225.

Cross-examination of character witness for accused with reference to particular acts or crimes, 47 ALR2d 1258.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 ALR2d 521.

Sufficiency of witness's claim of privilege against self-incrimination, 51 ALR2d 1178.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 ALR2d 1030; 29 ALR5th 1.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 ALR2d 431.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 ALR2d 463.

Duty of court to inform accused who is not represented by counsel of his right not to testify, 79 ALR2d 643.

Comment on accused's failure to testify by counsel for codefendant, 1 ALR3d 989.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 ALR3d 990.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation, 10 ALR3d 1054.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 ALR3d 723.

Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial, 16 ALR3d 726.

Violation of federal constitutional rule (*Griffin v. California*) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 ALR3d 1093; 32 ALR4th 774.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under *Miranda v. Arizona*, 25 ALR3d 1076.

Privilege against self-incrimination as

ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

Propriety of requiring accused to give handwriting exemplar, 43 ALR3d 653.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 ALR3d 548.

Refusal to answer questions before state grand jury as direct contempt of court, 69 ALR3d 501.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 ALR3d 325.

Admissibility, in state probation revocation proceedings, of incriminating statement obtained in violation of *Miranda* rule, 77 ALR3d 669.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 ALR3d 706.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 ALR3d 230.

Requiring defendant in criminal case to exhibit self, or perform physical acts, during trial and in presence of jury, 3 ALR4th 374.

Cross-examination of character witness for accused with reference to particular acts or crimes — modern state rules, 13 ALR4th 796.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error — modern cases, 32 ALR4th 774.

Admissibility of evidence of accused's membership in gang, 39 ALR4th 775.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding — post-Luce cases, 80 ALR4th 1028.

Admissibility of evidence of prior physical acts of spousal abuse committed by defen-

dant accused of murdering spouse or former spouse, 24 ALR5th 465.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 ALR5th 319.

Admissibility, under Rule 404(b) of Federal Rules of Evidence (28 USC Appx.) of evidence of accused's prior use of illegal drugs in prosecution for conspiracy to distribute such drugs, 114 ALR Fed. 511.

24-9-21. Confidentiality of certain communications.

There are certain admissions and communications excluded on grounds of public policy. Among these are:

- (1) Communications between husband and wife;
- (2) Communications between attorney and client;
- (3) Communications among grand jurors;
- (4) Secrets of state;
- (5) Communications between psychiatrist and patient;
- (6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;
- (7) Communications between patient and a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship; and
- (8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this Code section.

As used in this Code section, the term "psychotherapeutic relationship" means the relationship which arises between a patient and a licensed clinical social worker, a clinical nurse specialist in psychiatric/mental health, a licensed marriage and family therapist, or a licensed professional counselor using psychotherapeutic techniques as defined in Code Section 43-10A-3 and the term "psychotherapy" means the employment of "psychotherapeutic techniques." (Orig. Code 1863, § 3720; Code 1868, § 3744; Code 1873, § 3797; Code 1882, § 3797; Civil Code 1895, § 5198; Civil Code 1910, § 5785; Code 1933, § 38-418; Ga. L. 1959, p. 190, § 1; Ga. L. 1978, p. 1657, § 1; Ga. L. 1995, p. 858, § 1.)

Cross references. — Duty of attorney to maintain confidence of clients, § 15-19-4. Protection of communications between victim assistance personnel and victims,

§ 17-17-9.1. Compelling of spouses to testify in proceedings relating to enforcement of duty of support, § 19-11-69. Privilege of testimony given before medical peer review

organization, § 31-7-133. Disciplining of offender or employee of Department of Offender Rehabilitation for violating confidence of inmate supplying information regarding abuses and wrongdoing in the penal system, § 42-5-36. Confidentiality of communications between accountant and client, § 43-3-32. Confidentiality of communications between psychologist and client, § 43-39-16.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, the ending punctuation was changed in the undesignated paragraph at the end.

Law reviews. — For article on the expansion of the attorney-client privilege in Georgia, see 17 Ga. St. B.J. 150 (1981). For article surveying domestic relations law in 1984-1985, see 37 Mercer L. Rev. 221 (1985). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "The Marital Privileges in Georgia: What You Should Know," see 6 Ga. St. B.J. 8 (2001). For article, "The Absolute Privilege Between Patient and Psychiatrist in Civil Cases," see 6 Ga. St. B.J. 14 (2001). For article, "Lawyers as 'Tattletales': A Challenge to the Broad Application of the Attorney-Client Privilege and Rule 1.6, Confidentiality of Information," see 20 Ga. St. U.L. Rev. 617 (2004). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005).

For note discussing confidential commu-

nication privileges in Georgia, see 2 Ga. St. B.J. 356 (1966). For note, "Conflicts of Interest in the Liability Insurance Setting," see 13 Ga. L. Rev. 973 (1979). For note on the Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege, see 24 Ga. L. Rev. 1115 (1990). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 207 (1995). For note, "Role of Jaffee v. Redmond's 'Course of Diagnosis or Treatment' Condition in Preventing Abuse of the Psychotherapist-Patient Privilege," see 35 Ga. L. Rev. 345 (2000). For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

For comment criticizing exclusion from attorney-client privilege of fact and terms of employment in *In re Wasserman*, 198 F. Supp. 564 (D.D.C. 1961), see 13 Mercer L. Rev. 434 (1962). For comment on *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248 (1971), see 21 J. of Pub. L. 251 (1972). For comment, "Privileged Communications Between Psychiatrist and Patient in Georgia — Termination of the Privilege Upon Death of the Patient," see 9 Ga. St. B.J. 550 (1973). For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COMMUNICATIONS BETWEEN HUSBAND AND WIFE

COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT

COMMUNICATIONS BETWEEN PSYCHIATRIST AND PATIENT

General Consideration

Privilege is absolute, and if a matter is privileged it is not discoverable. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Privileged communications admissible for limited purpose. — Scope of exclusion of former Code 1933, § 38-413 (see O.C.G.A. § 24-9-21) was the content of the communications, whereas documents sought to be

admitted for the limited purpose of comparison of the handwritings were admissible as evidence, as was authorized by former Code 1933, §§ 38-708 and 38-709 (see O.C.G.A. §§ 24-7-6 and 24-7-7). *Guy v. State*, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

Separating privileged from nonprivileged information. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to

delete privileged matter, and this also would be within the inherent power of the court. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Statute does not simply proscribe the channel through which the evidence reaches the jury, but makes the evidence itself inadmissible. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

Waiver of privilege. — Confidential communication, whether orally made or by letter, is privileged, but such privilege may be waived. *McCord v. McCord*, 140 Ga. 170, 78 S.E. 833 (1913).

Third person overhearing communication. — Statute was not intended to forbid one who overhears a conversation between husband and wife from testifying with respect to the conversation. If they are unsuccessful in keeping secret that which they intend each other shall so regard, the mere fact that they did so intend will not render incompetent the testimony of an outsider. *Knight v. State*, 114 Ga. 48, 39 S.E. 928, 88 Am. St. R. 17 (1901). See also *Ford v. State*, 124 Ga. 793, 53 S.E. 335 (1906); *Cocroft v. Cocroft*, 158 Ga. 714, 124 S.E. 346 (1924); *Sims v. State*, 36 Ga. App. 266, 136 S.E. 460 (1927).

Time of objection to testimony. — An objection to testimony on the ground that the testimony was in the nature of confidential communications between husband and wife, and therefore to be excluded under the provisions of statute, comes too late when urged for the first time in the brief of counsel for the plaintiff in error in the reviewing court. *Holloway v. Hoard*, 140 Ga. 380, 78 S.E. 928 (1913); *Maxwell v. Maxwell*, 177 Ga. 483, 170 S.E. 362 (1933).

Patient-physician communications. — Confidential communications excluded from testimony do not include those made by a patient to a physician. *Collins v. Howard*, 156 F. Supp. 322 (S.D. Ga. 1957).

Trial court did not err in admitting the testimony of a family practice physician from whom the defendant sought psychiatric referral two days after an alleged rape and who also consulted with the victim and attempted an examination of her pelvic area. *Barnes v. State*, 171 Ga. App. 478, 320 S.E.2d 597 (1984).

Defendant offered no evidence that the information the defendant provided in the

medical questionnaire was ever imparted to a medical professional so it could not be said that the document constituted a privileged communication within the meaning of paragraphs (5) or (6) of O.C.G.A. § 24-9-21. *Manning v. State*, 231 Ga. App. 584, 499 S.E.2d 650 (1998).

Examples of nonprivileged communications. — Communications between an applicant for a job and the prospective employer, or between an applicant for unemployment insurance and the State Department of Labor, are not privileged communications for purposes of the statute. *Guy v. State*, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

Communications between principal and agent are not privileged, even if such communications ultimately reach the principal's attorney and are used in preparing a defense to litigation arising out of the occurrence forming the subject matter of the communications. *GMC v. Moseley*, 213 Ga. App. 875, 447 S.E.2d 302 (1994).

Open Records Act. — "Secrets of state" privilege did not exempt cost estimates of the DOT from disclosure under the Open Records Act, O.C.G.A. § 50-14-1 et seq. *Hardaway Co. v. Rives*, 262 Ga. 631, 422 S.E.2d 854 (1992).

Out-of-state order prohibiting unprivileged testimony. — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the Full Faith and Credit Clause did not require the federal district court in Georgia to give full effect to the Michigan Court order. *Williams v. GMC*, 147 F.R.D. 270 (S.D. Ga. 1993).

Confidential informants. — Trial court did not abuse the court's discretion in denying disclosure of the identity of a confidential informant who may have seen defendant in the possession of contraband, but who was not present, did not participate in the arrest, and did not take part in the offense. *Leonard v. State*, 228 Ga. App. 792, 492 S.E.2d 747 (1997).

Public policy in Georgia favored nondisclosure of the identity of a confidential informant (CI); because a CI did not participate in a controlled drug buy, the defendant's request to disclose the CI's identity was properly denied; while the defendant argued that the CI was a witness to whether

General Consideration (Cont'd)

or not the defendant consented to a search of the defendant's car, whether the defendant consented was immaterial because an officer was authorized to arrest the defendant for drug possession, and based on that arrest, the officer had the authority to search the car. *Little v. State*, 280 Ga. App. 60, 633 S.E.2d 403 (2006).

Identity of confidential informant. — In a prosecution for possession of cocaine with intent to distribute, the trial court did not err in not revealing the identity of a confidential informant since the informant's testimony was not material to the issue of guilt or punishment as the defendant was not charged with selling cocaine to the informant and the informant was not present during the search and arrest and was neither a participant in nor a witness to the specific offense with which the defendant was charged. *Turner v. State*, 247 Ga. App. 775, 544 S.E.2d 765 (2001).

School records when mental capacity raised as defense. — Pre-trial discovery of defendant's school records was permissible and not in error because defendant, on trial for murder, raised the issue of mental retardation and put defendant's mental capacity at issue, thus causing the affirmative defense of privilege to be waived. *Perkinson v. State*, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005).

Cited in *Bishop v. Bishop*, 124 Ga. 293, 52 S.E. 743 (1905); *Fortenberry v. State*, 175 Ga. 317, 165 S.E. 215 (1932); *Trammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315 (1935); *White v. White*, 182 Ga. 765, 187 S.E. 31 (1936); *Elliott v. Georgia Power Co.*, 58 Ga. App. 151, 197 S.E. 914 (1938); *Williams v. State*, 69 Ga. App. 863, 27 S.E.2d 54 (1943); *Smith v. State*, 203 Ga. 569, 47 S.E.2d 579 (1948); *Sechler v. State*, 90 Ga. App. 700, 83 S.E.2d 847 (1954); *Wills v. Wills*, 215 Ga. 556, 111 S.E.2d 355 (1959); *Farrar v. Glynn-Brunswick Mem. Hosp. Auth.*, 112 Ga. App. 773, 146 S.E.2d 111 (1965); *Bogges v. Aetna Life Ins. Co.*, 128 Ga. App. 190, 196 S.E.2d 172 (1973); *Pierce v. State*, 243 Ga. 454, 254 S.E.2d 838 (1979); *Leggett v. State*, 244 Ga. 226, 259 S.E.2d 476 (1979); *Tiller v. State*, 159 Ga. App. 557, 284 S.E.2d 63 (1981); *Gentry v. State*, 250 Ga. 802, 301

S.E.2d 273 (1983); *Chesser v. State*, 168 Ga. App. 195, 308 S.E.2d 589 (1983); *Polma, Inc. v. Coastal Canvas Prods. Co.*, 199 Ga. App. 616, 405 S.E.2d 531 (1991); *Kennedy v. State*, 205 Ga. App. 152, 421 S.E.2d 560 (1992); *Jones v. Abel*, 209 Ga. App. 889, 434 S.E.2d 822 (1993); *Begner v. State Ethics Comm'n*, 250 Ga. App. 327, 552 S.E.2d 431 (2001); *Nunnally v. State*, 261 Ga. App. 198, 582 S.E.2d 173 (2003); *In the Interest of M.E.*, 265 Ga. App. 412, 593 S.E.2d 924 (2004); *Webb v. State*, 284 Ga. 122, 663 S.E.2d 690 (2008); *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008); *In the Interest of B.H.*, 295 Ga. App. 297, 671 S.E.2d 303 (2008).

Communications Between Husband and Wife

General description of privilege. — Meaning of this provision simply is that neither of the married pair shall be permitted to testify as a witness concerning such communications or to furnish to another, for the purpose of being introduced in evidence, writings of any kind received under the seal of confidence during coverture. *Knight v. State*, 114 Ga. 48, 39 S.E. 928, 88 Am. St. R. 17 (1901); *Lowry v. Lowry*, 170 Ga. 349, 153 S.E. 11 (1930); *Gorman v. State*, 183 Ga. 307, 188 S.E. 455 (1936); *R. & J. Dick Co. v. Bass*, 295 F. Supp. 758 (N.D. Ga. 1968); *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

Rule modified by statute. — Former Code 1933, § 38-1604 (see O.C.G.A. § 24-9-23), which provides that a spouse shall be competent, although not compellable, to testify against the other spouse, has modified former Code 1933, § 38-418 (see O.C.G.A. § 24-9-21). *Hubbard v. State*, 145 Ga. App. 714, 244 S.E.2d 639 (1978); *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987).

Privilege belongs to communicator and is perpetual. — Since the privilege belongs to the communicator, the privilege cannot be waived by the administrator nor by the surviving spouse since communications between husband and wife survive death and are protected forever. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

Bank statement addressed to wife did not constitute "communication" between hus-

band and wife. *Leventhal v. Seiter*, 208 Ga. App. 158, 430 S.E.2d 378 (1993).

Husband and wife communication must be confidential to be privileged. — Paragraph (1) of O.C.G.A. § 24-9-21 provides that communications between a husband and wife are inadmissible on grounds of public policy; however, for this exclusion to apply, the communications must be confidential. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983), *aff'd in part and rev'd in part*, 813 F.2d 1140 (11th Cir.), *cert. denied*, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987).

Every spoken word between a husband and wife is not confidential; if the communication is an impersonal one not made in reliance on the marital relationship, the communication is not confidential, and no policy reason bars its admissibility. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983), *aff'd in part and rev'd in part*, 813 F.2d 1140 (11th Cir.), *cert. denied*, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987).

“Confidential communications” defined. — “Confidential communications” are those when one spouse derives knowledge from the other by virtue of the special confidence of the husband-wife relationship. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983), *aff'd in part and rev'd in part*, 813 F.2d 1140 (11th Cir.), *cert. denied*, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987).

Nonprivileged communications generally. — Nonprivileged communications relate to husband-wife conversations through third parties or in the presence of third parties, when the communication constitutes a ground of action by one spouse against the other, or when the conversation was of an impersonal nature spoken or performed without the special confidence one spouse reposes in the other in the marital relation. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

No protection for financial documents prepared by third party. — Although communications between a husband and a wife are confidential and privileged, such protections do not apply to financial documents either prepared or seen by third parties; a trial court did not err in granting a motion to compel an employee and the husband to produce financial documents such as checks, account statements, and tax returns.

Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77 (2006).

Indifference of one spouse to presence of the other. — When the act is done solely for the sake of doing the act, the indications being that the husband is indifferent to the presence of the wife, there is no communication. In such cases the privilege should not be allowed to deprive the court of the evidence. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

Presence of third party. — Wife can testify as to what was said by the husband to some other person in the presence of the wife. *R. & J. Dick Co. v. Bass*, 295 F. Supp. 758 (N.D. Ga. 1968).

Testimony of third party as to communications. — O.C.G.A. § 24-9-21 does not prohibit testimony about communications between spouses by someone who overheard the communication. *Helton v. State*, 217 Ga. App. 691, 458 S.E.2d 872 (1995).

Calling wife as defense witness did not waive husband's privilege. — Defendant was entitled to have the testimony of his wife excluded based upon his marital privilege as provided by O.C.G.A. § 24-9-21 as proper objection was made at trial. Although under certain circumstances the marital privilege may be waived by the communicator, the act of calling his wife as a defense witness did not, in and of itself, waive his privilege regarding protected confidential communications as the direct examination did not in any way touch on the privileged matters or open the door thereto. *White v. State*, 211 Ga. App. 694, 440 S.E.2d 68 (1994).

No evidence establishing element of confidentiality. — Though the rule establishes the wife as an incompetent witness for or against the husband in regard to any information derived from his confidence in her, when there is nothing to indicate that the knowledge was derived from any special confidence which one spouse reposed in the other, or that there was any occasion for the one spouse to make to the other any confidential communication concerning the matter, the knowledge gained is not privileged. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

Testimony as to injury of husband. — Wife of the injured party is not incompetent to testify as to the nature of the injury received by him and its effect upon his physical

Communications Between Husband and Wife (Cont'd)

condition when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife. *Macon Ry. & Light Co. v. Mason*, 123 Ga. 773, 51 S.E. 569 (1905).

Testimony as to child molestation. — With regard to a defendant's conviction on child molestation charges, the defendant's trial counsel was not deficient in failing to object to certain testimony of the defendant's ex-wife, the mother of the victim, concerning a prior bad act on the ground that the testimony violated the marital privilege, because the defendant was not on trial for the prior act; therefore, the ex-wife was competent, although not compellable, to testify concerning the prior act, and thus since the ex-wife did not invoke the privilege and was able to waive the privilege by voluntarily taking the stand and testifying, trial counsel was not ineffective for failing to object to the testimony of the ex-wife on the basis of marital privilege. *Nichols v. State*, 288 Ga. App. 118, 653 S.E.2d 300 (2007).

No privilege for mere acts or gestures. — Husband, who took a container of crack cocaine from an evidence file cabinet in the district attorney's office while his wife was present in the room, could not invoke the husband-wife privilege, where there was no clear proof that his acts or gestures were as much a communication as would have been his words to her describing the act. *Brown v. State*, 199 Ga. App. 188, 404 S.E.2d 469, cert. denied, 199 Ga. App. 905, 404 S.E.2d 469 (1991).

Wife's statements in a summary judgment affidavit as to the reasons her husband did not want to buy property were protected by the marital communications privilege. *Century 21 Pinetree Properties, Inc. v. Cason*, 220 Ga. App. 355, 469 S.E.2d 458 (1996).

Rule was applied to exclude evidence in the following cases. — See *Keaton v. McGwier*, 24 Ga. 217 (1858) (testimony that might discredit spouse's testimony); *McKie v. State*, 165 Ga. 210, 140 S.E. 625 (1927) (letters written by wife to husband); *Gorman v. State*, 183 Ga. 307, 188 S.E. 455 (1936) (facts that might discredit spouse's testimony); *Georgia Int'l Life Ins. Co. v. Boney*,

139 Ga. App. 575, 228 S.E.2d 731 (1976) (writing from one spouse to another concerning domestic relationships).

Waiver of privilege. — Spouse may waive his or her privilege by voluntarily taking the stand and testifying. *Duncan v. State*, 232 Ga. App. 157, 500 S.E.2d 603 (1998).

Trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to O.C.G.A. §§ 24-9-21 and 24-9-23 because the spouse was aware of the privilege but never asserted it to the trial court, and it was assumed that the spouse waived the right not to testify; the spouse was informed by defense counsel of the spouse's rights under the marital privilege, and the spouse did not assert the privilege even after defense counsel voiced objections to the testimony in the spouse's presence. *Geter v. State*, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

No common law marriage found. — When there was evidence to support the trial court's finding that defendant and the witness did not have a common law marriage, there was no error in allowing the witness to testify. *Abrams v. State*, 272 Ga. 63, 525 S.E.2d 86 (2000), overruled on other grounds, *Baugh v. State*, 276 Ga. 736, 585 S.E.2d 616 (2003).

Announcement of victim's name as witness. — Knowing that the victim was going to invoke the marital privilege, defendant was not entitled to a mistrial because defendant did not timely object to the announcement of defendant's wife's name as a witness; in any event, the mere announcement of the victim's name, without more, did not constitute the creation by the state of an "unwarranted negative inference" against defendant. *Carter v. State*, 275 Ga. App. 483, 621 S.E.2d 503 (2005).

E-mail communication not subject to marital privilege. — An e-mail from the defendant to the defendant's husband was not evidence given under compulsion by the defendant's spouse and so was not subject to the marital privilege under O.C.G.A. § 24-9-23(b) in a case charging the defendant with malice murder and related offenses in connection with the death of the defendant's 11-year-old step-daughter. *Reaves v. State*, 284 Ga. 236, 664 S.E.2d 207 (2008).

Communications Between Attorney and Client

Purpose of privilege. — Attorney-client privilege is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against the client in controversies with third persons, and it is designed to secure the client's confidence in the secrecy of the client's communication, and to promote greater freedom of consultation between clients and their legal advisers, and its object is to secure freedom in communication between attorney and client in order that the former may act with full understanding of the matters in which the attorney is employed. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

A narrow construction of the attorney-client privilege, inasmuch as the exercise of the privilege results in the exclusion of evidence, comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is "the object of all legal investigation." *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (2000).

Privilege not to be used to carry out crimes. — Privileged communication may be a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society, frauds, or perjuries. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Court should confine the attorney-client privilege to its narrowest permissible limits under the statute of its creation. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Revealing location of victim's body. — While the state is likely correct that the defendant's attorney had a positive obligation to reveal the location of the victim's body to law enforcement officers, it does not follow of necessity that the state should disclose to the jury that the source of the information that led to the discovery of the body was the attorney. Offering such testimony is a dangerous practice, and one the Supreme Court disapproves. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261,

106 L. Ed. 2d 606 (1989).

Rule modified by statute. *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987).

Privilege extends to attorney's work product. — Once the attorney-client relationship obtains as to a particular matter, the attorney may have investigations made or statements taken under the attorney's direct instruction and supervision, and these may be deemed a part of what the attorney has done, and thus a part of the attorney's work product, which may not be discovered absent a showing of necessity. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Matters communicated to attorney by source other than client. — Attorney-client privilege does not encompass matters of which the attorney has or gains knowledge through some source other than the communications of the attorney's client in preparation for litigation. If the attorney has knowledge from another source, testimony concerning that is proper. *Buffington v. McClelland*, 130 Ga. App. 460, 203 S.E.2d 575 (1973).

Placing material with attorney does not invoke privilege. — One cannot render privileged that which is otherwise not privileged merely by placing it in the hands of an attorney. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Mere fact of employment between attorney and client is not protected from disclosure. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Because a client's identity is not covered by the attorney-client privilege, the trial court correctly declined to permit an attorney to use the privilege to justify the attorney's refusal to reveal the identity of a client who has requested that the client's identity be kept confidential. *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (2000).

Terms of attorney's contract do not come within the statutory privilege. *Bank of Lumpkin v. Farmers State Bank*, 161 Ga. 801, 132 S.E. 221 (1926).

Facts attending execution of contract. — These provisions have no application to competency of an attorney as a witness with

Communications Between Attorney and Client (Cont'd)

respect to essential facts attending execution of a contract in the preparation and as to the attestation of which the attorney rendered professional service. *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949); *Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966).

Facts attending execution of will. — Statute has no application to the competency of an attorney as a witness with respect to essential facts attending execution of a will. *Manley v. Combs*, 197 Ga. 768, 30 S.E.2d 485 (1944).

Attorney-client privilege does not cover the identity of documents a party reviews to prepare for a deposition. *McKinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994).

Relation of attorney and client does not exist between prosecutor and prosecuting witness for the state, and therefore communications had between such witness and the prosecutor are not confidential, and on the trial of the defendant are admissible in evidence to prove contradictory statements. *Vernon v. State*, 49 Ga. App. 187, 174 S.E. 548 (1934).

Testimony of coconspirator's lawyer barred in criminal proceeding. — Criminal defendant's request to call defendant's coconspirator's counsel to rebut the coconspirator's testimony that the coconspirator had not been offered any "deal" by the state in exchange for the coconspirator's testimony was properly denied because the testimony defendant sought to elicit came within the attorney-client privilege. *Avery v. State*, 244 Ga. App. 177, 534 S.E.2d 897 (2000).

Presence of third party. — When the communication made by a client to an attorney is in the presence of the other party to a contract, and it comes within the attorney's knowledge, such communication is not embraced in the rule which prohibits that it may be given in evidence by the attorney when called on so to do. *Griffin v. Williams*, 179 Ga. 175, 175 S.E. 449 (1934).

Corporation can avail itself of the attorney-client privilege. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Burden is upon a corporation seeking to invoke the attorney-client privilege to establish that corporate counsel's advice was priv-

ileged legal advice and thus not subject to discovery. *Southern Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

No distinction between advice on specific cases and day-to-day business. — Attorney-client privilege statutes make no distinction between legal advice given to a corporate client in regard to specific cases pending and legal advice concerning day-to-day business matters. *Southern Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

Attorney-client privilege is applicable to a corporate employee's communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of the employee's corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents; moreover, the corporation has the burden of showing that the communication in issue meets all of the above requirements. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Communications between attorney and client are excluded from consideration of public policy and the privilege applies to communications to the officers and employees of a corporate client as well as to individual clients. *Associated Grocers Coop. v. Trust Co.*, 158 Ga. App. 115, 279 S.E.2d 248 (1981).

Habeas proceeding. — Habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine and the state is entitled only to counsel's documents and files relevant to the specific allegations of ineffectiveness. *Waldrup v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000).

Where no request is made by accused or accused's counsel to confer privately without the presence of the deputy marshal, the mere existence of such right would not affect the validity of the conviction since there must be denial of such right by the trial judge before the accused may complain.

Fowler v. Grimes, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Statement ceases to be privileged when renounced by client. — When defendant in a murder trial testified, without objection, at defendant's previous trial that defendant had lied to defendant's attorney by telling the attorney that someone at the scene of the shooting had handed defendant the murder weapon, defendant's testimony caused the information to cease to be a privileged communication, and proof of the statement at defendant's later trial became permissible. *Felts v. State*, 244 Ga. 503, 260 S.E.2d 887 (1979).

Penalties for breaching confidence. — There are no statutory criminal penalties visited upon an attorney who in violation of the attorney's ethical relation to the attorney's client divulges a confidential communication. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Inadvertent disclosure to defense counsel of a letter from plaintiff to plaintiff's attorneys did not waive the attorney-client privilege. *Lazar v. Mauney*, 192 F.R.D. 324 (N.D. Ga. 2000).

Testimony sought fell within attorney-client privilege. — Testimony that defendant sought from a codefendant's lawyer relating to an alleged deal to provide substantial assistance to the prosecution fell within the attorney-client privilege because there was no evidence of any fraud or crime; although the defendant insisted that the codefendant committed perjury when by testifying that the codefendant's attorney did not discuss "substantial assistance" with the codefendant, these arguments were merely speculative. *Pihlman v. State*, 292 Ga. App. 612, 664 S.E.2d 904 (2008), cert. denied, 2008 Ga. LEXIS 977 (Ga. 2008).

Communications Between Psychiatrist and Patient

Definition of psychiatrist. — "Psychiatrist" in O.C.G.A. § 24-9-21 means a person licensed to practice medicine, or reasonably believed by the patient so to be, who devotes a substantial portion of his or her time engaged in the diagnosis and treatment of a mental or emotional condition, including drug or alcohol addiction. *Wiles v. Wiles*, 264 Ga. 594, 448 S.E.2d 681 (1994).

Prerequisite relationship. — Before the privilege may be invoked, the requisite relationship of psychiatrist and patient must have existed to the extent that treatment was given or contemplated. *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248 (1971), for comment, see 21 J. of Pub. L. 251 (1972). *Strickland v. State*, 260 Ga. 28, 389 S.E.2d 230 (1990); *Mrozinski v. Pogue*, 205 Ga. App. 731, 423 S.E.2d 405 (1992).

When a party goes to a psychiatrist on the party's own volition for the purpose of gaining professional psychiatric assistance, this creates the requisite confidential relationship of psychiatrist and patient to claim the privilege. *Kimble v. Kimble*, 240 Ga. 100, 239 S.E.2d 676 (1977).

Existence of a "voluntary" psychiatrist-patient relationship renders any testimony whatsoever by the psychiatrist excludable from evidence at the election of the patient. *Wilson v. Bonner*, 166 Ga. App. 9, 303 S.E.2d 134 (1983).

When the defendant, the father of a child, retained a psychiatrist and paid the psychiatrist's fee for the purpose of obtaining testimony for use in a contempt action for visitation rather than for the purpose of obtaining psychiatric treatment or counseling, no psychiatrist-patient relationship existed as contemplated by O.C.G.A. § 24-9-21 and the psychiatrist was properly permitted to testify in a criminal action against the defendant. *Fulbright v. State*, 194 Ga. App. 827, 392 S.E.2d 298 (1990).

Communication with referred therapist for evaluation in sexual abuse case was privileged. — Although the mother had been referred to the therapist for evaluation in the sexual abuse case, the mother's communications with the therapist during therapy were privileged under O.C.G.A. § 24-9-21; the therapist provided mental health treatment to the mother, as the therapist had seen the mother for counseling for two and a half years, the mother had not missed a session, and the mother found the treatment to have been beneficial. In the Interest of I.M.G., 276 Ga. App. 598, 624 S.E.2d 236 (2005).

Parent's standing to sue for violation of child's privilege. — Father had standing to file suit for unauthorized disclosure of his minor daughter's clinical records and for

Communications Between Psychiatrist and Patient (Cont'd)

unauthorized release of privileged material regarding his minor daughter. *Mrozinski v. Pogue*, 205 Ga. App. 731, 423 S.E.2d 405, cert. denied, 205 Ga. App. 901, 423 S.E.2d 405 (1992).

Nature of privilege. — As a matter of public policy, Georgia excludes communications between psychiatrist and patient. This privilege is absolute, although it may be waived. Without a waiver, there is no basis for the admission of testimony about communications between psychiatrist and patient. *Freeman v. State*, 196 Ga. App. 343, 396 S.E.2d 69 (1990).

Protected communications. — Georgia law has an exceedingly strict view as to what are privileged communications; not only “communications” but “admissions” are privileged; what is protected is not merely words, but “disclosures made in confidence.” *Mrozinski v. Pogue*, 205 Ga. App. 731, 423 S.E.2d 405, cert. denied, 205 Ga. App. 901, 423 S.E.2d 405 (1992).

Communications with physicians generally distinguished. — Paragraph (5) of O.C.G.A. § 24-9-21 read with O.C.G.A. § 24-9-40 reflects that the physician shield law applies to physicians generally but requires physicians to release information upon proper order, whereas the confidentiality of communications to psychiatrists is protected by public policy and such communications are expressly excepted from the shield statute. *Gilmore v. State*, 175 Ga. App. 376, 333 S.E.2d 210 (1985).

Communications with mental health professionals other than psychiatrists or psychologists. — When defendant’s counselors were not psychiatrists nor clinical psychologists, defendant’s communications with the counselors were not privileged. While it is arguable that disclosures made in confidence to mental health professionals other than psychiatrists and psychologists ought to be privileged, the legislature has not seen to make them so. *Lipsey v. State*, 170 Ga. App. 770, 318 S.E.2d 184 (1984).

Communications absolutely privileged. — When plaintiff’s decedent took an overdose of prescription drugs and subsequently died during hospitalization, prior communications between decedent as patient and de-

cedent’s psychiatrist were not discoverable as objective evidence of decedent’s mental state. *Dynin v. Hall*, 207 Ga. App. 337, 428 S.E.2d 89 (1993).

Communications to coordinate care were proper. — Trial court properly directed a verdict in favor of the defendant, a psychiatrist, with regard to the plaintiff’s invasion of privacy complaint, which asserted that the defendant’s letters to the other treating physicians of the plaintiff violated the plaintiff’s right to privacy, because the evidence established that the information in the three letters disclosed to the plaintiff’s other treating physicians was disclosed in an attempt to coordinate care; the sharing of the information did not amount to a public disclosure and there was no evidence that the other treating physicians shared the information with anyone else. *Haughton v. Canning*, 287 Ga. App. 28, 650 S.E.2d 718 (2007), cert. denied, 2008 Ga. LEXIS 157 (Ga. 2008).

In an action arising from the unauthorized release of plaintiff’s psychiatric records by a hospital authority, under the facts of the case, and because of the strong public policy of maintaining strict compliance with the requirements governing release of psychiatric records, the trial court erred in granting summary judgment to defendants. *Sletto v. Hospital Auth.*, 239 Ga. App. 203, 521 S.E.2d 199 (1999).

If nurse is agent of hospital rather than communicant’s doctor, the doctor’s privilege will not protect communications made to the nurse. *Myers v. State*, 251 Ga. 883, 310 S.E.2d 504 (1984).

Court-appointed psychiatrist may testify. — Psychiatrist appointed by the court for a sanity examination of the defendant may not be regarded as a prosecution witness, but is instead a witness for the court, and the psychiatrist’s testimony as to statements made to the psychiatrist by the defendant during the course of the psychiatrist’s examination of the defendant is admissible. *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248 (1971). For comment, see 21 J. of Pub. L. 251 (1972).

Privileged relationship between psychiatrist and patient does not exist in criminal cases when defendant has pleaded not guilty by reason of insanity, and the psychiatrist was appointed by the court to determine the

issue of sanity. *Kimble v. Kimble*, 240 Ga. 100, 239 S.E.2d 676 (1977).

When a psychiatrist or psychologist is appointed by the court to conduct a preliminary examination of a criminal defendant, the psychiatrist or psychologist is a witness for the court, and the privilege concerning communications with a client does not apply. *Christenson v. State*, 261 Ga. 80, 402 S.E.2d 41 (1991), cert. denied, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130 (1991).

Since the psychologist-patient privilege set forth in O.C.G.A. § 43-39-16 arises only when the patient voluntarily seeks treatment, the communications between a mother and a psychologist in the course of a court-ordered mental evaluation were not privileged, and there was no error in admitting evidence of that evaluation. *In re L.H.*, 236 Ga. App. 132, 511 S.E.2d 253 (1999), overruled in part by *State v. Herendeen*, 279 Ga. 323, 613 S.E.2d 647 (2005).

Defendant failed to show that trial counsel's failure to object to the admission of court-appointed psychologists' statements was indicative of ineffectiveness and was not a conscious and deliberate trial strategy. *Johnson v. State*, 255 Ga. App. 544, 566 S.E.2d 353 (2002), overruled in part by *State v. Herendeen*, 279 Ga. 323, 613 S.E.2d 647 (2005).

Objective results of court-ordered examination are admissible. — When the examination of defendant by a physician has been ordered by the court at the request of defendant's counsel, communications between defendant and physician are protected, but the objective result of the examination is not so protected, and the objective result of the examination is admissible. *Plummer v. State*, 229 Ga. 749, 194 S.E.2d 419 (1972).

In a proceeding to terminate a guardianship proceeding, even if a psychiatrist-patient relationship existed between the doctor and ward, admission of the doctor's opinion that the ward needed a guardian of the ward's estate was harmless because the testimony was cumulative of other evidence which was properly admitted. *In re Vincent*, 240 Ga. App. 876, 525 S.E.2d 409 (1999).

Cross-examination after testimony about communication. — By calling the doctor as a witness and allowing the doctor to testify as to the mental condition of the accused, the

defense waives the right to object to relevant cross-examination of the doctor on the ground that such matter is privileged communication between patient and psychiatrist. *Fields v. State*, 221 Ga. 307, 144 S.E.2d 339 (1965); *Griggs v. State*, 241 Ga. 317, 245 S.E.2d 269 (1978).

Prosecutor's reference to defendant's right to have psychiatrist not testify was not a violation of defendant's right against self-incrimination. *Willett v. State*, 223 Ga. App. 866, 479 S.E.2d 132 (1996).

Since defendant was not at mental hospital for treatment nor did the record reflect that the defendant received any, the psychiatrist-patient privilege does not apply. *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

Joint counseling statement inadmissible. — Psychiatric-patient privilege applied to statements made by her husband in joint counseling sessions even though the wife requested admission at her trial for his murder. *Sims v. State*, 251 Ga. 877, 311 S.E.2d 161 (1984).

Joint treatment with other persons. — Psychiatrist-patient privilege is not diminished by the fact that the patient sought or contemplated treatment jointly with other persons, or primarily for the benefit of another person who is in treatment by the same psychiatrist. *Mrozinski v. Pogue*, 205 Ga. App. 731, 423 S.E.2d 405, cert. denied, 205 Ga. App. 901, 423 S.E.2d 405 (1992).

Facts of patient treatment and dates not within privilege. — Facts that two hospitals treated defendant as a patient and the dates of those treatments were not within the psychiatrist-patient privilege. *Johnson v. State*, 254 Ga. 591, 331 S.E.2d 578 (1985), cert. denied, 490 U.S. 1072, 109 S. Ct. 2079, 104 L. Ed. 2d 644 (1989).

Clinical record from psychiatric hospital producible, except for privileged communications. — When ex-husband, in a child custody proceeding, duly subpoenaed ex-wife's clinical record from the psychiatric hospital where she had voluntarily admitted herself, that record was producible, except for the portions containing any privileged communications. *Weksler v. Weksler*, 173 Ga. App. 250, 325 S.E.2d 874 (1985).

Since the mental health records of an incompetent, deaf, and speechless criminal defendant contain both privileged commu-

Communications Between Psychiatrist and Patient (Cont'd)

nications under O.C.G.A. §§ 24-9-21 and 43-39-16, and nonprivileged communications, records which contain privileged material are not to be produced in response to a request for production, but the remaining documents must be produced. *Annandale at Suwanee, Inc. v. Weatherly*, 194 Ga. App. 803, 392 S.E.2d 27 (1990).

Trial court erred by not conducting an in-camera inspection of a plaintiff's mental health records to determine whether the records contained any nonprivileged information relevant to the plaintiff's claims for damages in a civil suit. *Aetna Cas. & Sur. Co. v. Ridgeview Inst., Inc.*, 194 Ga. App. 805, 392 S.E.2d 286 (1990).

Discoverability in nonparty document production request. — Patient's failure to object within 10 days to a request for nonprivileged matter under a nonparty document production request did not amount to an affirmative waiver of privileged communications with the patient's psychiatrist. *Hopson v. Kennestone Hosp.*, 241 Ga. App. 829, 526 S.E.2d 622 (1999), *aff'd*, 273 Ga. 145, 538 S.E.2d 742 (2000).

Rule that a party's failure to object to a discovery request within the time required generally will result in a waiver of the right to object does not apply to requests under O.C.G.A. § 9-11-34(c) to nonparties for the production of documents that are protected by the psychiatrist-patient privilege. *Hopson v. Kennestone Hosp.*, 241 Ga. App. 829, 526 S.E.2d 622 (1999), *aff'd*, 273 Ga. 145, 538 S.E.2d 742 (2000).

Psychiatric medical records are not absolutely privileged. *Donalson v. State*, 192 Ga. App. 37, 383 S.E.2d 588 (1989), *cert. denied*, 493 U.S. 1030, 110 S. Ct. 742, 107 L. Ed. 2d 760 (1990).

Contents of a psychiatrist's records were privileged as to communications between the psychiatrist and a patient; however, the privilege did not extend to communications made to nurses or attendants, unless the nurses or attendants were acting as agents of the psychiatrist, nor did it preclude discovery of the fact and dates of treatment. *Plunkett v. Ginsburg*, 217 Ga. App. 20, 456 S.E.2d 595 (1995).

Psychologist-patient privilege applied to treatment records, regardless of whether

that treatment was voluntary; since treatment of children had been directed by a case plan and a juvenile court, an in camera inspection of records sought in a criminal prosecution arising out of facts developed in the dependency investigation was proper, but the case was remanded for the trial court to consider in the court's examination the established parameters of the psychotherapist-patient privilege. *Herendeen v. State*, 268 Ga. App. 113, 601 S.E.2d 372 (2004), *aff'd*, 279 Ga. 323, 613 S.E.2d 647 (2005).

In order to abrogate the psychiatrist-patient privilege, the defendant must make a showing of necessity, that is, that the evidence in question is critical to defendant's defense and that substantially similar evidence is otherwise unavailable to the defendant. *Bobo v. State*, 256 Ga. 357, 349 S.E.2d 690 (1986); *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000), *cert. denied*, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002).

Fact that plaintiff was seeking to recover damages for injuries of a mental and emotional nature would not constitute a waiver of the privilege to exclude testimony of defendant's psychiatrist. *Wilson v. Bonner*, 166 Ga. App. 9, 303 S.E.2d 134 (1983).

No psychiatrist/patient relationship is created if: (1) the defendant was not seeking out psychiatric care in the usual sense of the term; and (2) no real treatment was given or contemplated. *Rachals v. State*, 184 Ga. App. 420, 361 S.E.2d 671 (1987), *aff'd*, 258 Ga. 48, 364 S.E.2d 867, *cert. denied*, 487 U.S. 1238, 108 S. Ct. 2909, 101 L. Ed. 2d 941 (1988).

Cross-examination of therapist limited. — In a prosecution for child molestation, the trial court did not err by limiting defendant's cross-examination of the child's therapist and thereby preventing the defendant from engaging in a fishing expedition to dredge up evidence of domestic problems totally unrelated to the act of molestation. *Atkins v. State*, 243 Ga. App. 489, 533 S.E.2d 152 (2000).

Compositions written by defendant at the request of a psychiatrist were not subject to the evidentiary privilege for "communications between psychiatrist and patient" because the compositions were found in a trash can in defendant's home with no showing

that the compositions were ever given to the psychiatrist. *Daker v. State*, 243 Ga. App. 848, 533 S.E.2d 393 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002).

Privilege waived. — Trial court in civil proceeding brought by an injured police officer against an individual who suffered from a mental condition did not err in ruling that the individual lost the statutory psychiatric privilege by involuntary commitment to a state mental health facility. *Trammel v. Bradberry*, 256 Ga. App. 412, 568 S.E.2d 715 (2002).

Trial court did not abuse the court's discretion in admitting a 1980 report during the defendant's murder trial, which admit-

ted a psychologist's testimony and materials, performed for evaluation purposes, specifically to explore the possibility of an insanity plea, rather than for professional treatment, as under Georgia law, there can be no expectation of confidentiality based on the psychologist/patient privilege when the sole purpose of the relationship is evaluation. Even if such a privilege existed as to the 1980 report, when the defendant raised the claim of mental retardation, putting the defendant's mental capacity at issue, such affirmative defense waived any privilege. *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, U.S. , 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Attorneys employed by state agencies. — Although state agencies may employ persons with legal training and experience to serve as administrative legal service officers, those persons may not provide legal advice or representation to the agency, and no attorney-client relationship or privilege arises between the legal services officer and other agency officers or employees, or the agency itself. 1995 Op. Att'y Gen. No. 95-1.

Court order or subpoena does not abrogate privilege created by statute relating to the confidentiality of the patient-psychiatrist relationship; any response to a subpoena or court order must take these provisions into consideration. 1974 Op. Att'y Gen. No. U74-86.

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 273, 293, 427, 431, 436, 449, 450, 505.

Am. Jur. Pleading and Practice Forms. — 19A Am. Jur. Pleading and Practice Forms, Physicians, Surgeons, and Other Healers, § 163.

Am. Jur. Proof of Facts. — Protected Communication Between Physician and Patient, 45 POF2d 595.

Proof of Waiver of Attorney-Client Privilege, 32 POF3d 189.

Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery, 39 POF3d 1.

C.J.S. — 32 C.J.S., Evidence, § 500. 97 C.J.S., Witnesses, §§ 297, 298, 299 et seq., 361 et seq., 367 et seq.

ALR. — Applicability and effect in suit for alienation of affections of rule excluding confidential communications between husband and wife, 36 ALR 1068; 82 ALR 825.

Effect of knowledge of third person acquired by overhearing or seeing communication between husband and wife upon rule as to privileged communication, 63 ALR 107.

Privilege as to communications to attorney in connection with drawing of will, 64 ALR 144; 66 ALR2d 1302.

Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point, 70 ALR 94.

Expression of willingness by witness that another should testify as waiver of privilege in respect of latter's testimony, 72 ALR 148.

Refusal of attorney to disclose identity of, whereabouts of, or other information relating to, his client as contempt, 101 ALR 470.

Attorney's comment on opposing party's refusal to permit introduction of, or to offer, privileged testimony, or to permit privileged witness to testify, 116 ALR 1170.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 ALR 732.

Evidence: attorney-client privilege as applicable to communications between attorney and client's agent, employee, spouse, or relative, 139 ALR 1250.

Attorney-client privilege as applied to communications in presence of two or more persons interested in the subject matter to which the communications relate, 141 ALR 553.

Right of attorney to introduce evidence, and to cross-examine, in summary proceeding against him by, or in interest of, his client, 141 ALR 655.

Right to insist that opponent's claim of privilege shall be made in presence of jury, or to ask him if he is willing to waive privilege, 144 ALR 1007.

Withdrawal, during same trial, of waiver of privilege of confidential communication, 158 ALR 219.

Right of one against whom testimony is offered to invoke privilege of communication between others, 2 ALR2d 645.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them, 4 ALR2d 835.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 ALR2d 1389.

Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution, 38 ALR2d 570.

Privilege as to communications to attorney in connection with drawing of will, 66 ALR2d 1302.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 ALR2d 796.

Husband or wife as competent witness for or against co-offender with spouse, 90 ALR2d 648.

Discovery, inspection, and copying of photographs of article or premises the condition of which gave rise to instant litigation, 95 ALR2d 1061.

Persons other than client or attorney af-

ected by, or included within, attorney-client privilege, 96 ALR2d 125; 31 ALR4th 1226.

Construction of statute creating privilege against disclosure of communications made to stenographer or confidential clerk, 96 ALR2d 159.

Right of corporation to assert attorney-client privilege, 98 ALR2d 241; 26 ALR5th 628; 27 ALR5th 76.

Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 ALR3d 861.

Attorney-client privilege as affected by communications between several attorneys, 9 ALR3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 ALR3d 1029.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege, 16 ALR3d 1047.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 ALR3d 557.

Privilege in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient, 44 ALR3d 24.

Defense attorney as witness for his client in state criminal case, 52 ALR3d 887.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 ALR3d 1322.

Refusal to answer questions before state grand jury as direct contempt of court, 69 ALR3d 501.

Modern status of interspousal tort immunity in personal injury and wrongful death actions, 92 ALR3d 901.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 ALR3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 ALR3d 1285.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 ALR3d 37.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 ALR4th 1104.

Communication between unmarried couple living together as privileged, 4 ALR4th 422.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party, 4 ALR4th 765.

Disqualification of attorney because member of his firm is or ought to be witness in case — modern cases, 5 ALR4th 574.

Testimonial privilege for confidential communications between relatives other than husband and wife — state cases, 6 ALR4th 544; 62 ALR5th 629.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged, 9 ALR4th 807.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 ALR4th 1305.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 ALR4th 594.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 ALR4th 458.

Presence of child at communication between husband and wife as destroying confidentiality of otherwise privileged communication between them, 39 ALR4th 480.

Statute of limitations applicable to third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats, 41 ALR4th 1078.

Constitutionality, with respect to accused's

rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Insured-insurer communications as privileged, 55 ALR4th 336.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 ALR4th 1134.

Attorney-client privilege: who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client, 66 ALR4th 1227.

Involuntary disclosure or surrender of will prior to testator's death, 75 ALR4th 1144.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases, 26 ALR5th 628.

What corporate communications are entitled to attorney-client privilege—modern cases, 27 ALR5th 76.

What persons or entities may assert or waive corporation's attorney-client privilege — modern cases, 28 ALR5th 1.

Waiver of evidentiary privilege by inadvertent disclosure — state law, 51 ALR5th 603.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 23 ALR6th 1.

Waiver of evidentiary privilege by inadvertent disclosure — federal law, 159 ALR Fed. 153.

Views of United States Supreme Court as to attorney-client privilege, 159 ALR Fed. 243.

24-9-22. Communications to clergyman privileged.

Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communication in any court. (Ga. L. 1951, p. 468, §§ 1, 2; Ga. L. 1986, p. 1277, § 2.)

Law reviews. — For survey article on evidence law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 249 (2003).

For note discussing confidential communication privileges in Georgia, see 2 Ga. St. B.J. 356 (1966).

For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

JUDICIAL DECISIONS

Presence of more than one person. — Clerical privilege is not waived by the presence of more than one person seeking spiritual comfort or counseling. *Alternative Health Care Sys. v. McCown*, 237 Ga. App. 355, 514 S.E.2d 691 (1999).

Trial court did not err when the court denied defendant's motion to suppress the confession defendant made to the police chaplain because the trial court obviously believed the chaplain's adamant denial that the chaplain had repeated defendant's confession to the police. The testimony revealed that defendant confessed to the police officer in the chaplain's presence. *Blocker v. State*, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

Pastor who had physical custody of a child for two months was allowed to testify as to the child's condition at a termination of parental rights proceeding since there was no showing that any communications or observations arose from spiritual counseling or as a profession of religious faith. *Jones v. Department of Human Resources*, 168 Ga. App. 915, 310 S.E.2d 753 (1983).

Inapplicable to "father figure." — Defendant's conversations with a witness who had served as a father figure for defendant throughout defendant's life were not privileged, even though the witness had been ordained two years before defendant committed the murder with which defendant was charged. *Morris v. State*, 275 Ga. 601, 571 S.E.2d 358 (2002).

Inapplicable to "spiritual advisor" or "psychic." — Statutory privilege does not apply to a "spiritual advisor" or "psychic." *Manous v. State*, 200 Ga. App. 293, 407 S.E.2d 779 (1991).

Inapplicable to conversational statements to friend. — Under O.C.G.A. § 24-9-22, every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to a clergy person shall be deemed privileged; however, if such communications are not made to profess religious faith, or to seek spiritual comfort or guidance, but rather are conversational statements to a friend or frequent companion, the ministerial privilege is not applicable. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Son's statements were not privileged. — Defendant's statements to defendant's father, a minister, were not privileged under O.C.G.A. § 24-9-22 as defendant, in talking to defendant's father, was not seeking comfort or solace of a spiritual nature, but was seeking the help of a parent and a source of secular strength to accompany the defendant to the police station. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Waiver of privilege. — Very general testimony by the plaintiff that a chaplain met with the plaintiff's family and offered spiritual support and comfort, and the plaintiff's deposition statement, in response to the defendants' questioning, that the plaintiff was not upset by anything the chaplain said, did not address in any way the substance of the plaintiff's conversations with the chaplain and did not amount to a waiver of the privilege. *Alternative Health Care Sys. v. McCown*, 237 Ga. App. 355, 514 S.E.2d 691 (1999).

Cited in *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977); *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 493.

C.J.S. — 97 C.J.S., Witnesses, §§ 359 et seq.

ALR. — Expression of willingness by witness that another should testify as waiver of privilege in respect of latter's testimony, 72 ALR 148.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 ALR 732.

Withdrawal, during same trial, of waiver of privilege of confidential communication, 158 ALR 219.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 ALR2d 125; 31 ALR4th 1226.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers, 49 ALR3d 1205.

Matters to which the privilege covering communications to clergyman or spiritual advisor extends, 71 ALR3d 794.

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser, 93 ALR5th 327.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers, 101 ALR5th 619.

24-9-23. Compellability of testimony by defendant's spouse.

(a) Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.

(b) The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of Code Section 24-9-21 or subsection (a) of Code Section 24-9-27 shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged. (Ga. L. 1866, p. 138, § 2; Code 1868, § 3798; Code 1873, § 3854; Ga. L. 1880-81, p. 121, § 1; Code 1882, § 3854; Penal Code 1895, § 1011; Penal Code 1910, § 1037; Ga. L. 1927, p. 145, § 1; Code 1933, § 38-1604; Ga. L. 1957, p. 53, § 1; Ga. L. 1987, p. 1155, § 1.)

Cross references. — Competency of wife to testify against husband in proceeding against husband for abandonment of wife, § 19-10-2.

Law reviews. — For article surveying recent legislative and judicial developments in Georgia's evidence laws, see 31 Mercer L. Rev. 107 (1979). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Gender and Justice in the

Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992). For article, "The Marital Privileges in Georgia: What You Should Know," see 6 Ga. St. B.J. 8 (2001).

For note, "Circling the Wagons: Informational Privacy and Family Testimonial Privileges," see 20 Ga. L. Rev. 173 (1985).

JUDICIAL DECISIONS

Editor's notes. — Prior to the 1957 amendment of former Code 1933, § 38-1604, the spouse of a criminal defendant was not competent and could not be compelled to give evidence in the defendant's trial, except in certain specified cases. Some of the cases noted below were decided under the former rule but have been re-

tained because of their possible applicability to the present statute.

Privilege of refusing to testify belongs to witness and not to accused. James v. State, 223 Ga. 677, 157 S.E.2d 471 (1967); Kellar v. State, 226 Ga. 432, 175 S.E.2d 654 (1970); Young v. State, 232 Ga. 285, 206 S.E.2d 439 (1974); Smith v. State, 138 Ga. App. 683, 227

S.E.2d 84, aff'd, 237 Ga. 647, 229 S.E.2d 433 (1976); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 218, 58 L. Ed. 2d 194 (1978); *Carroll v. State*, 147 Ga. App. 332, 248 S.E.2d 702 (1978); *Wiley v. State*, 150 Ga. App. 607, 258 S.E.2d 286 (1979); *Morris v. State*, 173 Ga. App. 663, 327 S.E.2d 792 (1985); *Mapp v. State*, 191 Ga. App. 622, 382 S.E.2d 618, cert. denied, 191 Ga. App. 922, 382 S.E.2d 618 (1989); *Brown v. State*, 261 Ga. 66, 401 S.E.2d 492 (1991), cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240 (1991); *Duncan v. State*, 232 Ga. App. 157, 500 S.E.2d 603 (1998).

Defendant had no standing to exclude his wife's testimony at the trial because the privilege against spousal testimony is available only to the witness-spouse. *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2670, 81 L. Ed. 2d 375 (1984), vacated in part on other grounds sub nom., *Corn v. Kemp*, 772 F.2d 681 (11th Cir. 1985), judgment vacated, 478 U.S. 1016, 106 S. Ct. 3326, 92 L. Ed. 2d 732 (1986), remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), aff'd, 837 F.2d 1474 (1987), cert. denied, 486 U.S. 1023, 108 S. Ct. 1997, 100 L. Ed. 2d 228 (1988); *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987).

Trial court did not err in allowing defendant's wife to testify in defendant's trial for shooting their two adult sons to death as the privilege of refusing to testify belonged to the witness, the wife, and not to the accused; moreover, nothing showed that the wife's testimony was not voluntary. *Biswas v. State*, 255 Ga. App. 339, 565 S.E.2d 531 (2002).

Statements of common-law wife admissible. — In a murder prosecution, where defendant's common-law wife asserted privilege not to testify against the husband, statements the wife made during the official investigation and confirmed at a subsequent pre-trial hearing were admissible as an exception to the hearsay rule without conducting an additional hearing on the statement's reliability. *Drane v. State*, 265 Ga. 663, 461 S.E.2d 224 (1995). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

Privilege does not depend upon stability of marriage. — Application of the privilege

of refusing to testify does not depend upon the stability of the marriage, either at the time of the communication or at the time the privilege is asserted. *Brown v. State*, 261 Ga. 66, 401 S.E.2d 492 (1991), cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240 (1991).

Marital testimonial privilege may be asserted even though the marriage was entered into for the purpose of preventing the spouse's testimony. *State v. Peters*, 213 Ga. App. 352, 444 S.E.2d 609 (1994).

Privilege may be invoked by spouse who testified at previous hearing. — Privilege not to testify may be invoked by the witness spouse even if he or she has testified for or against the defendant spouse in a previous hearing. *Brown v. State*, 261 Ga. 66, 401 S.E.2d 492 (1991), cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240 (1991).

No inference could be drawn about defendant's truthfulness from his wife's failure to take the stand and corroborate his testimony. *James v. State*, 223 Ga. 677, 157 S.E.2d 471 (1967).

Comments on failure of spouse to testify constituted impermissible argument and warranted reversal. *Price v. State*, 175 Ga. App. 780, 334 S.E.2d 711 (1985).

Nature of evidence irrelevant. — Statute plainly means that a wife may not, over her objection, be forced to answer any questions or produce any other evidence which would either help or harm her spouse in any criminal proceeding. *Smith v. State*, 138 Ga. App. 683, 227 S.E.2d 84, aff'd, 237 Ga. 647, 229 S.E.2d 433 (1976).

No protection for documents prepared by third party. — Although communications between a husband and a wife are confidential and privileged, such protections do not apply to financial documents either prepared or seen by third parties; a trial court did not err in granting a motion to compel an employee and the husband to produce financial documents such as checks, account statements, and tax returns. *Dempsey v. Kaminski Jewelry, Inc.*, 278 Ga. App. 814, 630 S.E.2d 77 (2006).

This statute is applicable "in any criminal proceeding." *State v. Smith*, 237 Ga. 647, 229 S.E.2d 433 (1976) (see O.C.G.A. § 24-9-23).

In prosecution for manslaughter, marital privilege justified exclusion of suicidal statements the decedent allegedly related to the

decedent's spouse on the day that the decedent was shot. *Robinson v. State*, 221 Ga. App. 865, 473 S.E.2d 519 (1996).

Subsection (b) of O.C.G.A. § 24-9-23 applies when the victim and spouse are the same person; the victim of statutory rape could be compelled to testify even though the victim and defendant were married at the time of the trial. *Hamilton v. State*, 210 Ga. App. 398, 436 S.E.2d 522 (1993).

Spouse as victim. — When the victim, defendant's wife, who had refused to testify for the state against her husband, was called by her husband, the fact that she asserted her privilege during the state's case was not conclusive because the privilege not to incriminate one's spouse at the behest of the state is different from the privilege not to testify for one's spouse and she should have been summoned to state her intentions before the presiding judge whether she would testify at the behest of her husband or reassert her privilege. *Respres v. State*, 244 Ga. App. 689, 536 S.E.2d 586 (2000).

Knowing that the victim was going to invoke the marital privilege, defendant was not entitled to a mistrial because defendant did not timely object to the announcement of defendant's wife's name as a witness; in any event, the mere announcement of the victim's name, without more, did not constitute the creation by the state of an "unwarranted negative inference" against defendant. *Carter v. State*, 275 Ga. App. 483, 621 S.E.2d 503 (2005).

Grand jury consideration of proposed indictment is part of the criminal proceedings within the meaning of the statute. *Smith v. State*, 138 Ga. App. 683, 227 S.E.2d 84, *aff'd*, 237 Ga. 647, 229 S.E.2d 433 (1976).

Words "for or against each other" must relate to the word "evidence," since a criminal proceeding could not be described as being "for or against each other." *State v. Smith*, 237 Ga. 647, 229 S.E.2d 433 (1976).

Failure of a defendant's wife to testify is not a legitimate subject matter of argument for counsel for the state, although such a comment does not constitute reversible error where the trial court rebukes the prosecuting attorney immediately in the presence of the jury, instructs the jury that it is not necessary for any defendant or his wife ever to take the stand, and that the burden is always upon the state to prove a defendant's

guilt beyond a reasonable doubt. *Casey v. State*, 167 Ga. App. 437, 306 S.E.2d 683 (1983).

State may comment generally where defendant relies upon spouse's actions for corroboration. — It does not appear that it is harmful error for the state to comment generally, without direct reference to the exercise of the spousal privilege, upon the fact that it has no power to call a defendant's spouse who has not given direct testimony, but whose words and actions are relied upon by the defendant as being somewhat corroborative of the defendant's own exculpatory testimony. Under these circumstances, such a comment by the state would be no more than a statement informing the jury that the state's failure to call the nontestifying spouse did not necessarily signify an acceptance of or acquiescence in a portion of the defendant's exculpatory version of the events to which defendant has testified. *Wynn v. State*, 168 Ga. App. 132, 308 S.E.2d 392 (1983).

Testimony when spouse is charged with a crime against a minor child. — When defendant standing trial for child molestation argues that prosecuting attorney improperly questioned the defendant's failure to call his wife as a witness and that such argument constitutes reversible error because the defendant could not compel his wife to testify, there was no reversible error in the state's remarks on defendant's failure to call her as a witness, since spousal immunity does not apply to proceedings in which one spouse is charged with a crime against a minor child under subsection (b) of O.C.G.A. § 24-9-23. *Sosebee v. State*, 190 Ga. App. 746, 380 S.E.2d 464, *cert. denied*, 493 U.S. 933, 110 S. Ct. 323, 107 L. Ed. 2d 313 (1989).

Privilege created by O.C.G.A. § 24-9-23 does not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor, albeit testimony is compellable only with respect to the specific act for which the defendant is charged. *Pirkle v. State*, 234 Ga. App. 23, 506 S.E.2d 186 (1998).

With regard to a defendant's conviction on child molestation charges, the defendant's trial counsel was not deficient in failing to object to certain testimony of the defendant's ex-wife, the mother of the victim, concerning a prior bad act on the ground that the testimony violated the mar-

ital privilege, because the defendant was not on trial for the prior act; therefore, the ex-wife was competent, although not compellable, to testify concerning the prior act, and thus since the ex-wife did not invoke the privilege and was able to waive the privilege by voluntarily taking the stand and testifying, trial counsel was not ineffective for failing to object to the testimony of the ex-wife on the basis of marital privilege. *Nichols v. State*, 288 Ga. App. 118, 653 S.E.2d 300 (2007).

An email from the defendant to the defendant's husband was not evidence given under compulsion by the defendant's spouse and so was not subject to the marital privilege under O.C.G.A. § 24-9-23(b) in a case charging the defendant with malice murder and related offenses in connection with the death of the defendant's 11-year-old step-daughter. *Reaves v. State*, 284 Ga. 236, 664 S.E.2d 207 (2008).

Because O.C.G.A. § 16-12-80 prohibits a person from disseminating obscene material of any description, and the definition of obscene material makes no reference to minor, distributing obscene materials is not a crime against the person of a minor child within the plain meaning of O.C.G.A. § 24-9-23(b). *Peck v. State*, 300 Ga. App. 375, 685 S.E.2d 367 (2009).

Trial court did not err in concluding that the victim, who subsequently married the defendant, could be compelled to testify against the defendant with regard to the charge of sexual exploitation of children because that charge qualified as a crime against the person of a minor based upon the public policy expressed in O.C.G.A. § 24-9-23(b), the particular pictures involved in the case, and the specific subsection of O.C.G.A. § 16-12-100 with which the defendant was charged; the pictures in the defendant's possession showed the victim personally engaged in sexually explicit conduct. *Peck v. State*, 300 Ga. App. 375, 685 S.E.2d 367 (2009).

A defendant's alleged violation of O.C.G.A. § 16-5-70(d), cruelty to children, was a "crime against the person of a minor child" within the meaning of O.C.G.A. § 24-9-23(b), which provided an exception to the marital privilege against testifying in cases of crimes against the person of children, even though no physical contact was involved. Therefore, a trial court did not err

in compelling defendant's spouse to testify against defendant despite invoking the privilege. *Sherman v. State*, 302 Ga. App. 312, 690 S.E.2d 915 (2010).

Bigamous defendant. — Law as to competency of a wife to testify against her husband in a criminal case did not apply to a woman married to defendant, where there was uncontradicted testimony that before their marriage he was married to another woman, who was living at the time of the trial and from whom he had not been divorced. *Williams v. State*, 139 Ga. 591, 77 S.E. 818 (1913); *Dickerson v. State*, 30 Ga. App. 352, 118 S.E. 67 (1923).

Cohabitation does not render woman incompetent. — If a woman cohabits with a man, under his promise to marry her legally, but finding that he does not take legal steps to do so, quits him and again cohabits with him, she is not his wife and is a competent witness. *Hill v. State*, 41 Ga. 484 (1871).

Common-law marriage, when recognized, is sufficient to invoke the husband-wife privilege. However, in face of conflicting evidence as to a common-law marriage, the trial court is authorized to find that no common-law marriage exists. *Overcash v. State*, 239 Ga. 499, 238 S.E.2d 50 (1977); *Jordan v. State*, 267 Ga. 442, 480 S.E.2d 18 (1997).

Factual determination by the state court that a witness was not the defendant's common-law wife was required to be deferred to by the federal courts in a habeas corpus proceeding; therefore, the testimony of this witness was not a violation of the marital privilege and did not render the defendant's trial fundamentally unfair. *Holton v. Newsome*, 750 F.2d 1513 (11th Cir. 1985).

There was substantial evidence in support of the trial court's finding that there was no common-law marriage between the trial witness and the defendant. Therefore, the defendant could not assert the marital privilege. *Schirato v. State*, 260 Ga. 170, 391 S.E.2d 116 (1990).

In view of conflicting evidence, no common-law marriage. — O.C.G.A. § 24-9-23 was not applicable when, in view of the conflicting evidence as to the existence of a common-law marriage between defendant and the state's witness, the trial court was authorized to find that no common-law

marriage existed. *Brown v. State*, 187 Ga. App. 347, 370 S.E.2d 203, cert. denied, 187 Ga. App. 907, 370 S.E.2d 203 (1988).

Grant to witness of immunity from prosecution results in compulsory testimony notwithstanding the privilege against being required to testify against one's self. The grant of immunity does not, however, operate to compel one spouse to testify against another. *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 218, 58 L. Ed. 2d 194 (1978).

If evidence is in conflict as to existence of marriage, the trial judge may hear evidence to determine whether a marriage exists, and the judge's decision will not be disturbed on appeal if there is any evidence to support the judge's finding or the trial court may submit to the jury with appropriate instructions the question of whether or not a marriage exists. *Sheffield v. State*, 241 Ga. 245, 244 S.E.2d 869 (1978).

Method of making election to testify or not to testify. — State is not allowed to require the wife to go to the witness stand in presence of the jury and there make her election not to testify against her husband. *Colson v. State*, 138 Ga. App. 366, 226 S.E.2d 154 (1976).

Lower court should have granted motion in limine instructing prosecuting attorney not to make any reference to communication between wife and defendant or at least had a hearing on the motion out of presence of the jury and allowed the wife to make her election not to testify instead of compelling her to take the witness stand as a sworn witness and compelling her on examination before the jury to refuse to offer testimony. *Broome v. State*, 141 Ga. App. 538, 233 S.E.2d 883 (1977).

Waiver of privilege presumed. — When the witness voluntarily takes the stand and testifies, it will be presumed that she does so pursuant to waiver of her privilege. *Wiley v. State*, 150 Ga. App. 607, 258 S.E.2d 286 (1979); *Mapp v. State*, 191 Ga. App. 622, 382 S.E.2d 618, cert. denied, 191 Ga. App. 922, 382 S.E.2d 618 (1989); *White v. State*, 211 Ga. App. 694, 440 S.E.2d 68 (1994).

Trial court was not obligated to advise defendant's spouse of the marital privilege under O.C.G.A. § 24-9-23(b) relating to the spouse's testimony at defendant's sentencing hearing, and as defendant's spouse testi-

fied voluntarily, it was presumed that the spouse waived the marital privilege. *Ingram v. State*, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

Trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to O.C.G.A. §§ 24-9-21 and 24-9-23 because the spouse was aware of the privilege but never asserted it to the trial court, and it was assumed that the spouse waived the right not to testify; the spouse was informed by defense counsel of the spouse's rights under the marital privilege, and the spouse did not assert the privilege even after defense counsel voiced objections to the testimony in the spouse's presence. *Geter v. State*, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

Production of paper belonging to wife, and which is in custody either of herself or her attorney, cannot be compelled for the purpose of using the paper as evidence for the state in the trial of a criminal case against her husband by serving a subpoena duces tecum, or other process, either upon the wife or the attorney, or upon both. Under such circumstances, the paper in question is so far inaccessible as that secondary evidence of its contents is admissible. *Farmer v. State*, 100 Ga. 41, 28 S.E. 26 (1896).

Admission of documentary and oral evidence as to banking account of defendant's wife was not error as a violation of the husband-wife privilege. *Barbour v. State*, 66 Ga. App. 498, 18 S.E.2d 40 (1941).

Termination upon death or divorce. — Unlike the evidentiary prohibition of O.C.G.A. § 24-9-21(1), excluding interspousal communications, the spousal privilege against compellability in O.C.G.A. § 24-9-23 ceases when the marriage is terminated by death or divorce. *Chadwick v. State*, 176 Ga. App. 296, 335 S.E.2d 674 (1985), aff'd, 255 Ga. 376, 339 S.E.2d 717 (1986).

Defendant's claim that the former wife's testimony was improperly admitted was rejected as the wife's O.C.G.A. § 24-9-23 privilege ceased before the trial when the marriage was terminated by divorce. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

Spouse's forced testimony not reversible error. — Even if the trial court erred in compelling the defendant's wife to testify concerning an assault of the wife as a similar

transaction, such error was not reversible since there was no reasonable possibility of a different verdict; in addition to the wife's testimony, the state also presented testimony of defendant's girlfriend, the victim of defendant's assault, a neighbor who witnessed parts of the altercation, other corroborating witnesses, as well as evidence of prior difficulties between defendant and the girlfriend. *Phillips v. State*, 278 Ga. App. 439, 629 S.E.2d 130 (2006).

Instructions to jury. — Defendant accused of voluntary manslaughter was entitled to a new trial since the trial court failed to give curative instructions to the jury following closing remarks by the state noting the failure of defendant's wife to testify. *Ferry v. State*, 161 Ga. App. 795, 287 S.E.2d 732 (1982).

Cited in *Holley v. Lawrence*, 194 Ga. 529, 22 S.E.2d 154 (1942); *Peacon v. Peacon*, 197 Ga. 748, 30 S.E.2d 640 (1944); *Cady v. State*, 198 Ga. 99, 31 S.E.2d 38 (1944); *Blige v. State*, 72 Ga. App. 458, 33 S.E.2d 917 (1945); *Foster v. Withrow*, 201 Ga. 260, 39 S.E.2d 466

(1946); *Hardin v. State*, 203 Ga. 641, 47 S.E.2d 745 (1948); *Seymour v. State*, 210 Ga. 21, 77 S.E.2d 519 (1953); *Giles v. State*, 212 Ga. 465, 93 S.E.2d 739 (1956); *Ferguson v. Georgia*, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961); *Gates v. State*, 120 Ga. App. 518, 171 S.E.2d 375 (1969); *Brown v. State*, 226 Ga. 114, 172 S.E.2d 666 (1970); *Elinburg v. State*, 227 Ga. 246, 179 S.E.2d 926 (1971); *Merneigh v. State*, 123 Ga. App. 485, 181 S.E.2d 498 (1971); *Johnson v. State*, 232 Ga. 61, 205 S.E.2d 190 (1974); *Robinson v. State*, 232 Ga. 123, 205 S.E.2d 210 (1974); *Moody v. State*, 131 Ga. App. 355, 206 S.E.2d 79 (1974); *Whitehead v. State*, 144 Ga. App. 836, 242 S.E.2d 754 (1978); *Hubbard v. State*, 145 Ga. App. 714, 244 S.E.2d 639 (1978); *Oliver v. State*, 146 Ga. App. 798, 247 S.E.2d 487 (1978); *Parker v. State*, 162 Ga. App. 271, 290 S.E.2d 518 (1982); *Jones v. State*, 187 Ga. App. 25, 369 S.E.2d 314 (1988); *Crawford v. State*, 203 Ga. App. 215, 416 S.E.2d 820 (1992); *Luallen v. State*, 266 Ga. 174, 465 S.E.2d 672 (1996); *Webb v. State*, 284 Ga. 122, 663 S.E.2d 690 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Common-law wife may not be compelled to testify against her husband in court. 1958-59 Op. Att'y Gen. p. 89.

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 230, 284.

C.J.S. — 97 C.J.S., Witnesses, §§ 147 et seq., 299 et seq.

ALR. — Competency or privilege of one spouse as a witness in a prosecution against other for an offense committed before marriage, 76 ALR 1088.

Rule rendering husband or wife incompetent as a witness for the other in a criminal case as changed without the aid of a statute expressly abrogating it or comprehensively removing disqualification of witnesses, 93 ALR 1144.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 ALR2d 1389.

Effect of divorce or annulment on compe-

tency of one former spouse as witness against other in criminal prosecution, 38 ALR2d 570.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct, 76 ALR2d 920.

Husband or wife as competent witness for or against co-offender with spouse, 90 ALR2d 648.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 ALR2d 125; 31 ALR4th 1226.

Propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony, 32 ALR3d 906.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 ALR3d 1018.

Effect, on competency to testify against

spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 ALR3d 1285.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 ALR4th 1104.

Communication between unmarried couple living together as privileged, 4 ALR4th 422.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 ALR4th 1305.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 ALR4th 1134.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution—modern state cases, 74 ALR4th 223.

Competency of one spouse to testify against other in prosecution for offense

against third party as affected by fact that offense against spouse was involved in same transaction, 74 ALR4th 277.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 ALR4th 694.

Testimonial privilege for confidential communications between relatives other than husband and wife — state cases, 62 ALR5th 629.

Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither, 119 ALR5th 275.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 23 ALR6th 1.

Marital privilege under Rule 501 of Federal Rules of Evidence, 46 ALR Fed 735.

24-9-24. Client's communications to attorney privileged.

Communications to any attorney or to his employee to be transmitted to the attorney pending his employment or in anticipation thereof shall never be heard by the court. The attorney shall not disclose the advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers, except evidences of debt left in his possession by his client. This Code section shall not exclude the attorney as a witness to any facts which may transpire in connection with his employment. (Laws 1850, Cobb's 1851 Digest, p. 280; Ga. L. 1859, p. 18, § 1; Code 1863, § 3721; Code 1868, § 3745; Code 1873, § 3798; Code 1882, § 3798; Civil Code 1895, § 5199; Civil Code 1910, § 5786; Code 1933, § 38-419.)

Law reviews. — For article on the expansion of the attorney-client privilege in Georgia, see 17 Ga. St. B.J. 150 (1981).

For note discussing confidential communication privileges in Georgia, see 2 Ga. St. B.J. 356 (1966). For note on the Impact of the Zolin Decision on the Crime-Fraud Ex-

ception to the Attorney-Client Privilege, see 24 Ga. L. Rev. 1115 (1990). For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COMMUNICATIONS

WHEN PRIVILEGE ATTACHES

DISCLOSURE, PRODUCTION, OR DELIVERY

FACTS IN CONNECTION WITH EMPLOYMENT

WAIVER

General Consideration

Purpose of privilege. — Attorney-client privilege is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against the client in controversies with third persons, and it is designed to secure the client's confidence in the secrecy of the client's communication, and to promote greater freedom of consultation between clients and their legal advisers, and its object is to secure freedom in communication between attorney and client in order that the former may act with full understanding of the matters in which the attorney is employed. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Who may invoke privilege. — Court did not err in allowing the impeachment of a witness through the testimony of the witness's attorney, nor was defense counsel ineffective in failing to challenge the state's calling the attorney to testify; the rules of O.C.G.A. § 24-9-24 may not be invoked by strangers to the attorney-client relationship. *Womack v. State*, 260 Ga. 305, 393 S.E.2d 232 (1990).

Rule that communications between an attorney and a client are privileged, and that the attorney is an incompetent witness to testify thereto, cannot be invoked for the benefit of other persons who are strangers to such relationship. *Findley v. Davis*, 202 Ga. App. 332, 414 S.E.2d 317 (1991).

Communications between principal and agent are not privileged, even if such communications ultimately reach the principal's attorney and are used in preparing a defense to litigation arising out of the occurrence forming the subject matter of the communications. *GMC v. Moseley*, 213 Ga. App. 875, 447 S.E.2d 302 (1994).

Testimony of coconspirator's lawyer barred in criminal proceeding. — Criminal defendant's request to call the coconspirator's counsel to rebut the coconspirator's testimony that the coconspirator had not been offered any "deal" by the state in exchange for the coconspirator's testimony was properly denied because the testimony defendant sought to elicit came within the attorney-client privilege. *Avery v. State*, 244 Ga. App. 177, 534 S.E.2d 897 (2000).

Client's identity not covered by privilege.

— Because a client's identity is not covered by the attorney-client privilege, the trial court correctly declined to permit an attorney to use the privilege to justify refusal to reveal the identity of a client who had requested that the client's identity be kept confidential. *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (2000).

Privilege not to be used to carry out crimes. — Privileged communication may be a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society, frauds, or perjuries. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Crime-fraud exception to privilege. — Under the crime-fraud exception to the attorney-client privilege, the privilege does not extend to communications which occur before perpetration of a fraud or commission of a crime and which relate thereto. In *re Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 535 S.E.2d 340 (2000).

Corporation can avail itself of the attorney-client privilege. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Attorney-client privilege is applicable to a corporate employee's communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of a corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents; moreover, the corporation has the burden of showing that the communication in issue meets all of the above requirements. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Communications between attorney and client are excluded from consideration of public policy and the privilege applies to communications to the officers and employees of a corporate client as well as to individ-

ual clients. *Associated Grocers Coop. v. Trust Co.*, 158 Ga. App. 115, 279 S.E.2d 248 (1981).

Existence of "open government" does not negate existence of attorney-client privilege as to matters discussed between county officials and county attorney. *Dodson v. Floyd*, 529 F. Supp. 1056 (N.D. Ga. 1981).

Out-of-state order prohibiting unprivileged testimony. — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the full faith and credit clause did not require the federal district court in Georgia to give full effect to the Michigan Court order. *Williams v. GMC*, 147 F.R.D. 270 (S.D. Ga. 1993).

Work product rule. — Test to determine whether a document constitutes work product is whether it was prepared by the party or the party's representative because of the prospect of litigation. *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994).

Attorney-client privilege does not cover the identity of documents a party reviews to prepare for a deposition. *McKinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994).

Cited in *Parker v. Wellons*, 43 Ga. App. 721, 160 S.E. 109 (1931); *Smith v. State*, 203 Ga. 569, 47 S.E.2d 579 (1948); *Sechler v. State*, 90 Ga. App. 700, 83 S.E.2d 847 (1954); *Gearhart v. Etheridge*, 232 Ga. 638, 208 S.E.2d 460 (1974); *Anderson v. State*, 153 Ga. App. 401, 265 S.E.2d 299 (1980); *Nashville City Bank & Trust Co. v. Reliable Tractor, Inc.*, 90 F.R.D. 709 (M.D. Ga. 1981); *Gilbert v. State*, 169 Ga. App. 383, 313 S.E.2d 107 (1984); *In re N.S.M.*, 183 Ga. App. 398, 359 S.E.2d 185 (1987); *Joiner v. Hercules, Inc.*, 169 F.R.D. 695 (S.D. Ga. 1996); *Begner v. State Ethics Comm'n*, 250 Ga. App. 327, 552 S.E.2d 431 (2001).

Communications

Rule has broad scope, and is not confined merely to communicated matters, but extends to items as to which the attorney has acquired the attorney's knowledge by the attorney's own observation when this observation was the result of the attorney's professional employment. *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934).

Burden is upon a corporation seeking to invoke the attorney-client privilege to estab-

lish that its counsel's advice was privileged legal advice and thus not subject to discovery. *Southern Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

No distinction between advice on specific cases and day-to-day business. — Attorney-client privilege statutes make no distinction between legal advice given to a corporate client in regard to specific cases pending and legal advice concerning day-to-day business matters. *Southern Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

Rule is not confined to matters relating to litigation, but extends to all cases when the attorney is consulted by a client in the line of the attorney's profession. *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934).

This privilege must be narrowly confined to statutory language in order to permit liberal discovery. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Mixture of privileged and nonprivileged matter. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Joint representation waives privilege. — If two or more persons jointly consult or retain an attorney the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. In such situations it is considered that the attorney does not have an attorney-client relationship with either of the joint parties. *Peterson v. Baumwell*, 202 Ga. App. 283, 414 S.E.2d 278 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 278 (1992).

If, by consenting to joint representation, the parties waived the attorney-client privilege as to communications affecting the interest of the other, then such communications should be discoverable by each one of them against the other. The fact that there is present in this litigation a third party who will gain access to these communications does not change the fact of the initial waiver. *Peterson v. Baumwell*, 202 Ga. App. 283, 414 S.E.2d 278 (1991), cert. denied, 202 Ga.

Communications (Cont'd)

App. 907, 414 S.E.2d 278 (1992).

Conversations not with attorney. — When it appears from a transcript that none of the conversations about which witness is questioned was had with an attorney, the attorney-client privilege is not applicable. *Bridges v. State*, 242 Ga. 251, 248 S.E.2d 647 (1978).

Communications made for purpose of being imparted by the attorney to others are not privileged. *Riley v. State*, 180 Ga. 869, 181 S.E. 154 (1935).

Documents obtained from third parties. — Attorney client privilege does not apply to documents obtained by the attorney from a third party, or even documents which a party filters through its attorney. *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994).

Admission of certain letters did not violate privilege. — Admission of three letters from attorneys to the defendant in a malice murder trial did not violate the attorney-client privilege: the first letter was not privileged as the letter merely showed employment of an attorney; the second letter simply forwarded a letter noting the enclosure of a final payment for a real estate transaction; and the third letter was a follow-up letter asking the defendant if there was a mortgage or another indebtedness on the property and whether the defendant had a deed. *Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

Use of agent to transmit communication. — When legal advice of any kind is sought from a duly accredited professional legal advisor in the advisor's capacity as such, the communications relevant to that purpose, made in confidence by the client, are at the client's instance permanently protected from disclosure by the client, the legal advisor, or the agent of either confidentially used to transmit the communication, unless the client waives the protection; and clearly, therefore, since the client has used a confidential agent of transmission, which, under the circumstances, it was reasonably necessary for the client to do, the client will be protected against betrayal of this confidence by such agent to the same extent as against betrayal of confidence by the client's attorney. *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934).

Work product rule. — Under the work product rule, the attorney-client privilege

protects correspondence between defendant's claims examiners and counsel, letters between inside and outside counsel, correspondence between defendant's employees and insurance carrier, and handwritten notes by inside counsel; but not plaintiff's medical records, statements by plaintiff, or correspondence between defendant's agent and third parties. *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994).

Information obtained for preparing bankruptcy schedules gained during intake interview questioning was protected by the attorney-client privilege. *In re Stoutamire*, 201 Bankr. 592 (Bankr. S.D. Ga. 1996).

Placing material with attorney invokes no privilege. — It is axiomatic that one cannot render privileged that which is otherwise not privileged merely by placing it in the hands of one's attorney. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Photographs not "communications." — In a prosecution for sexual offenses, photographs given by the defendant to his attorney depicting sexual activity between defendant's wife and a 13-year-old girl were not "communications," but were admissible as evidence of a similar crime. *Johnson v. State*, 222 Ga. App. 722, 475 S.E.2d 918 (1996).

Testimony sought fell within attorney-client privilege. — Testimony that defendant sought from a codefendant's lawyer relating to an alleged deal to provide substantial assistance to the prosecution fell within the attorney-client privilege because there was no evidence of any fraud or crime; although the defendant insisted that the codefendant committed perjury when by testifying that the codefendant's attorney did not discuss "substantial assistance" with the codefendant, these arguments were merely speculative. *Pihlman v. State*, 292 Ga. App. 612, 664 S.E.2d 904 (2008), cert. denied, 2008 Ga. LEXIS 977 (Ga. 2008).

When Privilege Attaches

Prior statements. — Mere fact that at some later time statements are transmitted to an attorney for use in preparing a defense to litigation that may have arisen out of the occurrence to which the statements referred does not render the statements communications to the attorney or bring the statements within the privileged category. *Atlantic Coast*

Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Communication in anticipation of employment. — An attorney is neither compellable nor competent to testify to any matter or thing, knowledge of which the attorney may have acquired by reason of the anticipated employment of the person as attorney by one seeking the attorney's professional aid and advice, whether, as matter of fact, the attorney so consulted is or is not afterwards employed to undertake the service concerning which the confidential communication sought to be introduced in evidence was made. *Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. 637, 179 S.E. 420 (1935).

Testimony of an attorney to the effect that on a visit to the mother of defendant, made in anticipation of employment as attorney for defendant, the mother delivered a pistol and watch to the witness, with instructions to deliver them to a named police officer, was not inadmissible in evidence upon the ground that it was confidential communication between attorney and client. *Riley v. State*, 180 Ga. 869, 181 S.E. 154 (1935).

Communication of criminal plans. — As to violations of law or commissions of fraud, the protection extends only to communications after the act or transaction is finished, and does not cover communications respecting proposed infractions of the law in commission of a crime or perpetration of a fraud. *Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. 637, 179 S.E. 420 (1935).

When an attorney speaks with a defendant as a family friend, not as a legal advisor, and tells the defendant that the attorney does not represent the defendant and to contact an attorney if the defendant needs legal advice, no attorney-client relationship exists. *Spence v. State*, 252 Ga. 338, 313 S.E.2d 475 (1984).

Disclosure, Production, or Delivery

Privilege is absolute, and if a matter is privileged it is not discoverable. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Attorney's involvement in disclosure irrelevant. — Privilege bars communications regardless of whether the communications were voluntarily produced by the attorney to be used against the client, or were surreptitiously or otherwise taken from the posses-

sion of the attorney. *McKie v. State*, 165 Ga. 210, 140 S.E. 625 (1927).

Clerk or amanuensis of attorney cannot testify as to confidential communications in clerk's presence between the attorney and client. *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934).

Attorney-client relationship extends to the network of employees acting under the direction of the attorney. *In re Stoutamire*, 201 Bankr. 592 (Bankr. S.D. Ga. 1996).

Abuse of process. — An action was originally commenced against an individual, the sole shareholder of a corporation, instead of the corporation itself, the proper party. In a later action for abuse of process, the trial court properly allowed evidence to show that the defendant (the original plaintiff) was unwilling to allow the defendant's original attorney to divulge the reasons why the present plaintiff had been sued in an individual capacity, and to draw any reasonable inferences from this taking of the attorney-client privilege. *Ostroff v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

Revealing location of victim's body. — While the state is likely correct that defendant's attorney had a positive obligation to reveal the location of the victim's body to law enforcement officers, it does not follow of necessity that the state should disclose to the jury that the source of the information that led to the discovery of the body was the attorney. Offering such testimony is a dangerous practice, and one the Supreme Court disapproves. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Production of medical records. — Medical records in defendant's claim files are subject to neither the work product privilege nor the doctor patient privilege and should be produced for plaintiff's review. *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994).

Certain documents in an insurer's claim file were protected under the attorney-client privilege of O.C.G.A. § 24-9-24 because the documents related to retaining an attorney to defend the insured and were related to the attorney's representation of the insured, along with the attorney's mental impressions that were protected under the work product doctrine. *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663 (N.D. Ga. 2008).

Disclosure, Production, or Delivery (Cont'd)

Testimony of investigator hired by attorney. — In a proceeding on a motion to quash a subpoena requiring a private investigator to appear before a grand jury and produce evidence acquired by the investigator during employment in defendant's divorce proceeding, there was no violation of defendant's procedural rights because the investigator's in-camera testimony authorized the court to find that the subject communications from defendant were made after the investigator ceased acting as an agent or employee of the attorney, and that they fell within the crime-fraud exception to the attorney-client privilege. *In re Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 535 S.E.2d 340 (2000).

Refreshing recollection improperly. — Trial court erred in permitting the state, on cross-examination, to have the defense psychologist refresh the psychologist's recollection, thereby effectively impeaching defendant, by use of a privileged and confidential communication to the defense attorney's investigator; but because the impermissibly refreshed recollection was entirely consistent with, and cumulative of, other competent evidence, the error was harmless. *Revera v. State*, 223 Ga. App. 450, 477 S.E.2d 849 (1996).

Inadvertent disclosure to defense counsel of a letter from plaintiff to plaintiff's attorneys did not waive the attorney-client privilege. *Lazar v. Mauney*, 192 F.R.D. 324 (N.D. Ga. 2000).

Habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine. Under these circumstances, the state is entitled only to counsel's documents and files relevant to the specific allegations of ineffectiveness. *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000).

Facts in Connection with Employment

Mere fact of employment between attorney and client is not protected from disclosure. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

An attorney may testify with respect to essential facts attending execution of con-

tract in preparation and as to attestation of which the attorney rendered professional service. *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949).

An attorney at law who witnesses a contract as a subscribing witness, and who was employed to prepare the same, is competent, in a trial involving the mental capacity of the maker thereof to execute a valid contract, to testify as a witness concerning the maker's mental condition, and as to facts showing the latter's knowledge or ignorance of the contents of the paper, and as to all other pertinent facts attending signing and attestation of the instrument. *Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966).

Client accusing attorney of failure to inform. — When there was no claim of misconduct or incompetent representation, a habeas corpus petitioner cannot claim that the petitioner was not informed of the sentence consequences of a guilty plea, and then invoke the attorney-client privilege to prevent the attorney from testifying. *Bailey v. Baker*, 232 Ga. 84, 205 S.E.2d 278 (1974).

Client accusing attorney of previous misconduct. — When accused in statement to jury charged that attorney who represented the accused in previous prosecution for murder entered plea of guilty over the accused's protests of innocence, accused waived the accused's right to have their transactions considered as privileged, and the attorney was competent to give testimony to show that the attorney did not act basely in the transaction, as the attorney's one-time client claimed. *Hyde v. State*, 70 Ga. App. 823, 29 S.E.2d 820 (1944).

Letters between a private investigator and defendant's attorneys. — With regard to a defendant's conviction for malice murder, the trial court did not err by allowing the introduction of one letter by a private investigator and two letters by the defendant's attorneys in violation of the attorney-client privilege since the three letters did not involve any communications between the defendant and the defendant's attorneys. Rather, they were all communications between the private investigator and the attorneys, and the letters did not contain confidential information and, instead, concerned only the fact of the investigator's employment and the attorneys' claims that the investigator's services in the divorce case

between the defendant and an estranged spouse fell under the attorney-client privilege. *Davis v. State*, 285 Ga. 343, 676 S.E.2d 215 (2009).

Waiver

When no request is made by accused or the accused's counsel to confer privately without the presence of the marshal, the mere existence of such right would not affect the validity of the conviction, since there must be denial of such right by the trial judge before the accused may complain. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Presence of third party. — When a client makes to an attorney a communication or statement in the presence of the opposite party as to the transaction in hand, it is not confidential or privileged, and the attorney is a competent witness to testify respecting

the statement on the trial of a case arising out of such transaction. *Griffin v. Williams*, 179 Ga. 175, 175 S.E. 449 (1934).

Defendant's act of delivering to his wife a statement for her to read, rewrite, sign and have notarized prior to his giving it to his attorney was a waiver of the attorney-client privilege as to such document. *Osborn v. State*, 233 Ga. App. 257, 504 S.E.2d 74 (1998).

Privilege not waived by testifying before grand jury. — Civil plaintiff's counsel did not waive the work product privilege by testifying before a grand jury regarding information allegedly covered by the privilege and therefore did not render oneself a potential witness in the civil trial. *Wrisco Indus., Inc. v. Hinely*, 733 F. Supp. 106 (N.D. Ga. 1990).

An eavesdropper or a wiretapper is not incompetent to testify to the communications one overhears. *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934).

OPINIONS OF THE ATTORNEY GENERAL

Attorneys employed by state agencies. — Although state agencies may employ persons with legal training and experience to serve as administrative legal service officers, those persons may not provide legal advice or

representation to the agency, and no attorney-client relationship or privilege arises between the legal services officer and other agency officers or employees, or the agency itself. 1995 Op. Att'y Gen. No. 95-1.

ADVISORY OPINIONS OF THE STATE BAR

It is ethically proper for a lawyer to reveal the confidences or secrets of clients in any proceedings in which revelation may be nec-

essary to defend the lawyer against charges of professional misconduct. Adv. Op. No. 80-27 (November 21, 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witness, § 325.

Am. Jur. Proof of Facts. — Proof of Waiver of Attorney-Client Privilege, 32 POF3d 189.

Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery, 39 POF3d 1.

C.J.S. — 97 C.J.S., Witnesses, § 316, 317, 321 et seq.

ALR. — Privilege as to communications to attorney in connection with drawing of will, 64 ALR 184; 66 ALR2d 1302.

Expression of willingness by witness that another should testify as waiver of privilege in respect of latter's testimony, 72 ALR 148.

Refusal of attorney to disclose identity of, whereabouts of, or other information relating to, his client as contempt, 101 ALR 470.

Attorney-client privilege as affected by wrongful or criminal character of contemplated acts or course of conduct, 125 ALR 508.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 ALR 732.

Evidence: attorney-client privilege as applicable to communications between attorney and client's agent, employee, spouse, or relative, 139 ALR 1250.

Attorney-client privilege as applied to communications in presence of two or more persons interested in the subject matter to which the communications relate, 141 ALR 553.

Right of attorney to introduce evidence, and to cross-examine, in summary proceeding against him by, or in interest of, his client, 141 ALR 655.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 ALR2d 521.

Privilege as to communications to attorney in connection with drawing of will, 66 ALR2d 1302.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 ALR2d 796.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 ALR2d 125; 31 ALR4th 1226.

Right of corporation to assert attorney-client privilege, 98 ALR2d 241; 26 ALR5th 628; 27 ALR5th 76.

Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 ALR3d 861.

Attorney-client privilege as affected by communications between several attorneys, 9 ALR3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 ALR3d 1029.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege, 16 ALR3d 1047.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 ALR3d 557.

Defense attorney as witness for his client in state criminal case, 52 ALR3d 887.

Applicability of attorney-client privilege to

matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 ALR3d 1322.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party, 4 ALR4th 765.

Disqualification of attorney because member of his firm is or ought to be witness in case — modern cases, 5 ALR4th 574.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 ALR4th 594.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 ALR4th 458.

Privilege as to communications between lay representative in judicial or administrative proceedings and client, 31 ALR4th 1226.

Attorney-client privilege: who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client, 66 ALR4th 1227.

Involuntary disclosure or surrender of will prior to testator's death, 75 ALR4th 1144.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases, 26 ALR5th 628.

What corporate communications are entitled to attorney-client privilege—modern cases, 27 ALR5th 76.

Application of attorney-client privilege to electronic documents, 26 ALR6th 287.

Waiver of evidentiary privilege by inadvertent disclosure—federal law, 159 ALR Fed. 153.

Views of United States Supreme Court as to attorney-client privilege, 159 ALR Fed. 243.

24-9-25. When attorney may testify for or against client.

No attorney shall be competent or compellable to testify for or against his client to any matter or thing, the knowledge of which he may have acquired from his client by virtue of his employment as attorney or by reason of the anticipated employment of him as attorney. However, an attorney shall be both competent and compellable to testify for or against his client as to any matter or thing, the knowledge of which he may have acquired in any other manner. (Ga. L. 1866, p. 138, § 2; Code 1868, § 3798; Code 1873, § 3854; Code 1882, § 3854; Ga. L. 1887, p. 30, § 1; Civil Code 1895, § 5271; Penal

Code 1895, § 1011; Civil Code 1910, § 5860; Penal Code 1910, § 1037; Code 1933, § 38-1605.)

Law reviews. — For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For article on the expansion of the attorney-client privilege in Georgia, see 17 Ga. St. B.J. 150 (1981). For article, “Inadvertent Disclosure of Privileged Material,” see 18 Ga. St. B.J. 166 (1982). For annual survey of legal ethics, see 38 Mercer L. Rev. 269 (1986). For article, “The Attorney-Client Privilege: The Common Law and Georgia’s Uncommon Statutes,” see 5 Ga. St. U.L. Rev. 27 (1988). For article, “The

Defense Attorney’s Ethical Response to Ineffective Assistance of Counsel Claims,” see 5 Ga. St. B.J. 40 (1999).

For note, “Conflicts of Interest in the Liability Insurance Setting,” see 13 Ga. L. Rev. 973 (1979). For note, “Wills and the Attorney-Client Privilege,” see 14 Ga. L. Rev. 325 (1980). For note on the Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege, see 24 Ga. L. Rev. 1115 (1990).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ACQUISITION OF KNOWLEDGE

1. BY VIRTUE OF EMPLOYMENT
2. BY REASON OF ANTICIPATED EMPLOYMENT
3. BY ANY OTHER MANNER

APPLICATION IN SPECIFIC ACTIONS

General Consideration

Editor’s notes. — In instances where duplication could serve no useful purpose, cases decided under the predecessors of Code Sections 24-9-21, 24-9-24, and this Code section have been annotated under either Code Section 24-9-21 or Code Section 24-9-24, but not under this Code section. The user interested in a more general discussion of the attorney-client privilege should also consult those sections.

Statute not restrictive. — It was not the intention of the statute to restrict the admission of evidence, but to enlarge the rule for the admission of evidence. *Strickland v. Wynn*, 51 Ga. 600 (1874) (see O.C.G.A. § 24-9-25).

Rule set forth in the statute cannot be invoked by strangers to relationship. *O’Brien v. Spalding*, 102 Ga. 490, 31 S.E. 100, 66 Am. St. R. 202 (1897); *Neal v. Dover*, 217 Ga. 545, 123 S.E.2d 760 (1962); *Cleary v. Burlington Indus., Inc.*, 193 Ga. App. 81, 387 S.E.2d 36 (1989).

Communications not intended to be confidential. — Communications made by a client to an attorney for the purpose of being imparted by the attorney to others do

not fall within the inhibition of the statute. *Fowler v. Sheridan*, 157 Ga. 271, 121 S.E. 308 (1924).

Under O.C.G.A. § 24-9-25, in general, an attorney may not be compelled to testify against a client to any matter or thing, the knowledge of which the attorney may have acquired by virtue of the individual’s employment as an attorney; this rule, however, does not prohibit an attorney from testifying about matters that occurred in the presence of the opposing party, because such communications were not intended to be confidential. *Martinez v. Hous. Auth.*, 264 Ga. App. 282, 590 S.E.2d 245 (2003).

Presence of opposite party. — When a client makes to an attorney a communication or statement in the presence of the opposite party as to the transaction in hand, it is not confidential or privileged. *Stone v. Minter*, 111 Ga. 45, 36 S.E. 321, 50 L.R.A. 356 (1900).

Testimony pertaining to attorney fees is not a matter the knowledge of which the lawyer obtains from the client, and it is not necessary that the attorney be listed as a witness in the pre-trial order in order to testify as to such fees. *Halpern v. Lacy Inv.*

General Consideration (Cont'd)

Corp, 259 Ga. 264, 379 S.E.2d 519 (1989).

Client's identity not covered by privilege.

— Because a client's identity is not covered by the attorney-client privilege, the trial court correctly declined to permit an attorney to use the privilege to justify refusal to reveal the identity of a client who had requested that the client's identity be kept confidential. *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (2000).

Attorney may not be called to testify as to client's competency. — It is not legally permissible for the state to call defendant's counsel as a witness for the purpose of extracting facts and counsel's opinion as to the client's competency, which is gained from the attorney's participation in the attorney-client relationship with the defendant. *Almond v. State*, 180 Ga. App. 475, 349 S.E.2d 482 (1986).

Existence of "open government" does not negate existence of attorney-client privilege as to matters discussed between county officials and county attorney. *Dodson v. Floyd*, 529 F. Supp. 1056 (N.D. Ga. 1981).

Termination of relationship. — Law has no application as to communication made by a former client to the attorney after the relation of attorney and client had ceased to exist. *Philman v. Marshall*, 103 Ga. 82, 29 S.E. 598 (1897).

Privilege continues after client's death. *Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966).

Statute creates no "privilege as attorney" giving an attorney at law the right to refuse to answer pertinent questions asked for the purpose of proving that the attorney was not employed by a designated person to institute a given proceeding. *Alger v. Turner*, 105 Ga. 178, 31 S.E. 423 (1898).

An objection should state unqualifiedly that attorney represented party to whom the testimony related. *Brannan v. Mobley*, 169 Ga. 243, 150 S.E. 76 (1929).

Disqualification without consideration of statute error. — Trial court order disqualifying an attorney from acting as counsel for a party on the ground that the party was a necessary witness at trial was overruled since the trial court did not consider the applicability of O.C.G.A. § 24-9-25 in the context of

the evidence adduced at the disqualification hearing. *Southern Shipping Co. v. Oceans Int'l Corp.*, 174 Ga. App. 91, 329 S.E.2d 263 (1985).

Inapplicable to defendant-requested communications. — O.C.G.A. § 24-9-25 is not implicated as to testimony relating to information defendant instructs defense counsel to convey to third persons. *Shelton v. State*, 206 Ga. App. 579, 426 S.E.2d 69 (1992).

Out-of-state order prohibiting unprivileged testimony. — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the full faith and credit clause did not require the federal district court in Georgia to give full effect to the Michigan Court order. *Williams v. GMC*, 147 F.R.D. 270 (S.D. Ga. 1993).

Cited in *Dixie Mfg. Co. v. Ricks*, 153 Ga. 364, 112 S.E. 370 (1922); *Vernon v. State*, 49 Ga. App. 187, 174 S.E. 548 (1934); *Griffin v. Williams*, 175 Ga. 179, 175 S.E. 449 (1934); *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934); *Manley v. Combs*, 197 Ga. 768, 30 S.E.2d 485 (1944); *Peacon v. Peacon*, 197 Ga. 748, 30 S.E.2d 640 (1944); *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949); *Sechler v. State*, 90 Ga. App. 700, 83 S.E.2d 847 (1954); *Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966); *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969); *Nicolelli v. Connell*, 137 Ga. App. 563, 224 S.E.2d 511 (1976); *Peterson/Puritan, Inc. v. Day*, 157 Ga. App. 827, 278 S.E.2d 674 (1981); *Gilbert v. State*, 169 Ga. App. 383, 313 S.E.2d 107 (1984); *Crystal Cubes of Stone Mt., Inc. v. Kutz*, 201 Ga. App. 338, 411 S.E.2d 53 (1991); *Newcomer v. Newcomer*, 278 Ga. 776, 606 S.E.2d 238 (2004).

Acquisition of Knowledge**1. By Virtue of Employment**

Acquisition during and by reason of relationship. — To make an attorney incompetent to testify to a fact, knowledge of the fact must have been acquired by the attorney both during the relationship of client and attorney and by reason of that relationship. *Parker v. Wellons*, 43 Ga. App. 721, 160 S.E. 109 (1931).

Service performed as a favor. — When an attorney who prepared a deed was not em-

ployed to do so, but prepared the deed merely as a “friendly act” for the grantor, such attorney is not incompetent to testify as to statements made by the grantor at the time. *Lifsey v. Mims*, 193 Ga. 780, 20 S.E.2d 32 (1942).

2. By Reason of Anticipated Employment

Rule applies regardless of eventual employment. — Confidential communications, made to an attorney not actually employed at the time, but which were made in anticipation of employing the attorney, come within the rule protecting privileged communications, and this is true whether as a matter of fact the attorney so consulted is or is not afterwards employed to undertake the services concerning which the confidential communications ought to be introduced in evidence were made. *Young v. State*, 65 Ga. 525 (1880); *Peek & Sullivan v. Boone*, 90 Ga. 767, 17 S.E. 66 (1893). See also *Haywood v. State*, 114 Ga. 111, 39 S.E. 948 (1901).

3. By Any Other Manner

In general. — An attorney at law is not incompetent to testify to facts which did not come to the attorney’s knowledge by reason of the relation or contemplated relation of attorney and client between oneself and another. *Harkless v. Smith*, 115 Ga. 350, 41 S.E. 634 (1902).

An attorney is both competent and compellable to testify, for or against a client, as to any matter or thing, knowledge of which the attorney may have acquired in any other manner than by virtue of the attorney’s relations as attorney, or by reason of the attorney’s anticipated employment as attorney. *Bracewell v. State*, 21 Ga. App. 133, 94 S.E. 91 (1917).

Attorney-client privilege does not encompass matters of which the attorney has or gains knowledge through some source other than the communications of a client in preparation for litigation. If the attorney has knowledge from another source, testimony concerning that is proper. *Buffington v. McClelland*, 130 Ga. App. 460, 203 S.E.2d 575 (1973).

Application in Specific Actions

Actions by client against attorney. — Rule as to privilege has no application if the

client, in an action against the attorney, charges negligence, malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of the attorney. *Daughtry v. Cobb*, 189 Ga. 113, 5 S.E.2d 352 (1939).

No disqualification in adversarial bankruptcy action after former representation in arbitration proceeding. — Bankruptcy court denied a trustee’s motion to disqualify an attorney who represented a church that was sued in an adversary proceeding; although the attorney represented the church during an arbitration proceeding that led to a settlement agreement, and the trustee claimed that the attorney was a potential witness who had information relevant to the claim that the church breached the settlement agreement, the court noted that O.C.G.A. § 24-9-25 protected the attorney from being called to testify about information the attorney obtained while performing legal services for the church, and that evidence regarding nonprivileged matters was attainable from other sources, and the court found that allowing the attorney to represent the church would not be a violation of Ga. St. Bar R. 4-102:3.7. *Hays v. Paradise Mission Church, Inc. (In re Harrington, George & Dunn, P.C.)*, No. 05-91725, 2007 Bankr. LEXIS 2160 (Bankr. N.D. Ga. May 29, 2007).

Consider statute in disqualifying attorneys. — When there was no evidence showing the attorneys acquired knowledge regarding surety’s denial of general contractor’s claim in a capacity other than as surety’s attorneys, and when it was unclear from the trial court’s order whether the trial court considered O.C.G.A. § 24-9-25 applicable to the decision to disqualify the attorneys, and the statute being directly relevant to the issue of disqualification, the trial court’s order disqualifying surety’s counsel was reversed and the case remanded for a determination of whether attorneys could even be competent witnesses in the case. *Amwest Sur. Ins. Co. v. Interstate Constr. Co.*, 212 Ga. App. 590, 442 S.E.2d 772 (1994).

Incompetency does not relate solely to admissions made by the client. *Freeman v. Brewster*, 93 Ga. 648, 21 S.E. 165 (1894).

Testimony of client as to advice given to the client by counsel is incompetent, and on

Application in Specific Actions (Cont'd)

timely motion should be excluded. *Braxley v. State*, 17 Ga. App. 196, 86 S.E. 425 (1915).

Declaring book to be original. — Allowing of defendant to state, under oath, that the book which defendant proposed to offer in evidence was defendant's original book of entry was not such testimony or evidence in relation to the cause of action in issue or on trial as is contemplated by statute. *Strickland v. Wynn*, 51 Ga. 600 (1874).

Contracts. — Statute has no application to the competency of an attorney as a witness with respect to essential facts attending the execution of a contract in preparation and as to attestation of which the attorney rendered professional service. In such a matter the attorney is not testifying "for or against his client." *Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966), later appeal, 223 Ga. 560, 156 S.E.2d 901 (1967).

Evidence of employment of attorney. — It is competent to show the fact of an attorney's employment, either by the client or the attorney, and evidence confined to this fact was not objectionable on the ground that it involved confidential relations. *Fowler v. Sheridan*, 157 Ga. 271, 121 S.E. 308 (1924).

Insurance carried by client. — Rule applies with reference to the attorney's knowledge concerning insurance which the client may have carried. *Weatherbee v. Hutcheson*, 114 Ga. App. 761, 152 S.E.2d 715 (1966).

Knowledge of contents of insurance policy. — When knowledge of an attorney of the contents of an insurance policy was acquired while acting in the attorney's professional capacity under employment to collect the policy, and by reason of that relationship, the attorney was an incompetent witness to testify to those facts, it was error to admit this evidence. *Freeman v. Brewster*, 93 Ga. 648, 21 S.E. 165 (1894).

Request to call coconspirator's counsel. — Criminal defendant's request to call defendant's coconspirator's counsel to rebut the coconspirator's testimony that the coconspirator had not been offered any "deal" by the state in exchange for the coconspirator's testimony was properly denied because the testimony defendant sought to elicit came within the attorney-client privilege. *Avery v. State*, 244 Ga. App. 177, 534 S.E.2d 897 (2000).

No privilege in joint representation. — If two or more persons jointly consult or retain an attorney the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. In such situations it is considered that the attorney does not have an attorney-client relationship with either of the joint parties. *Peterson v. Baumwell*, 202 Ga. App. 283, 414 S.E.2d 278 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 278 (1992).

If, by consenting to joint representation, the parties waived the attorney-client privilege as to communications affecting the interest of the other, then such communications should be discoverable by each one of the parties against the other. The fact that there is present in this litigation a third party who will gain access to these communications does not change the fact of the initial waiver. *Peterson v. Baumwell*, 202 Ga. App. 283, 414 S.E.2d 278 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 278 (1992).

Offspring acquires no attorney-client privilege resulting from deceased parent's relationship. — Trial court did not err in admitting testimony of attorney who represented the testator as the daughter could not invoke the attorney-client privilege to prevent that testimony since the daughter was a stranger to that attorney-client relationship. *White v. Regions Bank*, 275 Ga. 38, 561 S.E.2d 806 (2002).

Attorney attacking judgment. — Attorney of record who represented a plaintiff in bringing suit and taking judgment will not be heard to urge, in the attorney's own behalf, the invalidity of the judgment for want of process. *Kennedy v. Redwine*, 59 Ga. 327 (1877).

Abuse of process. — An action was originally commenced against an individual, the sole shareholder of a corporation, instead of the corporation itself, the proper party. In a later action for abuse of process, the trial court properly allowed evidence to show that the defendant (the original plaintiff) was unwilling to allow the defendant's original attorney to divulge the reasons why the present plaintiff had been sued in an individual capacity, and to draw any reasonable inferences from this taking of the attorney-client privilege. *Ostroff v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

Letters. — Letters written between the attorney and the agent of a corporation, which was the attorney's client, containing confidential communications between the two, should not have been forced to be produced for use in evidence against the client. *Fire Ass'n v. Fleming*, 78 Ga. 733, 3 S.E. 420 (1887).

Letter from the plaintiff in a case to plaintiff's attorney, and from the attorney delivered to defendant's counsel, is not admissible. *Southern Ry. v. White*, 108 Ga. 201, 33 S.E. 952 (1899).

An attorney is not incompetent to testify as to mental condition of a deceased client, based upon the attorney's observations while representing the client in litigation. *Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966).

Compelling attorney to produce title papers. — Court has no power to compel the counsel of one of the parties to disclose on oath, in spite of one's claim of privilege, that one has in court one of the client's title papers, and to produce the papers to be used in the suit as evidence for the opposite party, especially if notice to produce has not been previously given. *Dover v. Harrell*, 58 Ga. 572 (1877).

In a dispossessory action brought by a mortgage company against a possessor, the trial court properly granted the mortgage company a writ of possession as the company produced a recorded certified copy of the security deed, which the possessor failed to prove was a fraud since the possessor's signature on the deed matched that as appeared on the answer filed. The trial court properly rejected the possessor's attempt to examine the mortgage company's counsel regarding the authenticity of the deed since counsel represented the mortgage company and was, therefore, not competent to testify. *Egana v. HSBC Mortg. Corp.*, 294 Ga. App. 456, 669 S.E.2d 159 (2008).

Revealing location of victim's body. — While the state is likely correct that defendant's attorney had a positive obligation to reveal the location of the victim's body to law enforcement officers, it does not follow of necessity that the state should disclose to the jury that the source of the information that led to the discovery of the body was the attorney. Offering such testimony is a dangerous practice, and one the Supreme Court

disapproves. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Wills. — Statute has no application to the competency of an attorney as a witness with respect to essential facts attending the execution of a will in preparation and as to attestation of which the attorney rendered professional services. *O'Brien v. Spalding*, 102 Ga. 490, 31 S.E. 100, 66 Am. St. R. 202 (1897); *Waters v. Wells*, 155 Ga. 439, 117 S.E. 322 (1923); *Manley v. Combs*, 197 Ga. 768, 30 S.E.2d 485 (1944).

Under the mandate of statute, the trial court errs in allowing decedent's attorney to testify as to confidential communications arising out of preparation of an unexecuted will for decedent, in an action for specific performance of an alleged oral contract to make a will. *DeLoach v. Myers*, 215 Ga. 255, 109 S.E.2d 777 (1959).

In an action against the estate of decedent's wife for breach of contract to make a will, the decedent's nephew and decedent's secretary were barred from giving testimony regarding communications by the decedent to the nephew when the nephew was acting in the nephew's capacity as an attorney for the decedent. *Spence v. Hamm*, 226 Ga. App. 357, 487 S.E.2d 9 (1997).

Inadvertent disclosure to defense counsel of a letter from plaintiff to plaintiff's attorneys did not waive the attorney-client privilege. *Lazar v. Mauney*, 192 F.R.D. 324 (N.D. Ga. 2000).

Knowledge of plea deal. — Testimony that defendant sought from a codefendant's lawyer relating to an alleged deal to provide substantial assistance to the prosecution fell within the attorney-client privilege because there was no evidence of any fraud or crime; although the defendant insisted that the codefendant committed perjury when by testifying that the codefendant's attorney did not discuss "substantial assistance" with the codefendant, these arguments were merely speculative. *Pihlman v. State*, 292 Ga. App. 612, 664 S.E.2d 904 (2008), cert. denied, 2008 Ga. LEXIS 977 (Ga. 2008).

Habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine; thus, the state is entitled only to counsel's documents and

Application in Specific Actions (Cont'd)

files relevant to the specific allegations of ineffectiveness. *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000).

Paralegal's testimony in eviction proceeding. — Trial court did not err by admitting the testimony of a paralegal with a tenant's former attorney's office as, assuming the

attorney-client privilege applied to paralegals, the paralegal testified about meetings and other communications the paralegal had with the housing authority on the tenant's behalf, not about any private communications the paralegal had with the tenant. *Martinez v. Hous. Auth.*, 264 Ga. App. 282, 590 S.E.2d 245 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 273, 325.

Am. Jur. Proof of Facts. — Interference with Attorney-Client Relationship, 19 POF2d 335.

Existence of Attorney-Client Relationship, 48 POF2d 525.

Proof of Waiver of Attorney-Client Privilege, 32 POF3d 189.

C.J.S. — 97 C.J.S., Witnesses, §§ 176 et seq., 316, 317, 321 et seq.

ALR. — Admissibility of statements by attorney out of court as to probability of verdict or decision adverse to client, 8 ALR 1334.

Privilege as to communications to attorney in connection with drawing of will, 64 ALR 184; 66 ALR2d 1302.

Refusal of attorney to disclose identity of, whereabouts of, or other information relating to, his client as contempt, 101 ALR 470.

Evidence: attorney-client privilege as applicable to communications between attorney and client's agent, employee, spouse, or relative, 139 ALR 1250.

Attorney-client privilege as applied to communications in presence of two or more persons interested in the subject matter to which the communications relate, 141 ALR 553.

Right of attorney to introduce evidence, and to cross-examine, in summary proceeding against him by, or in interest of, his client, 141 ALR 655.

Privilege as to communications to attorney in connection with drawing of will, 66 ALR2d 1302.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 ALR2d 521.

Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent, 67 ALR2d 1268.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 ALR2d 796.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 ALR2d 125; 31 ALR4th 1226.

Right of corporation to assert attorney-client privilege, 98 ALR2d 241; 26 ALR5th 628; 27 ALR5th 76.

Testamentary capacity as affected by use of intoxicating liquor or drugs, 9 ALR3d 15.

Attorney-client privilege as affected by communications between several attorneys, 9 ALR3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 ALR3d 1029.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege, 16 ALR3d 1047.

Propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony, 32 ALR3d 906.

Defense attorney as witness for his client in state criminal case, 52 ALR3d 887.

Prosecuting attorney as a witness in criminal case, 54 ALR3d 100.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party, 4 ALR4th 765.

Disqualification of attorney because member of his firm is or ought to be witness in case — modern cases, 5 ALR4th 574.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 ALR4th 458.

Attorney-client privilege: who is "representative of the client" within state statute or

rule privileging communications between an attorney and the representative of the client, 66 ALR4th 1227.

Application of attorney-client privilege to electronic documents, 26 ALR6th 287.

Involuntary disclosure or surrender of will prior to testator's death, 75 ALR4th 1144.

24-9-26. Law enforcement officers; privilege not to divulge address in criminal proceedings; exception.

Law enforcement officers testifying before any court in any criminal proceedings shall not be compelled to reveal their home address but may be required to divulge the business address of their employer, except that the court may require any officer to answer questions as to his home address whenever such fact may be material to any issue in the case. (Ga. L. 1973, p. 547, § 1.)

RESEARCH REFERENCES

ALR. — Right to cross-examine witness as to his place of residence, 85 ALR3d 541.

24-9-27. Privilege of parties and witnesses; public officials.

(a) No party or witness shall be required to testify as to any matter which may criminate or tend to criminate himself or which shall tend to bring infamy, disgrace, or public contempt upon himself or any member of his family.

(b) Except in proceedings in which a judgment creditor or his successor in interest seeks postjudgment discovery involving a judgment debtor pursuant to Code Section 9-11-69, no party or witness shall be required to testify as to any matter which shall tend to work a forfeiture of his estate.

(c) No party or witness shall be required to make discovery of the advice of his professional advisers or his consultation with them.

(d) No official persons shall be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment. (Orig. Code 1863, §§ 3035, 3737, 3794; Code 1868, §§ 3047, 3761, 3814; Code 1873, §§ 3102, 3814, 3870; Code 1882, §§ 3102, 3814, 3870; Civil Code 1895, §§ 3947, 3957, 5288; Civil Code 1910, §§ 4544, 4554, 5877; Code 1933, §§ 38-1102, 38-1205, 38-1711; Ga. L. 1978, p. 2000, § 1.)

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

Law reviews. — For article surveying Georgia cases in the area of trial practice and procedure from June 1977 through May 1978, see 30 Mercer L. Rev. 239 (1978). For

article, "Caught Between a Rock and a Hard Place: Invocation of the Privilege Against Self-Incrimination in Civil Cases," see 15 (No. 1) Ga. St. B.J. 14 (2009).

For note discussing discovery proceedings available to creditors, see 12 Ga. L. Rev. 814 (1978).

For comment discussing the privilege against answers tending to disgrace but not incriminate, see 18 Ga. B.J. 88 (1955). For

comment, "The Government's Privilege to Withhold the Identity of Informers, as Applied to Decoys," see 20 Ga. B.J. 562 (1958).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
SELF-INCRIMINATION
FORFEITURE OF ESTATE
STATE MATTERS

General Consideration

Self-incrimination and forfeiture provisions compared. — Self-incrimination privilege involves important policy and constitutional implications not applicable to the forfeiture privilege. *Kushner v. Mascho*, 143 Ga. App. 801, 240 S.E.2d 290 (1977).

Witness protected from indirect incrimination. — Protection is not limited to cases if the question or answer has a direct tendency to incriminate the defendant or to expose the defendant to a penalty or forfeiture; the defendant is protected from answering any question which may form a link in the chain by which such cases are to be established. *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974).

Witness must explain silence. — Witness may not stand moot, but must testify that the answer would incriminate or tend to incriminate oneself, work a forfeiture of one's estate, or tend to bring infamy or disgrace or public contempt upon the witness or any member of one's family as the case may be, otherwise one would be in contempt. *Wynne v. State*, 139 Ga. App. 355, 228 S.E.2d 378 (1976).

Appeal from motion to disclose identity of informant. — State was without authority to appeal from the grant of a motion to disclose the identity of the confidential informant because it was not among the enumerated instances set forth in O.C.G.A. § 5-7-1, nor was the order dispositive of the charges against defendant. *Glenn v. State*, 271 Ga. 604, 523 S.E.2d 13 (1999).

Public policy in Georgia favored nondisclosure of the identity of a confidential informant (CI); because a CI did not participate in a controlled drug buy, the defendant's request to disclose the CI's identity was properly denied; while the defendant

argued that the CI was a witness to whether or not the defendant consented to a search of the defendant's car, whether the defendant consented was immaterial because an officer was authorized to arrest the defendant for drug possession, and based on that arrest, the officer had the authority to search the car. *Little v. State*, 280 Ga. App. 60, 633 S.E.2d 403 (2006).

Trial court did not err in refusing the defendant's request to disclose the identity of a confidential informant in order to support an entrapment defense as the defendant was unable to present an arguably persuasive case regarding the lack of a predisposition to commit the crime, based specifically on: (1) a discussion with a detective about the impending drug sale; (2) the defendant's act of displaying a weapon considered to be protection against a robbery; and (3) the defendant's act of coordinating the movements of the numerous participants in the large-scale transaction the defendant was a part of. *Griffiths v. State*, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

Instructions. — It is not reversible error for the court to fail or refuse to instruct a witness of the existence of a law designed for the witness's own protection and not for the protection of another person who is on trial; whatever might be its effect if the witness were personally afterward put on trial, a third person, against whom the witness testified, cannot complain that such witness was not so instructed. *Guiffreda v. State*, 61 Ga. App. 595, 7 S.E.2d 34 (1940).

When the court instructed the witness as follows: "If at any time there's any question as to whether or not you should answer a question as possibly tending to incriminate you or as holding you up for public contempt, for public ridicule, you may have a right to refuse to answer it," there was no

error, since the court gave the witness fair and adequate notice of the witness's privilege against self-incrimination. *Wilbanks v. Wilbanks*, 220 Ga. 665, 141 S.E.2d 161 (1965).

Privilege against self-incrimination can be waived in praesenti. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Privilege against self-incrimination can be voluntarily waived by property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Notice of waiver. — When a person represented by counsel enters into a property settlement agreement which has the necessary effect of waiving a constitutional right, express notice of or reference to such waiver is not required. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Waiver by a witness at a former trial of the same case will not bar the witness's right to exercise the witness's privilege. *Georgia R.R. & Banking Co. v. Lybrend*, 99 Ga. 421, 27 S.E. 794 (1896); *Mallin v. Mallin*, 227 Ga. 833, 183 S.E.2d 377 (1971).

Party, though introduced as a witness in party's own behalf, may, upon cross-examination as to matters not voluntarily testified about on direct examination, decline to give testimony which would tend to incriminate the party, or to bring infamy, disgrace, or public contempt upon the witness or the witness's family, notwithstanding the fact that at a previous trial of the case the witness had waived the privilege of remaining silent as to these matters. A waiver of this kind is not binding upon a witness at a trial subsequent to that at which the waiver was made. *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966).

Burden is upon a corporation seeking to invoke the attorney-client privilege to establish that its counsel's advice was privileged legal advice and thus not subject to discovery. *Southern Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

No distinction between advise on specific cases and day-to-day business. — Attorney-client privilege statutes make no distinction between legal advice given to a corporate client in regard to specific cases pending and legal advice concerning

day-to-day business matters. *Southern Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

Cited in *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931); *Jenkins v. State*, 65 Ga. App. 16, 14 S.E.2d 594 (1941); *Crosby v. State*, 90 Ga. App. 63, 82 S.E.2d 38 (1954); *Thomas v. State*, 95 Ga. App. 699, 99 S.E.2d 242 (1957); *Miles v. State*, 100 Ga. App. 614, 112 S.E.2d 237 (1959); *Williams v. Mayor of Atlanta*, 118 Ga. App. 271, 163 S.E.2d 239 (1968); *Thomason v. Harper Motor Lines*, 225 Ga. 312, 168 S.E.2d 147 (1969); *Townsend v. Northcutt*, 121 Ga. App. 230, 173 S.E.2d 470 (1970); *Mallin v. Mallin*, 226 Ga. 628, 176 S.E.2d 709 (1970); *Morrison v. State*, 129 Ga. App. 558, 200 S.E.2d 286 (1973); *Brooks v. State*, 233 Ga. 524, 212 S.E.2d 355 (1975); *Kitchens v. State*, 134 Ga. App. 81, 213 S.E.2d 180 (1975); *Wynne v. State*, 139 Ga. App. 355, 228 S.E.2d 378 (1976); *Fair v. State*, 140 Ga. App. 281, 231 S.E.2d 1 (1976); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Brown v. State*, 242 Ga. 536, 250 S.E.2d 438 (1978); *Master v. Savannah Sur. Assocs.*, 148 Ga. App. 678, 252 S.E.2d 186 (1979); *Thompson v. State*, 150 Ga. App. 567, 258 S.E.2d 180 (1979); *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981); *Davis v. State*, 159 Ga. App. 213, 283 S.E.2d 11 (1981); *Parker v. State*, 162 Ga. App. 271, 290 S.E.2d 518 (1982); *Hardy v. State*, 162 Ga. App. 797, 292 S.E.2d 902 (1982); *Statiras v. State*, 170 Ga. App. 739, 318 S.E.2d 156 (1984); *Hubbard v. State*, 173 Ga. App. 127, 325 S.E.2d 799 (1984); *Sullivan v. State*, 204 Ga. App. 274, 418 S.E.2d 807 (1992); *Nunnally v. State*, 261 Ga. App. 198, 582 S.E.2d 173 (2003); *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

Self-Incrimination

Interest of the court in considering a refusal on the grounds of incrimination is not that the defendant may be criminally implicated by an answer but that the defendant might conceivably be so implicated. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Privilege must be honored. — Questioned party's invocation of a constitutional privilege to be free from compulsion to testify against oneself must be honored. *Eason v.*

Self-Incrimination (Cont'd)

Berger & Co., 153 Ga. App. 126, 264 S.E.2d 579 (1980).

Incriminating effect can be under state or federal law. — Witness in a state court can claim the privilege against self-incrimination as to matters which might tend to incriminate the witness under either state or federal law. *Mallin v. Mallin*, 227 Ga. 833, 183 S.E.2d 377 (1971).

Privilege is personal to witness. — Privilege against self-incrimination is that of the person under examination as a witness, and is intended for the witness's protection only. *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980), sentence vacated, 449 U.S. 988, 101 S. Ct. 523, 66 L. Ed. 2d 285 (1980) (remanded for consideration in light of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)), *aff'd*, 247 Ga. 233, 275 S.E.2d 318 (1981); *Riley v. State*, 257 Ga. 91, 355 S.E.2d 66 (1987).

Privilege cannot be asserted in advance of the questions actually propounded in the examination or hearing. *Chastain v. State*, 113 Ga. App. 601, 149 S.E.2d 195 (1966).

Indiscriminate assertion of privilege prohibited. — What is impermissible is that a defendant in a civil case merely slides out of the defendant's obligations by a brash assertion that any and all questions directed to the defendant would tend to incriminate the defendant, regardless of the likelihood of such result. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Admissions as to property value were not advice. — Admissions and other evidence in requested documents as to the value of the property in question were not the advice of a professional adviser and could not be considered part of a privileged consultation simply because that evidence was included in a loan application. *Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc.*, 207 Ga. App. 693, 428 S.E.2d 687 (1993).

Witness required to answer if evidence is material. — Witness is required to answer questions tending to bring infamy, disgrace, or public contempt upon the witness or the witness's family, if the proposed evidence is material to the issues in the case; it is only if the proposed answer has no effect on the case except to impair the witness's credibility that the witness may fall back on the privi-

lege. *Brown v. State*, 242 Ga. 536, 250 S.E.2d 438 (1978).

Notice to witness of privilege. — It was not error for the trial court to allow state to advise a defense witness before the witness testified regarding Miranda warnings and the witness's fifth amendment rights where, in an earlier statement, the witness detailed how the defendant had forced the witness to have sexual intercourse with the victim on three occasions creating the possibility that the witness could be charged with felony offenses. *Allen v. State*, 210 Ga. App. 447, 436 S.E.2d 559 (1993).

Determining the possibility of incrimination. — When a question is propounded it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then the witness may answer the question without violating the privilege which is secured to the witness by law. If a direct answer to it may criminate the witness, then the witness must be the sole judge what the witness's answer would be. The court cannot participate with the witness in this judgment. If the question be of such a description that the answer to the question may or may not incriminate the witness, according to the purport of that answer, it must rest with the witness, who alone can tell what it would be, to answer the question or not. If in such a case the witness says, upon the witness's oath, that the witness's answer would criminate the witness, the court can demand no other testimony of the fact. *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966); *Interstate Life & Accident Ins. Co. v. Wilmington*, 123 Ga. App. 337, 180 S.E.2d 913 (1971); *Wynne v. State*, 139 Ga. App. 355, 228 S.E.2d 378 (1976); *Baker v. State*, 162 Ga. App. 606, 292 S.E.2d 451 (1982); *Lawrence v. State*, 257 Ga. 423, 360 S.E.2d 716 (1987).

When a court cannot say that answers to questions concerning a defendant's financial resources and dealings might not tend to incriminate the defendant in any matter, under either state or federal law, a trial judge does not err in allowing the defendant to determine whether answers to the interrogatories might tend to incriminate the defendant. *Mallin v. Mallin*, 227 Ga. 833, 183 S.E.2d 377 (1971).

Mere say-so of the witness does not estab-

lish a substantial, real danger of incrimination: defendant must also show defendant has reasonable cause to apprehend danger of incrimination from the answer, and the court must first determine whether there is a proper basis for invoking the privilege. *Prince & Paul v. Don Mitchell's WLAQ, Inc.*, 127 Ga. App. 502, 194 S.E.2d 269 (1972).

In a civil action the burden is on the reneging defendant to consider each question separately and state the defendant's general reason for any refusal to answer, at which point the trial judge may decide either that the question might be incriminating under certain circumstances (whether or not the defendant had in fact committed any crime) or whether or not the line of questions as a whole, and as a matter of law, might so tend; the discretion of neither is absolute. *Tennessee, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Attorney who delivered an anonymous campaign contribution on behalf of a client in violation of O.C.G.A. § 21-5-30(e) was improperly held in contempt for failing to disclose the client's name to the State Ethics Commission; the attorney invoked the self-incrimination privilege and the trial court found the attorney in contempt without first determining whether the commission's proposed questions might have been incriminating. *Begner v. State Ethics Comm'n*, 250 Ga. App. 327, 552 S.E.2d 431 (2001).

There was no blanket right to refuse to answer questions in civil proceedings based on the self-incrimination privilege, and since there was no transcript of the hearing at which the trial court made the court's finding that the privilege was not implicated, the appellate court presumed that evidence supported the trial court's finding and order compelling discovery; further, the trial court's order compelling an employee and the husband to produce financial documents such as checks, account statements, and tax returns in a civil proceeding did not violate the self-incrimination privilege. *Dempsey v. Kaminski Jewelry, Inc.*, 278 Ga. App. 814, 630 S.E.2d 77 (2006).

Trial court did not engage in the required analysis for a witness asserting a fifth amendment privilege, but merely declared that answering the questions concerning knowledge of the court's order regarding remov-

ing a child from a father's home would not incriminate the witness; at a minimum, such knowledge would establish a link in the chain of evidence needed to prove the witness was in contempt of that order and the trial court's finding of contempt based on the witness's refusal to answer the question was improper. In *re Tidwell*, 279 Ga. App. 734, 632 S.E.2d 690 (2006).

Requiring suspect to verbalize specified words for identification purposes, whether or not the words used are the same as those allegedly used during the commission of the offense, does not violate an accused's privilege against self-incrimination accorded the accused by the United States Constitution and the state's statutes and constitution. *Clark v. State*, 166 Ga. App. 366, 304 S.E.2d 494 (1983).

Trial court's refusal to allow questions as to sexual relations proper. — Trial court did not err by refusing ex-husband's questions to his former wife seeking to determine whether she engaged in sexual intercourse with her live-in lover on the grounds of self-incrimination in ex-husband's action to modify alimony payments. *Hathcock v. Hathcock*, 249 Ga. 74, 287 S.E.2d 19 (1982).

Instruction to jury necessary if party refuses to answer questions about sexual relations. — Ex-wife litigant's refusal to incriminate herself by answering questions about her sexual relations with a live-in lover required the trial court to instruct the jury about the adverse inference they might wish to draw from such an answer. The failure to charge the jury left the jury without instructions as to the nature and effect of the legal basis for this adverse inference, and the error was harmful since proof of sexual intercourse between ex-wife and third party was the linch-pin of the former husband's case. *Hathcock v. Hathcock*, 249 Ga. 74, 287 S.E.2d 19 (1982).

Inference may be drawn when privilege invoked. — Although a person does have a right to invoke the privilege in a civil case in order to protect oneself, when the person does so, an inference against the person's interest may be drawn by the factfinder. *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974); *Jefferson Ins. Co. v. Dunn*, 224 Ga. App. 732, 482 S.E.2d 383 (1997).

Prior testimony stricken when privilege invoked. — After a female witness was asked

Self-Incrimination (Cont'd)

if she did not have children and she reluctantly replied in the affirmative and was then asked if she had ever been married, there was no error on the part of the court in instructing the witness that she need not answer the question, nor in ruling out the former answer, on her declining to answer the second question. *Gravett v. State*, 74 Ga. 191 (1884).

Party as witness. — Party, though introduced as a witness in the party's own behalf, may, upon cross-examination as to matters not voluntarily testified about on direct examination, claim the party's privilege. *Bishop v. Bishop*, 157 Ga. 408, 121 S.E. 305 (1924).

Form for invoking privilege. — When it is plain from the context of the questioning in general that plaintiff was invoking the fifth amendment privilege against self-incrimination it is not necessary to invoke the privilege in express terms. *Temple v. Temple*, 228 Ga. 73, 184 S.E.2d 183 (1971).

Forfeiture of Estate

Determining the possibility of incrimination. — Where a witness testifies under oath that the witness's answer to any question asked of the witness would incriminate the witness and comes within the constitutional immunities guaranteed to the witness, the court can demand no further testimony of the fact. *Interstate Life & Accident Ins. Co. v. Wilmont*, 123 Ga. App. 337, 180 S.E.2d 913 (1971).

Extensive questioning concerning financial affairs might tend to incriminate a person as a matter of law. In the particular situation of financial affairs, only the defendant or witness can weigh the effect. *Busby v. Citizens Bank*, 131 Ga. App. 738, 206 S.E.2d 640 (1974).

Privilege does not cover a pledge by the defendant not to reveal information. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Privilege inapplicable where earning ability alone is threatened. — Forfeiture of estate objection, if it means merely that answering would interfere with the defendant's mode of earning a living, is not acceptable. *Tennesco, Inc. v. Berger*, 144 Ga.

App. 45, 240 S.E.2d 586 (1977); *In re Manheim*, 259 Ga. 791, 387 S.E.2d 330 (1990).

Post-judgment discovery. — Statute does not protect a person from answering financial questions on post-judgment discovery because such answer may tend to work a forfeiture of a person's estate. Any forfeiture would not result from answering the questions or producing documents, but rather as a result of the judgment already entered. *First Fed. Sav. & Loan Ass'n v. Fisher*, 422 F. Supp. 1 (N.D. Ga. 1976), *aff'd*, 544 F.2d 902 (5th Cir. 1977); *Kushner v. Mascho*, 143 Ga. App. 801, 240 S.E.2d 290 (1977).

Form for invoking privilege. — When it is plain from the context of the questioning in general that plaintiff was invoking the fifth amendment privilege against self-incrimination it is not necessary to invoke the privilege in express terms. *Temple v. Temple*, 228 Ga. 73, 184 S.E.2d 183 (1971).

State Matters

Identity of informants need not be disclosed. — Ordinarily, one who acts in the capacity of a peace officer or connected therewith will not be required by the courts to disclose the name of their informants concerning a crime for which an accused is being tried. *Anderson v. State*, 72 Ga. App. 487, 34 S.E.2d 110 (1945); *Morgan v. State*, 211 Ga. 172, 84 S.E.2d 365 (1954); *Thomas v. State*, 134 Ga. App. 18, 213 S.E.2d 129 (1975); *State v. Keith*, 139 Ga. App. 399, 228 S.E.2d 332 (1976), *aff'd*, 238 Ga. 157, 231 S.E.2d 727 (1977); *State v. Burnett*, 249 Ga. App. 334, 548 S.E.2d 443 (2001).

Disclosure of an informer's name is not required under O.C.G.A. § 24-9-27. *Childs v. State*, 158 Ga. App. 376, 280 S.E.2d 401 (1981).

Trial court did not abuse the court's discretion in denying disclosure of the identity of a confidential informant who may have seen defendant in the possession of contraband, but who was not present, did not participate in the arrest, and did not take part in the offense. *Leonard v. State*, 228 Ga. App. 792, 492 S.E.2d 747 (1997).

No protection for testimony of eyewitness. — When defendant was seeking the testimony of an eyewitness to the incident which formed the basis of the crimes

charged, the witness was not subject to protection as a confidential informer and defendant did not have the burden of proving the materiality or necessity of the witness's testimony. *Swint v. State*, 199 Ga. App. 515, 405 S.E.2d 333 (1991).

In a prosecution for possession of cocaine with intent to distribute, the trial court did not err in not revealing the identity of a confidential informant since the informant's testimony was not material to the issue of guilt or punishment as the defendant was not charged with selling cocaine to the informant and the informant was not present during the search and arrest and was neither a participant in nor a witness to the specific offense with which the defendant was charged. *Turner v. State*, 247 Ga. App. 775, 544 S.E.2d 765 (2001).

Nondisclosure grounded in public policy. — Privilege of not disclosing sources of information in criminal cases is grounded in a sound public policy which recognizes the need for informants in the enforcement of the criminal laws and the further consideration that revelation of the identity of an informer destroys the informer's usefulness for any other cases. *Stanford v. State*, 134 Ga. App. 61, 213 S.E.2d 519 (1975).

When the possible testimony of an informant would be of minimal significance to a defendant and when the information provided is mere evidence tending to establish a public nuisance, the public policy in favor of nondisclosure of the informant's identity must control. *Chancey v. Hancock*, 233 Ga. 734, 213 S.E.2d 633 (1975).

Public policy underlying this privilege is to protect and encourage the flow of information to law enforcement officials. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978).

Absolute privilege against disclosure not permitted. — An absolute privilege against disclosure of the identity of every informer who supplies the information upon which an arrest is based is impermissible when a motion is made to disclose information favorable to the defendant. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978).

Disclosure of informant's identity is discretionary with court. — Disclosure of the name, address, etc., of an informant is not required as a matter of law, but rests in the discretion of the trial judge, balancing the rights of the defendant and the rights of the state under all the facts and circumstances. *Taylor v. State*, 136 Ga. App. 31, 220 S.E.2d 49 (1975); *State v. Keith*, 139 Ga. App. 399, 228 S.E.2d 332 (1976), aff'd, 238 Ga. 157, 231 S.E.2d 727 (1977); *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978); *Hatcher v. State*, 154 Ga. App. 770, 270 S.E.2d 16 (1980); *Miller v. State*, 163 Ga. App. 889, 296 S.E.2d 182 (1982).

Disclosure not warranted if informant is mere tipster. — If the state proves to the court's satisfaction that an informer is a pure tipster, who has neither participated in nor witnessed the offense, any evidence the informer might offer would be hearsay and inadmissible. Thus, the tipster's identity could not be material to the guilt or innocence of the defendant or be relevant and helpful to the defense. The public policy of the state toward nondisclosure would not be overcome and the state may rely on the privilege. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978).

When the interviewing officer testified that the tipster had no personal knowledge of the crime and was merely repeating the conversation of an unknown person the tipster had overheard at a party, and where the tipster's information was not supportable by any evidence the police were able to uncover, the state was empowered to refuse to identify the tipster on the ground that the tipster's contribution was not material to the defense on the issue of guilt or punishment. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 391 (1979).

Disclosure not warranted if informant's life threatened. — If the district attorney objects to a question asking whether a "responsible citizen" in an affidavit is a particular person, and states that the lives of the informants had been threatened and requests the court not to require the witness to

State Matters (Cont'd)

name them, there is no error in a court's refusing to disclose the name of the person who gave the information. *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971).

Informant and decoy compared. — When a person merely takes an undercover police officer to a location and identifies, or introduces the officer to the defendant, and the officer arranges for and buys contraband from the defendant, and the person witnesses such sale, or alleged sale, such person is an informant and not a “decoy” and a disclosure of one's name, address, etc., to the defendant is not required as a matter of law but rests in the discretion of the trial judge, balancing the rights of the defendant and the rights of the state under all the facts and circumstances. *Bell v. State*, 141 Ga. App. 277, 233 S.E.2d 253 (1977); *Miller v. State*, 141 Ga. App. 382, 233 S.E.2d 460 (1977); *Howard v. State*, 144 Ga. App. 208, 240 S.E.2d 908 (1977).

Disclosure by unofficial. — Newspaper reporter cannot claim an exemption from answering material questions on the ground that the reporter promised not to divulge the name of the informant. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781, 35 L.R.A.

(n. s.) 583, 1972B Ann. Cas. 1259 (1911).

Court must hear evidence before ordering disclosure. — Mere refusal of the state to disclose the identity of an informer does not authorize a trial judge to exercise the judge's discretion as to whether disclosure should be required when the judge hears no evidence as the judge was required to do under Ga. L. 1966, p. 567, § 13 (now O.C.G.A. § 17-5-30(b)). *State v. Keith*, 139 Ga. App. 399, 228 S.E.2d 332 (1976), *aff'd*, 238 Ga. 157, 231 S.E.2d 727 (1977).

Disclosure when informant is a witness or participant in trial. — See *Henderson v. State*, 162 Ga. App. 320, 292 S.E.2d 77 (1982).

Trial court exercised discretion in determining that witness need not disclose identity of informer. — See *Carter v. State*, 168 Ga. App. 6, 308 S.E.2d 30 (1983).

Failure to compel disclosure of informant not error. — Trial court does not err in failing to compel the state to disclose an informant's identity in camera at a motion to suppress hearing. *Miller v. State*, 169 Ga. App. 552, 314 S.E.2d 120 (1984).

Open Records Act. — “State matter” privilege did not exempt cost estimates of the DOT from disclosure under the Open Records Act. *Hardaway Co. v. Rives*, 262 Ga. 631, 422 S.E.2d 854 (1992).

OPINIONS OF THE ATTORNEY GENERAL

Georgia Bureau of Investigation is not required to turn its files over to an investi-

gating subcommittee of the United States Senate. 1954-56 Op. Att'y Gen. p. 336.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Criminal Law — Need for Disclosure of identity of Informant, 33 POF2d 549.

C.J.S. — 27 C.J.S., Discovery, §§ 5, 18, 19.

ALR. — Right to recover property held by public authorities as evidence for use in a criminal trial, 13 ALR 1168.

Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 ALR 749.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 ALR 991.

Privilege against self-incrimination as applicable to answer to pleadings, 52 ALR 143.

Footprint evidence as violating rule against self-defense, 64 ALR 1089.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 ALR 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 ALR 1503.

Waiver of immunity from testifying and constitutional provision against self-incrimi-

nation, by accomplice testifying for prosecution, 87 ALR 882.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 ALR 389.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 ALR 911.

Right as against objection of one other than voter himself to consider testimony as to how he voted given by him after his claim of privilege had been erroneously overruled, 113 ALR 1228.

Privilege against self-incrimination as justification for refusal to comply with order or subpoena requiring production of books or documents of private corporation, 120 ALR 1102.

Evidence: statement or report by servant or agent to master or principal, in respect of matters then or afterward involved in litigation, as a privileged communication, 146 ALR 977.

Disclosure by witness of fact or transaction as waiver of his privilege against self-incrimination in respect of details and particulars which will elucidate it, 147 ALR 255.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 ALR 1208.

Testimony of incriminating character which witness as compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 ALR2d 1404.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 ALR2d 1438.

Discovery or inspection of trade secret, formula, or the like, 17 ALR2d 383.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 ALR2d 388.

Inferences arising from refusal of witness

other than accused to answer question on the ground that answer would tend to incriminate him, 24 ALR2d 895.

Court's power to determine, upon government's claim of privilege, whether official information contains state secrets or other matters disclosure of which is against public interest, 32 ALR2d 391.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury, 36 ALR2d 1403.

Sufficiency of witness's claim of privilege against self-incrimination, 51 ALR2d 1178.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 ALR2d 1030; 29 ALR5th 1.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 ALR2d 431.

Testifying in civil proceeding as waiver of privilege against self-incrimination, 72 ALR2d 830.

Sufficiency and timeliness of notice by indemnitee to indemnitor of action by third person, 73 ALR2d 504.

Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises, 74 ALR2d 876.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 ALR2d 262.

Admissibility of confession, admission, or incriminatory statement of accused as affected by fact that it was made after indictment and in the absence of counsel, 90 ALR2d 732.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 ALR2d 125; 31 ALR4th 1226.

Construction of statute creating privilege against disclosure of communications made to stenographer or confidential clerk, 96 ALR2d 159.

Comment on accused's failure to testify, by counsel for codefendant, 1 ALR3d 989.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 ALR3d 545.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 ALR3d 912.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 ALR3d 1401.

Propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony, 32 ALR3d 906.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

Propriety of requiring accused to give handwriting exemplar, 43 ALR3d 653.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413.

Refusal to answer questions before state grand jury as direct contempt of court, 69 ALR3d 501.

Discovery, in medical malpractice action, of names of other patients to whom defen-

dant has given treatment similar to that allegedly injuring plaintiff, 74 ALR3d 1055.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 ALR3d 944.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 ALR3d 304.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Communication between unmarried couple living together as privileged, 4 ALR4th 422.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 ALR4th 368.

Right of independent expert to refuse to testify as to expert opinion, 50 ALR4th 680.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases, 26 ALR5th 628.

What corporate communications are entitled to attorney-client privilege—modern cases, 27 ALR5th 76.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-9-28. Grant of immunity; refusal to testify treated as contempt.

(a) Whenever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may request the superior court in writing to order that person to testify or produce the evidence. Upon order of the court that person shall not be excused on the basis of his privilege against self-incrimination from testifying or producing any evidence required; but no testimony or other evidence required under the order or any information directly or indirectly derived from such testimony or evidence may be used against the person in any proceedings or prosecution for a crime or offense concerning which he testified or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing, or contempt committed in testifying or failing to testify, or in producing or failing to produce evidence in accordance with

the order but shall not be required to produce evidence that can be used in any other courts, including federal courts. Any order entered under this Code section shall be entered of record in the minutes of the court so as to afford a permanent record thereof; and any testimony given by a person pursuant to such order shall be transcribed and filed for permanent record in the office of the clerk of the court.

(b) If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered without regard to the expiration of the grand jury. If the grand jury before which he was ordered to testify has been dissolved, he may purge himself by testifying before the court. (Ga. L. 1975, p. 727, §§ 1, 2.)

Law reviews. — For article, “Georgia’s Judicial Development,” see 32 Mercer L. Witness Immunity Statute: Explication for Rev. 341 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

GRANT OF IMMUNITY

REFUSAL TO TESTIFY

General Consideration

Disclosures used in other county. — County prosecutor’s agreement not to make derivative use of defendant’s disclosures of criminal conduct did not prevent prosecutor in another county from making use of those disclosures. *Bryant v. State*, 164 Ga. App. 555, 296 S.E.2d 792 (1982).

Discretion of court. — It was within the discretion of the trial court to order that a codefendant testify; however, the court abused the court’s discretion in refusing such order based upon the court’s own determination of the credibility of the witness since that issue is reserved for jury determination. *State v. Mosher*, 265 Ga. 666, 461 S.E.2d 219 (1995).

Cited in *Downs v. State*, 145 Ga. App. 588, 244 S.E.2d 113 (1978); *Lemley v. State*, 245 Ga. 350, 264 S.E.2d 881 (1980); *Dampier v. State*, 249 Ga. 299, 290 S.E.2d 431 (1982); *Baker v. State*, 162 Ga. App. 606, 292 S.E.2d 451 (1982); *Hawkins v. State*, 175 Ga. App. 606, 333 S.E.2d 870 (1985); *Brock v. State*, 179 Ga. App. 519, 347 S.E.2d 230 (1986); *Lee v. King*, 263 Ga. 116, 428 S.E.2d 326 (1993); *Elliott v. State*, 210 Ga. App. 717, 437

S.E.2d 490 (1993); *Render v. State*, 266 Ga. 490, 467 S.E.2d 528 (1996); *In re J.B.*, 223 Ga. App. 429, 477 S.E.2d 874 (1996); *Williams v. State*, 234 Ga. App. 191, 506 S.E.2d 237 (1998); *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000); *McNeal v. State*, 281 Ga. 427, 637 S.E.2d 375 (2006).

Grant of Immunity

Effect. — Trial court’s grant of an order of immunity pursuant to subsection (a) of O.C.G.A. § 24-9-28 removed any right of the witness to invoke the privilege against self-incrimination. *Willard v. State*, 244 Ga. App. 469, 535 S.E.2d 820 (2000).

State’s interest outweighs defense’s need. — When the state was planning to proceed with the prosecution of defendant if defendant decided not to plead guilty, the state’s interest in denying use immunity to defendant outweighed the codefendant’s need for defendant’s testimony in a separate trial. *House v. State*, 203 Ga. App. 55, 416 S.E.2d 108, cert. denied, 203 Ga. App. 906, 416 S.E.2d 108 (1992).

No denial of due process shown. — There was no denial of due process since the

Grant of Immunity (Cont'd)

record shows defendant exercised the opportunity to cross-examine a witness and expressly waived defendant's right for further cross-examination after use immunity was offered to the witness. *Eschena v. State*, 203 Ga. App. 621, 417 S.E.2d 214, cert. denied, 203 Ga. App. 906, 417 S.E.2d 214 (1992).

Statute is limited to proceedings in which the right against self-incrimination can legitimately be raised. *Smith v. State*, 138 Ga. App. 683, 227 S.E.2d 84, aff'd, 237 Ga. 647, 229 S.E.2d 433 (1976).

Fact defendant had a pending motion for new trial which, if granted by the trial court or required by the appellate court, would have subjected defendant to the self-incrimination choice once again, did not preclude compelled testimony via immunity in a codefendant's trial. *Lee v. State*, 191 Ga. App. 882, 383 S.E.2d 366 (1989).

Prosecutor has the power to forego prosecution as long as the promise contains a "description of the crimes or transaction's" for which an individual is excused from prosecution and the promise is approved by the court. *State v. Dean*, 212 Ga. App. 724, 442 S.E.2d 830 (1994).

Statute does not authorize conditional grants of immunity. *Corson v. Hames*, 239 Ga. 534, 238 S.E.2d 75 (1977).

Statute authorizes only a grant of use and derivative use immunity. *Corson v. Hames*, 239 Ga. 534, 238 S.E.2d 75 (1977).

"Use and derivative use" immunity. — It was the intention of the General Assembly to grant "use and derivative use" immunity. *Brooks v. State*, 238 Ga. 435, 233 S.E.2d 208 (1977).

Statute does not authorize a grant of transactional immunity, i.e., immunity from prosecution. *Corson v. Hames*, 239 Ga. 534, 238 S.E.2d 75 (1977).

State is not required to grant immunity to codefendant in return for testimony. In re J.S.S., 168 Ga. App. 340, 308 S.E.2d 855 (1983).

Statute applies only if witness forfeits a right. — Although the language of O.C.G.A. § 24-9-28 is theoretically broad enough to encompass all promises to forgo prosecution in exchange for evidence, there is no indication that the legislature intended the stat-

ute to apply except to the extraction of information in a situation in which the witness gives up a valuable right; the statute is intended to extend the requisite constitutional protection in such a case. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

No common-law transactional immunity exists in Georgia in the sense of the protection of a witness who gives up a valuable right. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

Transactional immunity flowing from full disclosure of crime is not a matter of right but rests in the discretion of the court, which can determine whether the defendant has lived up to defendant's end of the bargain. *Hanson v. State*, 161 Ga. App. 536, 287 S.E.2d 764, aff'd, 249 Ga. 739, 295 S.E.2d 297 (1982).

Irrelevant that no conviction results. — State may contract with a criminal for the criminal's exemption from prosecution whether the party testified against is convicted or not. *Hanson v. State*, 161 Ga. App. 536, 287 S.E.2d 764, aff'd, 249 Ga. 739, 295 S.E.2d 297 (1982).

Conditions under which city may order employees to take polygraph test. — City may, without violating the employees' privilege against self-incrimination, order fire fighters or police officers to take a polygraph test and may discipline those who do not pass, as long as the employees are not coerced into taking the test, are not required to waive any constitutional rights, and the results are not to serve as a sole ground for any action against the employees, since the privilege against self-incrimination does not prevent a governmental unit from taking non-criminal disciplinary action against an employee on the basis of compelled testimony. *Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).

Rule that indictments returned by grand jury are not amendable by district attorney is not violated by grant of immunity. *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982).

Curative instruction removed prejudice of testimony about immunity. — When defendant testified in the trial of defendant's co-conspirators under a grant of immunity and a witness mentioned that fact in defendant's trial, even if such mention violated O.C.G.A. § 24-9-28, a curative instruction was sufficient to remove any potential preju-

dice. *Robertson v. State*, 268 Ga. 772, 493 S.E.2d 697 (1997), cert. denied, 523 U.S. 1140, 118 S. Ct. 1845, 140 L. Ed. 2d 1095 (1998).

Refusal to Testify

No violation of immunity order occurred when, in trial for murder and hindering apprehension of a criminal, officer was asked by prosecutor whether defendant had testified at previous trial of another to everything defendant had told officer, to which the officer stated no, since the prosecutor was attempting to ensure that the testimony from the previous trial not be used in defendant's trial, and to clarify officer's response to earlier inquiry by defense counsel. *Highfield v. State*, 246 Ga. 478, 272 S.E.2d 62 (1980).

Appearance of immunized witness. — Defendants were not deprived of their right to effective cross-examination on the basis of the state's creation of an "unfavorable inference" through the appearance on the witness stand of a witness who had been granted immunity pursuant to subsection

(a) of O.C.G.A. § 24-9-28 and who refused to testify. *Willard v. State*, 244 Ga. App. 469, 535 S.E.2d 820 (2000).

Violation of immunity order found. — Trial court properly found defendant in contempt for refusing to testify against a codefendant after being granted testimonial immunity pursuant to O.C.G.A. § 24-9-28(a); an evidentiary hearing was not required prior to the grant of immunity, and the immunity removed any fifth amendment privilege against self-incrimination. In the *Interest of S.U.*, 269 Ga. App. 306, 603 S.E.2d 790 (2004).

Criminal contempt conviction reversed. — Defendant's criminal contempt conviction was reversed as the trial court relied on another court's ex parte immunity grant in ordering defendant to testify and neither court made a finding that defendant's testimony was "necessary to the public interest" as required by O.C.G.A. § 24-9-28; the state had to grant a valid immunity as broad in scope as the privilege it replaced and to show the applicability of that state immunity to the witness. In *re Long*, 276 Ga. App. 306, 623 S.E.2d 181 (2005).

RESEARCH REFERENCES

ALR. — Privilege against self-incrimination as extending to danger of prosecution in other state or country, 59 ALR 895; 82 ALR 1380.

Calling upon accused in the presence of jury to produce document in his possession as violation of privilege against self-incrimination, 110 ALR 101.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 118 ALR 602; 53 ALR2d 1030; 29 ALR5th 1.

Promise of immunity or leniency as affecting one's competency as witness in criminal case, 120 ALR 751.

Necessity and sufficiency of assertion of privilege against self-incrimination as condition of statutory immunity of witness from prosecution, 145 ALR 1416.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 ALR2d 631.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 ALR2d 1438.

Immunity from service of process of non-resident witness appearing in other than strictly judicial proceedings, 35 ALR2d 1353.

Sufficiency of witness's claim of privilege against self-incrimination, 51 ALR2d 1178.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes, 43 ALR3d 281.

Use in disbarment proceeding of testimony given by attorney in criminal proceeding under grant of immunity, 62 ALR3d 1145.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness, 4 ALR4th 617.

Prosecutor's power to grant prosecution witness immunity from prosecution, 4 ALR4th 1221.

Propriety, under state constitutional provi-

sions, of granting use or transactional immunity for compelled incriminating testimony—post-Kastigar cases, 29 ALR5th 1.

24-9-29. Veterinarians.

No veterinarian licensed under Chapter 50 of Title 43 shall be required to disclose any information concerning the veterinarian's care of an animal except on written authorization or other waiver by the veterinarian's client or on appropriate court order or subpoena. Any veterinarian releasing information under written authorization or other waiver by the client or under court order or subpoena shall not be liable to the client or any other person. The privilege provided by this Code section shall be waived to the extent that the veterinarian's client or the owner of the animal places the veterinarian's care and treatment of the animal or the nature and extent of injuries to the animal at issue in any civil or criminal proceeding. (Code 1981, § 24-9-29, enacted by Ga. L. 1986, p. 1090, § 1.)

24-9-30. Persons, companies, or other entities engaged in gathering or dissemination of news.

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

- (1) Is material and relevant;
- (2) Cannot be reasonably obtained by alternative means; and
- (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. (Code 1981, § 24-9-30, enacted by Ga. L. 1990, p. 167, § 1.)

Law reviews. — For annual survey article discussing developments in the law of evidence, see 51 Mercer L. Rev. 279 (1999). For article, "Eleventh Circuit Survey: January 1, 2008 — December 31, 2008: Comment: 2009: A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How

Blogs are Changing the Legal Community," see 60 Mercer L. Rev. 1353 (2009).

For note on 1990 enactment of this Code section, see 7 Ga. St. U.L. Rev. 286 (1990).

For comment, "The Reporter's Privilege in Georgia: 'Qualified' to Do the Job?," see 9 Ga. St. U.L. Rev. 495 (1993).

JUDICIAL DECISIONS

Availability of information by alternative means. — State sought information state

could reasonably have obtained by alternative means when several questions sought

the identity of law enforcement officers and jailers who may have had public contact with the reporter or served as a confidential source. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999).

Materiality and relevance. — State sought information that was not material or relevant when the state propounded interrogatories which inquired when and how the reporter found out that an attorney represented the defendant, whether the reporter advised the defendant of defendant's rights under Miranda or made promises to the defendant in exchange for the interview, whether the defendant referred to defendant's attorney during the interview, and why the reporter did not call the defendant's attorney to notify the attorney about the interview before the interview occurred and to inform the attorney about the interview after the interview took place. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999).

Necessity of information for prosecution. — State failed to show that the reporter's testimony was necessary for the state to prosecute the defendant for murder where, although the state contended that the state needed the reporter's testimony to prove the defendant's mental state at the time the defendant made the incriminating admissions to the reporter, the state had already presented evidence at pre-trial hearings of the defendant's mental capacity and demeanor when the defendant confessed to police; not only did the state have at least two confessions on videotape, where the jury could observe the defendant, but the state also presented expert testimony of a forensic psychiatrist at the Jackson-Denno hearing concerning the defendant's competency to stand trial and whether defendant was suffering from any mental illness or delusion. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999).

Courtroom gossip or speculation. — O.C.G.A. § 24-9-30 was not meant to be used to uncover the source of mere courtroom gossip or speculation. Nobles v. State, 201 Ga. App. 483, 411 S.E.2d 294, cert. denied, 201 Ga. App. 904, 411 S.E.2d 294 (1991).

Privilege properly invoked. — Trial court did not err by allowing a reporter who declined to reveal "confidential sources" in the sheriff's department to invoke the privilege created by O.C.G.A. § 24-9-30 since the evidence showed that there were fewer than a dozen former employees of the sheriff's office in the relevant time period, and that the defense team made no effort to contact any of the employees. Stripling v. State, 261 Ga. 1, 401 S.E.2d 500 (1991), cert. denied, 502 U.S. 985, 112 S. Ct. 593, 116 L. Ed. 2d 617 (1991).

Privilege not waived by partial disclosure. — Reporter did not waive reporter's qualified privilege against disclosure of reporter's confidential sources and unpublished information by writing a news article based on the reporter's interview with the defendant; publication of part of the information gathered does not waive the privilege as to all of the information gathered on the same subject matter because it would chill the free flow of information to the public. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999).

Appeal. — Non-parties engaged in news gathering may file a direct appeal of an order denying the parties the statutory reporter's privilege under the collateral order exception to the final judgment rule. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999).

Cited in *Moclair v. State*, 215 Ga. App. 360, 451 S.E.2d 68 (1994); *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 555 S.E.2d 175 (2001); *In re Morris Communications Co.*, 258 Ga. App. 154, 573 S.E.2d 420 (2002).

PART 2

MEDICAL INFORMATION

Cross references. — Power of Department of Community Health to require reporting of certain diseases and injuries, § 31-12-2. Disclosure of medical records and other medical information pertaining to the mentally ill, the mentally retarded, alcoholics,

and others, §§ 37-3-166, 37-4-125, 37-7-166. Privilege of state officers and employees to refuse to disclose identity of persons furnishing information pursuant to medical or public health investigation by Department of Community Health, § 50-18-72.

Editor's notes. — Ga. L. 2001, p. 1172, § 2, not codified by the General Assembly, provides that: "No hospital shall release for public use any autopsy photographs or images without the written permission of the family."

Law reviews. — For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001). For article, "The Medical Records Custodian's Perspective," see 6 Ga. St. B.J. 8 (2001).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Medical Malpractice — Use of Hospital Records, 22 POF2d 1.

Qualification of Medical Expert Witness, 33 POF2d 179.

Foundation for Admissibility of Hospital Records and X-Rays, 38 POF2d 145.

Qualification of Chiropractor as Expert Witness, 45 POF2d 137.

Protected Communication Between Physician and Patient, 45 POF2d 595.

Foundation for Admission of Thermogram, 46 POF2d 275.

Admissibility and Reliability of Electrocardiogram, 4 POF3d 73.

Use of CAT Scans in Litigation, 8 POF3d 145.

Proof of Paralysis, 67 POF3d 1.

Sexual Organ Injuries: Male Genitalia, 70 POF3d 229.

Traumatic Brain Injuries, 72 POF3d 363.

24-9-40. When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.

(a) No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility, including those operated by an agency or bureau of the state or other governmental unit, shall be required to release any medical information concerning a patient except to the Department of Community Health, its divisions, agents, or successors when required in the administration of public health programs pursuant to Code Section 31-12-2 and where authorized or required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or on appropriate court order or subpoena; provided, however, that any physician, hospital, or health care facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness.

(b) No pharmacist licensed under Chapter 4 of Title 26 shall be required to release any medical information concerning a patient except on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena; provided, however, that any pharmacist releasing

information under written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any administrative, civil, or criminal proceeding. (Code 1933, § 38-418; Ga. L. 1978, p. 1657, § 1; Ga. L. 1982, p. 1077, §§ 1, 3; Ga. L. 1986, p. 1277, § 3; Ga. L. 1993, p. 1050, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228.)

The 2009 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” in the first sentence of subsection (a).

Cross references. — Physical examination of state employees, T. 4, C. 2, A. 3.

Administrative rules and regulations. — Release of Confidential Prescription Drug Order Information, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia State Board of Pharmacy, Miscellaneous Guidelines for Pharmacists, Rule 480-16-.07.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, “Controlling Conflicts of Interest in the Doctor-Patient Relationship:

Lessons from Moore v. Regents of the University of California,” see 42 Mercer L. Rev. 989 (1991). For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 143 (1993). For note, “The Final Patient Privacy Regulations Under the Health Insurance Portability and Accountability Act — Promoting Patient Privacy or Public Confusion?,” see 37 Ga. L. Rev. 723 (2003).

For comment, “The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved,” see 34 Emory L.J. 777 (1985).

JUDICIAL DECISIONS

Federal law preempts state law. — Regulations enacted under 42 U.S.C. § 1320d-2(d)(2)(A) of the Health Insurance Portability and Accountability Act (HIPAA) preempt O.C.G.A. § 24-9-40(a) with regard to ex parte communications between defense counsel and a plaintiff’s prior treating physicians because HIPAA affords patients more control over their medical records than § 24-9-40(a) when it comes to informal contacts between litigants and physicians. *Moreland v. Austin*, 284 Ga. 730, 670 S.E.2d 68 (2008).

Fact of employment is not within the physician-patient privilege. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Employee and company-appointed physician. — No physician-patient relationship existed between an employee and a company-appointed physician retained to give the employee a return to work physical.

Payne v. Sherrer, 217 Ga. App. 761, 458 S.E.2d 916 (1995).

Employment agreement regarding confidential medical issues. — Medical director’s agreement to abide by policies of contract employer in order to obtain patient privileges at its hospital constituted a waiver under O.C.G.A. § 24-9-40 of an action for the contract employer’s alleged failure to keep the medical director’s test result records showing the medical director had tested positive for an infectious disease confidential as the agreement permitted authorized hospital representatives and staff to provide and act upon information bearing on the medical director’s professional ability and qualifications, and the medical director agreed to waive all legal claims related to such disclosure. *Nelson v. Glynn-Brunswick Hosp. Auth.*, 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Applicability of physician shield law to

physicians generally and to psychiatrists. — O.C.G.A. § 24-9-40 read with O.C.G.A. § 24-9-21(5) reflects that the physician shield law applies to physicians generally but requires physicians to release information upon proper order, whereas the confidentiality of communications to psychiatrists is protected by public policy and such communications are expressly excepted from the shield statute. *Gilmore v. State*, 175 Ga. App. 376, 333 S.E.2d 210 (1985).

Transmittal of records to health care professional performing subsequent treatment. — Psychologist who performed the neuropsychological testing and evaluation did not violate the patient's policy rights either by transmitting the records in question to the health care professional who took over the patient's treatment or by discussing the case with that professional. *Jarallah v. Schwartz*, 202 Ga. App. 32, 413 S.E.2d 210 (1991), cert. denied, 202 Ga. App. 906, 413 S.E.2d 210 (1992).

Subpoena of personal medical records. — In the absence of waiver and without notice to the accused or an opportunity to object, it is not "appropriate" under O.C.G.A. § 24-9-40 for the state in a criminal case to subpoena a defendant's own personal medical records which are then in the possession of a physician, hospital, or health care facility. *King v. State*, 272 Ga. 788, 535 S.E.2d 492 (2000).

Unlike the fourth amendment, which requires that the state have probable cause prior to the seizure of an accused or an accused's property, O.C.G.A. § 24-9-40(a) does not contain any express limits on the use of a subpoena to obtain a defendant's medical records for possible introduction as evidence in a criminal proceeding; therefore, defendant was not entitled to notice of a search warrant and an opportunity to object prior to the state's receipt of defendant's private medical records. *King v. State*, 276 Ga. 126, 577 S.E.2d 764 (2003).

Psychiatrist-patient communications absolutely privileged. — Legislature has clearly expressed legislature's intent that, as a matter of public policy, psychiatrist-patient communications are to be privileged and are to remain privileged even though the patient's "care and treatment or the nature and extent of his injuries [have been put] at issue in any civil or criminal proceeding," such

that communications between a deceased patient and the psychiatrist did not lose their privileged character and were not discoverable merely because they were the most objective evidence of the relevant issue of the decedent's mental state. *Dynin v. Hall*, 207 Ga. App. 337, 428 S.E.2d 89 (1993).

Criminal defense attorney who subpoenaed records from a psychiatric hospital was entitled to rely on the presumption that the records the attorney received from the hospital were either non-privileged or that the hospital first obtained a waiver from the patient. *Karpowicz v. Hyles*, 247 Ga. App. 292, 543 S.E.2d 51 (2000).

Dentist is not immune from liability under O.C.G.A. § 24-9-40; however, if the defendant complies in good faith with a production request, or if the defendant has been compelled to comply by a court, the defendant is shielded from liability for the disclosure under O.C.G.A. § 24-9-44. *McFarlin v. Taylor*, 187 Ga. App. 54, 369 S.E.2d 330 (1988).

Trial court did not err in admitting testimony of a family practice physician from whom the defendant sought psychiatric referral two days after an alleged rape and who also consulted with the victim and attempted an examination of her pelvic area. *Barnes v. State*, 171 Ga. App. 478, 320 S.E.2d 597 (1984).

Past recollections within medical record inadmissible. — If the original of the medical record itself is admissible but diagnostic opinions and conclusions therein are inadmissible, past recollection recorded by a doctor of a patient's medical history contained in a medical record, which included a diagnostic opinion of another doctor, would be inadmissible. *Stoneridge Properties, Inc. v. Kuper*, 178 Ga. App. 409, 343 S.E.2d 424 (1986).

Filing of action as waiver. — Once plaintiff filed action questioning the nature and quality of medical treatment rendered to plaintiff's child, the plaintiff waived the child's qualified right to privacy implicit in the Hippocratic oath, and doctor having source of information pertaining to that action was authorized to release information pertaining thereto and was immune from liability to the patient or any other person for release of that information. *Orr v. Sievert*, 162 Ga. App. 677, 292 S.E.2d 548 (1982).

Fact that plaintiff was seeking to recover damages for injuries of a mental and emotional nature would not constitute a waiver of the privilege to exclude testimony of a psychiatrist. *Wilson v. Bonner*, 166 Ga. App. 9, 303 S.E.2d 134 (1983).

Communications to coordinate care. — Trial court properly directed a verdict in favor of the defendant, a psychiatrist, with regard to the plaintiff's invasion of privacy complaint, which asserted that the defendant's letters to the other treating physicians of the plaintiff violated the plaintiff's right to privacy because the evidence established that the information in the three letters disclosed to the plaintiff's other treating physicians was disclosed in an attempt to coordinate care; the sharing of the information did not amount to a public disclosure and there was no evidence that the other treating physicians shared the information with anyone else. *Haughton v. Canning*, 287 Ga. App. 28, 650 S.E.2d 718 (2007), cert. denied, 2008 Ga. LEXIS 157 (Ga. 2008).

Names and addresses of stop-smoking clinic patients not privileged information. — When the trial court ordered the defendant stop smoking clinic to produce the names and addresses of all persons who received the clinic's stop smoking treatment, the trial

court was authorized to order disclosure of any relevant, nonprivileged information, and as the information sought by plaintiffs was not privileged there was no reversible error in the trial court's decision. *National Stop Smoking Clinic-Atlanta, Inc. v. Dean*, 190 Ga. App. 289, 378 S.E.2d 901 (1989).

Whether defendant had AIDS placed "at issue." — Defendant, who was charged with aggravated assault with intent to murder after biting a police officer, placed "at issue" the issue of AIDS by defendant's conduct in committing an act which was inextricably linked to the question of defendant having AIDS. *Scroggins v. State*, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

Cited in *Morton v. Skrine*, 242 Ga. 844, 252 S.E.2d 408 (1979); *Tiller v. State*, 159 Ga. App. 557, 284 S.E.2d 63 (1981); *Jones v. Thornton*, 172 Ga. App. 412, 323 S.E.2d 217 (1984); *Bobo v. State*, 256 Ga. 357, 349 S.E.2d 690 (1986); *Mrozinski v. Pogue*, 205 Ga. App. 731, 423 S.E.2d 405 (1992); *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994); *In re Vincent*, 240 Ga. App. 876, 525 S.E.2d 409 (1999); *In re Vincent*, 240 Ga. App. 876, 525 S.E.2d 409 (1999); *Boswell v. Primary Care Profl's, P.C.*, 265 Ga. App. 522, 594 S.E.2d 725 (2004); *Henderson v. Gandy*, 270 Ga. App. 827, 608 S.E.2d 248 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 416.

C.J.S. — 97 C.J.S., Witnesses, §§ 341 et seq.

ALR. — Waiver by beneficiary or personal representative, in actions on insurance policy, of privilege of communications to physician, 15 ALR 1544.

Evidence: privilege as to family matters or affairs incidentally learned by physician while professionally attending patient, 24 ALR 1202.

Evidence: privilege as to facts learned on autopsy or post-mortem examination, 58 ALR 1134.

Classes of persons within term "physician" in rule as to privileged communications, 68 ALR 176.

Privilege in respect of testimony of physician or surgeon that he noticed odor of liquor on patient's breath or other indications of recent use of liquor, 79 ALR 1131.

Presence of third person as affecting privileged character of communications between patient and physician, 96 ALR 1419.

Voluntary disclosure at trial of one's physical condition at certain time as waiver of privilege as regards testimony by physician as to condition at earlier time, 98 ALR 1284.

Physician-patient privilege as affected by contention that purpose was examination and not treatment, 107 ALR 1495.

When testimony by patient deemed to waive physician-patient privilege, 114 ALR 798.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 ALR 732.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 ALR2d 1429.

Evidence: privilege of communications by or to nurse or attendant, 47 ALR2d 742.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536.

Who may waive privilege of confidential communication to physician by person since deceased, 97 ALR2d 393.

Physician-patient privilege: testimony as to communications or observations as to mental condition of patient treated for other condition, 100 ALR2d 648.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 ALR3d 1458.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 ALR3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 ALR3d 1401.

Physician-patient privilege as applied to physicians testimony concerning wound required to be reported to public authority, 85 ALR3d 1196.

Evidence of automobile passenger's blood-alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident, 5 ALR4th 1194.

Physician-patient privilege as extending to patient's medical or hospital records, 10 ALR4th 552.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 ALR4th 668.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS), 12 ALR5th 149.

Transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 ALR5th 628.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-9-40.1. Confidential nature of AIDS information.

AIDS confidential information as defined in Code Section 31-22-9.1 and disclosed or discovered within the patient-physician relationship shall be confidential and shall not be disclosed except as otherwise provided in Code Section 24-9-47. (Code 1981, § 24-9-40.1, enacted by Ga. L. 1988, p. 1799, § 6.)

Editor's notes. — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not

through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While

education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention

of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection.”

JUDICIAL DECISIONS

Use of pseudonyms. — When a patient filed suit solely alleging that the improper disclosure of HIV confidential information and the non-disclosure exception of O.C.G.A. § 24-9-47(y) did not apply, a trial

court retained discretion to determine if the patient could prosecute a case under a pseudonym. *Doe v. Hall*, 260 Ga. App. 421, 579 S.E.2d 838 (2003).

24-9-40.2. Confidentiality of raw research data.

(a) The General Assembly finds and declares that protecting the confidentiality of research data from disclosure in administrative proceedings, civil and criminal judicial proceedings, and quasi-judicial proceedings is essential to safeguarding the integrity of research in this state, guaranteeing the privacy of individuals who participate in research projects, and ensuring the continuation of research in science, medicine, and other fields that benefits the citizens and institutions of Georgia and other states. The protection of such research data has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and consequently is properly a matter for regulation under the police power of the state.

(b) As used in this Code section, the term “confidential raw research data” means medical information, interview responses, reports, statements, memoranda, or other data relating to the condition, treatment, or characteristics of any person which is gathered by or provided to a researcher:

- (1) In support of a research study approved by an appropriate research oversight committee of a hospital, health care facility, or educational institution; and
- (2) With the objective to develop, study, or report aggregate or anonymous information not intended to be used in any way in which the identity of an individual is material to the results.

The term does not include published compilations of the raw research data created by the researcher or the researcher’s published summaries, findings, analyses, or conclusions related to the research study.

(c) Confidential raw research data in a researcher’s possession shall not be subject to subpoena, otherwise discoverable, or deemed admissible as evidence in any administrative, civil, criminal, or other judicial proceeding in any court except as otherwise provided in subsection (d) of this Code section.

(d) Confidential raw research data may be released, disclosed, subject to subpoena, otherwise discoverable, or deemed admissible as evidence in a judicial or quasi-judicial proceeding as follows:

(1) Confidential raw research data related to a person may be disclosed to that person or to another person on such person's behalf where the authority is otherwise specifically provided by law;

(2) Confidential raw research data related to a person may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the research participant or where a designation is made in writing by a person authorized by law to act for the participant;

(3) Confidential raw research data related to a person may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if those data are required by law or regulation to be reported to that agency or department;

(4) Confidential raw research data may be disclosed in any proceeding in which a party was a participant, researcher, or sponsor in the underlying research study, including but not limited to any judicial or quasi-judicial proceeding in which a research participant places his or her care, treatment, injuries, insurance coverage, or benefit plan coverage at issue; provided, however, that the identity of any research participant other than the party to the judicial or quasi-judicial proceeding shall not be disclosed, unless the researcher or sponsor is a defendant in the case;

(5) Confidential raw research data may be disclosed in any proceeding in which the researcher has either volunteered to testify or has been hired to testify as an expert by one of the parties to the proceeding; and

(6) In a criminal proceeding, the court shall order the production of confidential raw research data if the data are relevant to any issue in the proceeding, impose appropriate safeguards against unauthorized disclosure of the data, and admit confidential raw research data into evidence if the data are material to the defense or prosecution.

(e) Nothing in this Code section shall be construed to permit, require, or prohibit the disclosure of confidential raw research data in any setting other than an administrative, judicial, or quasi-judicial proceeding that is governed by the requirements of this title.

(f) Any disclosure of confidential raw research data authorized or required by this Code section or any other law shall in no way destroy the confidential nature of that data except for the purpose for which the authorized or required disclosure is made. (Code 1981, § 24-9-40.2, enacted by Ga. L. 1999, p. 516, § 1; Ga. L. 2000, p. 1372, § 1.)

Cross references. — Use of confidential, classified, or restricted records for research, § 50-18-101.

24-9-41. Disclosure of medical records — Terms defined.

As used in this Code section and Code Sections 24-9-42 through 24-9-45, the term:

(1) “Confidential or privileged” means the protection afforded by law from unauthorized disclosure, whether the protection is afforded by law as developed and applied by the courts, by statute or lawful regulations, or by the requirements of the Constitutions of the State of Georgia or the United States. The term “confidential or privileged” also includes protection afforded by law from compulsory process or testimony.

(2) “Disclosure” means the act of transmitting or communicating medical matter to a person who would not otherwise have access thereto.

(3) “Health care facility” means any institution or place in which health care is rendered to persons, which health care includes but is not limited to medical, psychiatric, acute, intermediate, rehabilitative, and long-term care.

(4) “Laws requiring disclosure” means laws and statutes of the State of Georgia and of the United States and lawful regulations issued by any department or agency of the State of Georgia or of the United States which require the review, analysis, or use of medical matter by persons not originally having authorized access thereto. The term “laws requiring disclosure” also includes any authorized practice of disclosure for purposes of evaluating claims for reimbursement for charges or expenses under any public or private reimbursement or insurance program.

(5) “Limited consent to disclosure” means proper authorization given by or on behalf of a person entitled to protection from disclosure of medical matter and given for a specific purpose related to such person’s health or related to such person’s application for insurance or like benefits.

(6) “Medical matter” means information respecting the medical or psychiatric condition, including without limitation the physical and the mental condition, of a natural person or persons, however recorded, obtained, or communicated.

(6.1) “Nurse” means a person authorized by license issued under Chapter 26 of Title 43 as a registered professional nurse or licensed practical nurse to practice nursing.

(7) “Physician” means any person lawfully licensed in this state to practice medicine and surgery pursuant to Chapter 34 of Title 43. (Ga. L. 1974, p. 595, § 1; Ga. L. 1995, p. 10, § 24; Ga. L. 2004, p. 466, § 5.)

JUDICIAL DECISIONS

Cited in *Boswell v. Primary Care Prof'l's*, (2004); *Henderson v. Gandy*, 270 Ga. App. P.C., 265 Ga. App. 522, 594 S.E.2d 725 827, 608 S.E.2d 248 (2004).

RESEARCH REFERENCES

ALR. — Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 ALR2d 1429.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 ALR2d 1031.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-9-42. Disclosure of medical records — Effect on confidential or privileged character thereof.

The disclosure of confidential or privileged medical matter constituting all or part of a record kept by a health care facility, a nurse, or a physician, pursuant to laws requiring disclosure or pursuant to limited consent to disclosure, shall not serve to destroy or in any way abridge the confidential or privileged character thereof, except for the purpose for which such disclosure is made. (Ga. L. 1974, p. 595, § 2; Ga. L. 1995, p. 10, § 24; Ga. L. 2004, p. 466, § 6.)

JUDICIAL DECISIONS

Cited in *Boswell v. Primary Care Prof'l's*, P.C., 265 Ga. App. 522, 594 S.E.2d 725 (2004).

RESEARCH REFERENCES

ALR. — Evidence: privilege as to facts learned on autopsy or post-mortem examination, 58 ALR 1134.

Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Evidence: public health record as subject of privilege, 136 ALR 856.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 ALR2d 1429.

Admissibility of hospital record relating to

physician's opinion as to whether patient is malingering or feigning injury, 55 ALR2d 1031.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 ALR2d 1001.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Discovery, in medical malpractice action, of names of other patients to whom defen-

dant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-9-43. Disclosure of medical records — Use of medical matter so disclosed.

Persons to whom confidential or privileged medical matter is disclosed in the circumstances described in Code Section 24-9-42 shall utilize such matter only in connection with the purpose or purposes of such disclosure and thereafter shall keep such matter in confidence. However, nothing in Code Sections 24-9-41 and 24-9-42, this Code section, and Code Sections 24-9-44 and 24-9-45 shall prohibit the use of such matter where otherwise authorized by law. (Ga. L. 1974, p. 595, § 3; Ga. L. 1995, p. 10, § 24.)

RESEARCH REFERENCES

ALR. — Admissibility of hospital chart or other hospital record, 120 ALR 1124.
Evidence: public health record as subject of privilege, 136 ALR 856.
Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 ALR2d 1031.
Physical examination of allegedly negligent person with respect to defect claimed to

have caused or contributed to accident, 89 ALR2d 1001.
Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.
Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-9-44. Disclosure of medical records — Immunity from liability.

Any person, corporation, authority, or other legal entity acting in good faith shall be immune from liability for the transmission, receipt, or use of medical matter disclosed pursuant to laws requiring disclosure or pursuant to limited consent to disclosure. (Ga. L. 1974, p. 595, § 4.)

JUDICIAL DECISIONS

Dentist not liable if good faith disclosure. — Dentist is not immune from liability under O.C.G.A. § 24-9-40. However, if the dentist complies in good faith with a production request, or if the dentist has been compelled to comply by a court, the dentist is shielded

from liability for the disclosure under O.C.G.A. § 24-9-44. *McFarlin v. Taylor*, 187 Ga. App. 54, 369 S.E.2d 330 (1988).
Cited in *Jones v. Thornton*, 172 Ga. App. 412, 323 S.E.2d 217 (1984).

RESEARCH REFERENCES

ALR. — Admissibility of hospital chart or other hospital record, 120 ALR 1124.
Evidence: public health record as subject of privilege, 136 ALR 856.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

24-9-45. Disclosure of medical records — Use for educational purposes not precluded.

Nothing in Code Sections 24-9-41 through 24-9-44 and this Code section shall be construed to prevent the customary and usual audit, discussion, and presentation of cases in connection with medical and public education. (Ga. L. 1974, p. 595, § 5; Ga. L. 1995, p. 10, § 24.)

24-9-46. Confidential nature of certain library records.

(a) Circulation and similar records of a library which identify the user of library materials shall not be public records but shall be confidential and may not be disclosed except:

- (1) To members of the library staff in the ordinary course of business;
- (2) Upon written consent of the user of the library materials or the user's parents or guardian if the user is a minor or ward; or
- (3) Upon appropriate court order or subpoena.

(b) Any disclosure authorized by subsection (a) of this Code section or any unauthorized disclosure of materials made confidential by that subsection (a) shall not in any way destroy the confidential nature of that material, except for the purpose for which an authorized disclosure is made. A person disclosing material as authorized by subsection (a) of this Code section shall not be liable therefor. (Code 1981, § 24-9-46, enacted by Ga. L. 1987, p. 595, § 1.)

24-9-47. Disclosure of AIDS confidential information.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Except as otherwise provided in this Code section:

(1) No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for recording, reporting, or maintaining AIDS confidential information shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

(2) No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

(c) AIDS confidential information may be disclosed to the person identified by that information or, if that person is a minor or incompetent person, to that person's parent or legal guardian.

(d) AIDS confidential information may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the person identified by that information or, if that person is a minor or incompetent person, by that person's parent or legal guardian.

(e) AIDS confidential information may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

(f) The results of an HIV test may be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

(g) When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

(h)(1) An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Community Health:

(A) The name and address of that patient;

(B) That such patient has been determined to be infected with HIV; and

(C) The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

(2) When mandatory and nonanonymous reporting of confirmed positive HIV tests to the Department of Community Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be

required. On and after the date so established, each health care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Community Health the name and address of any person thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Community Health.

(3) The Department of Community Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV infected person. The Department of Community Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

(A) May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

(B) May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

(C) Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons are reasonably likely to have engaged in sexual intercourse or any other act determined by the department likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

(i) Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(j) A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

(k) When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

(l) When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law, such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee is authorized to make such disclosure to the person at risk.

(m) When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees are only authorized when reasonably necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

(n) Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

(o) Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(p) Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure

is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be AIDS confidential information except that such information does not permit the identification of any person.

(q) A public safety agency or district attorney may obtain the results from an HIV test to which the person named in the request has submitted under Code Section 15-11-66.1, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

(r) Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such person or legal entity shall disclose that information as required by that order.

(s) AIDS confidential information may be disclosed as medical information pursuant to Code Section 24-9-40, relating to the release of medical information, or pursuant to any other law which authorizes or requires the disclosure of medical information if:

(1) The person identified by that information:

(A) Has consented in writing to that disclosure; or

(B) Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

(2) A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

(t)(1) A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

(A) A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

(B) Any party in a civil cause of action; or

(C) A public safety agency or the Department of Community Health if that agency or department has an employee thereof who has, in the

course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

and for purposes of this subsection the term “petitioner for disclosure” means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

(2) An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

(3) A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person’s true name shall be communicated confidentially, in documents not filed with the court.

(4) Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

(5) Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

(6) Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person named in the order is an HIV infected person, the court shall disclose to the petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

(7) The record of the proceedings under this subsection shall be sealed by the court.

(8) An order may not be issued under this subsection against the Department of Community Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

(u) A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

(v) AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which specifically refers to "AIDS confidential information," "HIV test results," or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

(w) A health care provider who has received AIDS confidential information regarding a patient from the patient's health care provider directly or indirectly under the provisions of subsection (i) of this Code section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(x) Neither the Department of Community Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

(y) The protection against disclosure provided by Code Section 24-9-40.1 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his heirs, successors, assigns, or a beneficiary of such person, including but not limited to an executor, administrator, or personal representative of such person's estate:

(1) Files a claim or claims other entitlements under any insurance policy or benefit plan or is involved in any civil proceeding regarding such claim;

(2) Places such person's care and treatment, the nature and extent of his injuries, the extent of his damages, his medical condition, or the reasons for his death at issue in any civil or criminal proceeding; or

(3) Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

(z) AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33, relating to the collection, use, and disclosure of information gathered by insurance institutions.

(aa) In connection with any civil or criminal action in which AIDS confidential information is disclosed as authorized or required by this Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including but not limited to testifying regarding any notifications to the patient regarding results of an HIV test. The provisions of this subsection shall apply as to records, personnel, or both of the Department of Community Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

(bb) AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, mentally retarded, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

(1) Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

(2) AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guard-

ian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

(3) If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

(A) Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal of such information in connection with such proceeding or procedure except in compliance with this subsection;

(B) Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

(C)(i) If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

(ii) The superior court in which a petition is filed pursuant to division (i) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a compelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unautho-

rized disclosure. The records of that hearing otherwise shall be under seal; and

(4) The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or procedures, so long as the identity of the person identified by such information is not thereby revealed. (Code 1981, § 24-9-47, enacted by Ga. L. 1988, p. 1799, § 6; Ga. L. 1989, p. 14, § 24; Ga. L. 1990, p. 705, § 1; Ga. L. 2000, p. 20, § 19; Ga. L. 2004, p. 161, § 5; Ga. L. 2008, p. 12, § 2-4/SB 433; Ga. L. 2009, p. 453, § 1-4/HB 228.)

The 2008 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” in the introductory language of paragraph (h)(1).

The 2009 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” throughout this Code section.

Editor’s notes. — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: “The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to

continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection.”

Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: “This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act.”

Mandatory nonanonymous HIV reporting was required by the Department of Human Resources pursuant to paragraph (2) of subsection (h), effective December 31, 2003.

Administrative rules and regulations. — Acquired Immune Deficiency Syndrome, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Public Health, Chapter 290-5-48.

Law reviews. — For note on 1990 amendment of this Code section, see 7 Ga. St. U.L. Rev. 312 (1990).

For comment, “Confidentiality and Dis-

semination of Personal Information: An Examination of State Laws Governing Data Protection,” see 41 Emory L.J. 1185 (1992).

JUDICIAL DECISIONS

Statute not intended as shield in prosecution for criminal conduct. — O.C.G.A. § 24-9-47 was never intended to be a shield in a prosecution for criminal conduct involving the AIDS disease. *Scroggins v. State*, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

Subparagraph (t)(1)(A) of O.C.G.A. § 24-9-47 proves an overriding policy to facilitate prosecution of HIV-infected persons for criminal conduct with potential for endangering any member of society. The legislature’s failure in this directive to include prosecutions for a crime of wilful conduct by a person with the AIDS disease or HIV virus was an oversight. *Scroggins v. State*, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

Defendant, who was charged with aggravated assault with intent to murder after biting a police officer, placed “at issue” the issue of AIDS by defendant’s conduct in committing an act which was inextricably linked to the question of defendant having AIDS. *Scroggins v. State*, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991).

Right of patient to keep HIV-infected status confidential. — Trial court properly

granted summary judgment to doctor who disclosed to HIV-infected dental hygienist’s employer, a dentist who occasionally provided the dental hygienist with free dental care, that the dental hygienist had tested positive for HIV as not only did the dental hygienist sign a consent form allowing disclosure, but the right of the dental hygienist to keep that status confidential was outweighed by the right of the doctor to disclose that status pursuant to O.C.G.A. § 24-9-47 to specified people in that statute so that those people could take appropriate precautions. *Waddell v. Bhat*, 257 Ga. App. 580, 571 S.E.2d 565 (2002).

Use of pseudonym in trial court’s discretion. — When a patient filed suit solely alleging that the improper disclosure of HIV confidential information under O.C.G.A. § 24-9-40.1 and the non-disclosure exception of O.C.G.A. § 24-9-47(y) did not apply, a trial court retained discretion to determine if the patient could prosecute a case under a pseudonym. *Doe v. Hall*, 260 Ga. App. 421, 579 S.E.2d 838 (2003).

Cited in Multimedia WMAZ, Inc. v. Kubach, 212 Ga. App. 707, 443 S.E.2d 491 (1994); *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 614 S.E.2d 758 (2005).

RESEARCH REFERENCES

ALR. — Rescission or cancellation of insurance policy for insured’s misrepresentation or concealment of information concerning human immunodeficiency virus

(HIV), acquired immunodeficiency syndrome (AIDS), or related health problems, 15 ALR5th 92.

ARTICLE 3

EXAMINATION

Cross references. — Televising of testimony of child who is victim of certain offenses, § 17-8-55.

JUDICIAL DECISIONS

Discretion of court. — Examination of witnesses is a matter largely within the discretion of the court. *National Land & Coal Co. v. Zugar*, 171 Ga. 228, 155 S.E. 7 (1930).

Examination by more than one counsel. — Although a defendant has both a state and federal right to self-representation, when the defendant has counsel to represent the defendant, the trial court can require the examination and cross-examination of witnesses to be conducted by one counsel only. *Johnson v. State*, 246 Ga. 126, 269 S.E.2d 18 (1980).

Examination by judge. — Trial judge has the right to propound a question or series of questions to any witness for the purpose of developing fully the truth of the case; and the extent to which the examination conducted by the court shall go is a matter within the judge's discretion. *Daniels v. State*, 154 Ga. App. 323, 268 S.E.2d 376 (1980).

Lengthy examination of a witness by the court will not be cause for a new trial unless

the court during the examination of the witness expresses an opinion on the facts of the case or the examination becomes argumentative. *Daniels v. State*, 154 Ga. App. 323, 268 S.E.2d 376 (1980).

Recall of witnesses. — Trial judge's discretion extends to allowing the state to reopen the case and recall a witness for the purpose of amplifying testimony previously given, and to allowing a witness to be recalled after the close of evidence to correct the witness's former testimony, which the witness contends was mistaken. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

It is within the discretionary power of the court to allow a witness to be sworn after the evidence on both sides has been announced closed and the argument has been commenced; and a liberal practice in this respect is most favorable to the ends of justice. *Robinson v. State*, 154 Ga. App. 591, 269 S.E.2d 86 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 688.

Am. Jur. Proof of Facts. — Impeachment of Expert Witness — Financial Interest, 21 POF2d 73.

Expert Testimony at Sentencing, 21 POF2d 645.

Contradiction of Expert Witness Through Use of Authoritative Treatise, 31 POF2d 443.

Qualification of Medical Expert Witness, 33 POF2d 179.

Qualification of Chiropractor as Expert Witness, 45 POF2d 137.

Establishing an Adequate Foundation for Proof of Medical Expenses, 23 POF3d 243.

Corroboration of a Child's Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

Challenge to Eyewitness Testimony Through Expert Testimony, 35 POF3d 1.

Proof of Contamination in Toxic Tort Cases Through Expert Testimony, 39 POF3d 539.

Damages for Loss of Enjoyment of Life, 49 POF3d 339.

Firearms Forensics — Firearms Identification at Trial, 60 POF3d 1.

Proof of Identity of Fiber, Fabric, or Textile, 61 POF3d 501.

Proof of Incompetency, 62 POF3d 197.

ALR. — Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal injury or death action carries liability insurance, 56 ALR 1418; 74 ALR 849; 95 ALR 388; 105 ALR 1319; 4 ALR2d 761.

Propriety of conduct of trial judge in propounding questions to witnesses in criminal case, 84 ALR 1172.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 ALR 1089.

Constitutionality, construction, and effect of statute or regulation relating specifically to divulgence of information acquired by public officers or employees, 165 ALR 1302.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination, 45 ALR2d 1354.

Coaching of witness by spectator at trial as prejudicial error, 81 ALR2d 1142.

Closed-circuit television witness examination, 61 ALR4th 1155.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS), 12 ALR5th 149.

Transmission or risk of transmission of

human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 ALR5th 628.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

24-9-60. Oath or affirmation required.

The sanction of an oath or affirmation equivalent thereto shall be necessary to the reception of any oral evidence. The court may frame such affirmation according to the religious faith of the witness. (Orig. Code 1863, § 3786; Code 1868, § 3806; Code 1873, § 3862; Code 1882, § 3862; Civil Code 1895, § 5279; Civil Code 1910, § 5868; Code 1933, § 38-1701.)

JUDICIAL DECISIONS

In general. — In this state, an oath or affirmation is required of all witnesses, and unsworn statements are not treated as amounting to evidence, except in specified cases from necessity. *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943).

Children. — Under O.C.G.A. § 24-9-5(b), which provides that in certain limited categories of cases a child is deemed legally competent to testify, the prerequisite administration of the oath otherwise called for by O.C.G.A. § 24-9-60 has been obviated when the child does not comprehend its nature. The child simply becomes an unsworn witness, made so because incapable of taking an oath. *Bright v. State*, 197 Ga. App. 784, 400 S.E.2d 18 (1990).

Testimony of competent child, not formerly sworn, admitted. — Testimony of a child witness who, in response to questioning by the state, demonstrated that the child was aware that the child was under an obligation to tell the truth and could have been punished for not doing so, and who was shown to be competent, was properly admitted although the child was not sworn where, after the preliminary questioning by the state, the defendant failed to request that the child be formally sworn and did not object to the child testifying. *Hilson v. State*, 204 Ga. App. 200, 418 S.E.2d 784 (1992).

Framing oath according to religious faith.

— It was not error to accept testimony of a witness who declined to take an oath, saying: “Well, I’m not going to swear but I promise to tell you the truth.” *Chapman v. State*, 257 Ga. 19, 354 S.E.2d 149 (1987).

Objection to lack of oath or affirmation.

— When a party, without objection, allows a witness to go on the stand and testify against the party without being first sworn, such party cannot, after verdict against the party, urge in this court the failure of the witness to take the oath as a ground for rejecting the brief of the evidence, which has the approval of the trial judge, since such objection was not raised in the court below. *Neidlinger v. Mobley*, 76 Ga. App. 599, 46 S.E.2d 747 (1948).

When a party, without objection, allows a witness to testify against the party without first being sworn, that party, through the party’s failure to object, has waived the requirements of an oath. *Belcher v. State*, 173 Ga. App. 509, 326 S.E.2d 857 (1985).

Cited in *Chevrolet-Atlanta Div., GMC v. Nash*, 81 Ga. App. 671, 59 S.E.2d 681 (1950); *Davis v. State*, 166 Ga. App. 327, 304 S.E.2d 475 (1983); *Howard v. State*, 262 Ga. 784, 426 S.E.2d 365 (1993); *Grantham v. Grantham*, 224 Ga. App. 1, 479 S.E.2d 370 (1996); *Cousins v. Maced. Baptist Church of Atlanta*, 283 Ga. 570, 662 S.E.2d 533 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Affirmations. — Statute although dealing with oaths as given in the trial of cases, nevertheless substantiates the belief that the word “swear” could be stricken and the word “affirm” used in loyalty oaths. 1948-49 Op. Att’y Gen. p. 565.

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 681 et seq.
ALR. — Sufficiency, under rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness’s testimony, 127 ALR Fed. 207.

24-9-61. Right to have witnesses sequestered; effect of irregularity.

Except as otherwise provided in Code Section 24-9-61.1, in all cases either party shall have the right to have the witnesses of the other party examined out of the hearing of each other. The court shall take proper care to effect this object as far as practicable and convenient, but no mere irregularity shall exclude a witness. (Orig. Code 1863, § 3787; Code 1868, § 3807; Code 1873, § 3863; Code 1882, § 3863; Civil Code 1895, § 5280; Penal Code 1895, § 1017; Civil Code 1910, § 5869; Penal Code 1910, § 1043; Code 1933, § 38-1703; Ga. L. 1985, p. 744, § 1.)

Law reviews. — For article surveying developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
RIGHT OF SEQUESTRATION
EXCEPTIONS TO SEQUESTRATION RULE
TESTIMONY OF WITNESSES NOT SEQUESTERED

General Consideration

Purpose. — Purpose of the rule of sequestration is to prevent a witness who has not testified, or who has not completed his or her testimony, from overhearing and having his or her testimony affected by the testimony of another witness. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *Hall v. Hall*, 220 Ga. 677, 141 S.E.2d 400 (1965); *General Oglethorpe Hotel Co. v. Lanier*, 99 Ga. App. 401, 109 S.E.2d 769 (1959); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Byrd v. Brand*, 140 Ga. App. 135, 230 S.E.2d 113 (1976); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

Import of O.C.G.A. § 24-9-61 is to preserve the integrity of testimony, with the ultimate goal of arriving at the truth; thus, the rule extends to communications, direct and indirect, between witnesses outside the courtroom. *O’Kelley v. State*, 175 Ga. App. 503, 333 S.E.2d 838 (1985).
Purpose of the rule of sequestration is to prevent a witness who has testified from influencing the witness who has not. Whether the witness has been excused after testifying is of no relevance to the witness’s duty to refrain from discussing the witness’s testimony with another witness. *Rogers v. State*, 257 Ga. 590, 361 S.E.2d 814 (1987).
Sequestration rule literally prohibits only witnesses from being examined in the hear-

General Consideration (Cont'd)

ing of each other. *Johnson v. State*, 258 Ga. 856, 376 S.E.2d 356 (1989).

Right to testimony of witnesses unaffected. — Party's right to have the testimony of any witness, when material to the assertion of the party's rights, is unaffected by this statute which relates to the sequestration of witnesses. *Higdon v. State*, 46 Ga. App. 346, 167 S.E. 782 (1933); *McCartney v. McCartney*, 217 Ga. 200, 121 S.E.2d 785 (1961); *Baker v. State*, 131 Ga. App. 48, 205 S.E.2d 79 (1974).

Contact between attorney and witness. — This rule of sequestration does not prohibit discussions between an attorney for a party in the case and a prospective witness, at least so long as the attorney talks to the witness separately from the other witnesses and does not inform the witness of previous testimony. *Norman v. State*, 212 Ga. App. 105, 441 S.E.2d 94 (1994).

Spectators not excluded. — Rule of sequestration is not applicable to spectators and it is not designed to exclude nonwitnesses from the courtroom. *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

Trial court did not commit prejudicial error in allowing witnesses testifying on behalf of a child molestation victim to remain in the courtroom during the victim's testimony since the witnesses' testimony did not bolster the victim's testimony. *Mullis v. State*, 184 Ga. App. 525, 362 S.E.2d 90 (1987).

Victim/witness conversing with spectator. — Rule of sequestration was not violated after victim/witness conversed with spectator during recess. *Kirkland v. State*, 173 Ga. App. 687, 327 S.E.2d 808 (1985).

Violation of rule of sequestration. — In a juvenile court deprivation proceeding, evidence that father discussed his testimony with his mother before her testimony in violation of the rule of sequestration justified finding of contempt. *In re A.L.L.*, 211 Ga. App. 767, 440 S.E.2d 517 (1994).

Rule of sequestration was not violated by allowing a witness to testify who was in the courtroom at the time defendant attempted to plead guilty. *Cook v. State*, 221 Ga. App. 831, 472 S.E.2d 686 (1996).

Sequestration of the victim's spouse was not required since, although the spouse's name appeared on the state's witness list

originally, the spouse was removed from the list and did not testify. *Edwards v. State*, 224 Ga. App. 14, 479 S.E.2d 754 (1996).

Even though a police officer, who was a witness for the state, spoke to defense witnesses during the trial, there was no violation of this rule, since there was no allegation that the officer spoke with the witnesses about their testimony or that any witness heard the officer's testimony. *Bayer v. State*, 230 Ga. App. 708, 497 S.E.2d 266 (1998).

Procedure of the trial judge in allowing the victim to remain in the courtroom while a detective and polygraph examiner testified, and then letting the victim give the victim's own testimony was fully within the court's discretion and did not constitute reversible error. *Shepherd v. State*, 245 Ga. App. 386, 537 S.E.2d 777 (2000).

Trial court did not violate O.C.G.A. § 24-9-61 by permitting three prior difficult witnesses to remain in the courtroom together while the court instructed each of them on the limitation to be placed on their testimony since each was then examined out of the hearing of each other. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Curing violation of rule of sequestration. — In a medical malpractice action, violation of an order on sequestration, indicated by defendant's expert when the expert revealed that defendant's attorney had discussed with the expert testimony of one of plaintiff's attorneys, did not warrant a new trial since the court gave curative instructions to the jury, admonishing defendant's attorney and advising that the violation could be considered in assessing the witness's credibility. *Bean v. Landers*, 215 Ga. App. 366, 450 S.E.2d 699 (1994).

Appropriate remedy in a case where a witness violated the rule of sequestration when the witness spoke to another witness outside the courtroom was to admit testimony regarding the violation and failure to do so was reversible error. *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996).

Witness who has finished testifying. — Once a witness who has been sequestered has testified and is excused and neither side intends to recall the witness, the witness can do as the witness pleases and leave or remain in the courtroom. *Bigby v. State*, 184 Ga. App. 94, 360 S.E.2d 751 (1987).

Mutual observations of witnesses outside courtroom following testimony not prejudi-

cial. — Mutual observation of two witnesses outside the courtroom that they could not identify a suspicious party by one's shoes constituted only innocuous remarks which could not have been prejudicial even to appellant's codefendant, about whom the observation ostensibly related, especially given the fact that the two witnesses had already testified when their conversation took place. *Almond v. State*, 173 Ga. App. 423, 326 S.E.2d 798 (1985).

Rule of sequestration is not violated when witnesses discuss their testimony outside of courtroom, as the rule only prevents a potential witness from being present in the courtroom while any other witness is testifying. *Boyd v. State*, 168 Ga. App. 246, 308 S.E.2d 626 (1983).

Out-of-court violation. — Witness's violation of the rule of sequestration when the witness spoke to another witness outside the courtroom was relevant to the issue of the witness's credibility and could be considered by the jury in assessing the credit to be given the testimony of the violator, irrespective of the violating witness's success in affecting the testimony of the other witness. *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996).

Sequestration of defendant's wife. — Trial court did not abuse the court's discretion in sequestering defendant's wife when it appeared she would be called as a witness. *Norman v. State*, 255 Ga. 313, 338 S.E.2d 249 (1986).

Sequestration of juvenile's parent. — Parent is not a party to criminal proceedings in which a juvenile is being tried as an adult and the court has discretion to grant a motion to sequester a parent who is a witness. *Appling v. State*, 221 Ga. App. 162, 470 S.E.2d 761 (1996).

Sequestering of defendant's experts. — In a prosecution for driving under the influence, the trial court did not abuse the court's discretion by sequestering defendant's expert on field sobriety evaluations during the presentation of the state's case. *McNeil v. State*, 229 Ga. App. 149, 493 S.E.2d 570 (1997).

Sequestration of plaintiff. — In a negligence suit wherein a train patron was attacked and raped while exiting a train station, the trial court did not abuse the court's discretion by not forcing the plaintiff to either testify first or to leave the courtroom

until the plaintiff testified after the rule of sequestration had been invoked as it was within the trial court's broad discretion to allow the plaintiff to remain in the courtroom during the presentation of the case and to testify at a later point in that presentation. *MARTA v. Doe*, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

Appellate review. — In the absence of an offer of proof as to expert's testimony, the appellate court could not review the defendant's claim of error based on the trial court's actions in invoking the sequestration rule and threatening the defendant's attorney and expert with contempt, whereupon the defendant's counsel withdrew the expert from the witness list so that the expert could remain in the courtroom and assist counsel during the state's case. *Pittman v. State*, 274 Ga. 260, 553 S.E.2d 616 (2001).

Ineffective assistance of counsel not established by failure to object to lack of sequestering admonition. — Defendant's counsel did not provide ineffective assistance because counsel did not object to the trial court's failure to admonish sequestered witnesses not to talk to each other as O.C.G.A. § 24-9-61 did not prohibit the witnesses from having any contact, but merely prohibited them from discussing their testimony and/or the charges. *Ogle v. State*, 256 Ga. App. 26, 567 S.E.2d 700 (2002).

Cited in *Hodges v. State*, 94 Ga. App. 772, 96 S.E.2d 312 (1956); *Ledford v. State*, 215 Ga. 799, 113 S.E.2d 628 (1960); *Waldrop v. State*, 221 Ga. 319, 144 S.E.2d 372 (1965); *McKeever v. State*, 118 Ga. App. 386, 163 S.E.2d 919 (1968); *Sparks v. State*, 121 Ga. App. 115, 173 S.E.2d 239 (1970); *Cotton States Ins. Co. v. Studdard*, 126 Ga. App. 217, 190 S.E.2d 549 (1972); *Byers v. Lieberman*, 126 Ga. App. 582, 191 S.E.2d 470 (1972); *Ricketts v. Liberty Mut. Ins. Co.*, 127 Ga. App. 483, 194 S.E.2d 311 (1972); *Shouse v. State*, 231 Ga. 716, 203 S.E.2d 537 (1974); *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974); *McFarland v. State*, 137 Ga. App. 354, 223 S.E.2d 739 (1976); *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Hall v. State*, 239 Ga. 832, 238 S.E.2d 912 (1977); *Lockleer v. State*, 144 Ga. App. 493, 241 S.E.2d 613 (1978); *Booker v. State*, 242 Ga. 773, 251 S.E.2d 518 (1979); *Smith v. State*, 245 Ga. 168, 263 S.E.2d 910 (1980); *O'Dillon v. State*, 245 Ga. 342, 265 S.E.2d 18

General Consideration (Cont'd)

(1980); McElroy v. State, 154 Ga. App. 368, 269 S.E.2d 497 (1980); Head v. State, 246 Ga. 360, 271 S.E.2d 452 (1980); Hood v. State, 157 Ga. App. 282, 277 S.E.2d 261 (1981); Walden v. Metropolitan Atlanta Rapid Transit Auth., 161 Ga. App. 725, 288 S.E.2d 671 (1982); Mathis v. State, 249 Ga. 454, 291 S.E.2d 489 (1982); Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360 (1982); Hill v. State, 250 Ga. 277, 295 S.E.2d 518 (1982); GaDonna v. State, 164 Ga. App. 582, 298 S.E.2d 556 (1982); Brooks v. State, 165 Ga. App. 115, 299 S.E.2d 167 (1983); Hart v. Owens-Illinois, Inc., 165 Ga. App. 681, 302 S.E.2d 701 (1983); Dowdy v. Palmour, 251 Ga. 135, 304 S.E.2d 52 (1983); Magsby v. State, 169 Ga. App. 637, 314 S.E.2d 473 (1984); Barfield v. State, 170 Ga. App. 796, 318 S.E.2d 219 (1984); Cargill v. State, 255 Ga. 616, 340 S.E.2d 891 (1986); Thayer v. State, 189 Ga. App. 321, 376 S.E.2d 199 (1988); Justice v. Kern & Co., 197 Ga. App. 272, 398 S.E.2d 223 (1990); Johnson v. State, 198 Ga. App. 316, 401 S.E.2d 331 (1991); Chambers v. State, 216 Ga. App. 361, 454 S.E.2d 567 (1995); Tidwell v. State, 219 Ga. App. 233, 464 S.E.2d 834 (1995); State Farm Mut. Auto. Ins. Co. v. Drury, 222 Ga. App. 196, 474 S.E.2d 64 (1996); Heath v. State, 223 Ga. App. 680, 478 S.E.2d 462 (1996); Adame v. State, 244 Ga. App. 257, 534 S.E.2d 817 (2000); Williams v. State, 277 Ga. 853, 596 S.E.2d 597 (2004).

Right of Sequestration

Right of sequestration is absolute, subject only to the discretion of the trial judge in making exceptions thereto. Johnson v. State, 14 Ga. 55 (1853); Bird v. State, 50 Ga. 585 (1874); Hughes v. State, 128 Ga. 19, 57 S.E. 236 (1907); Hill-Atkinson Co. v. Hasty, 17 Ga. App. 569, 87 S.E. 839 (1916); Blitch-Everett Co. v. Jackson, 29 Ga. App. 440, 116 S.E. 47 (1923); Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946); Montos v. State, 212 Ga. 764, 95 S.E.2d 792 (1956), overruled on other grounds, White v. State, 273 Ga. 787, 546 S.E.2d 514 (2001); Smith v. State, 215 Ga. 51, 108 S.E.2d 688 (1959); Spurlin v. State, 222 Ga. 179, 149 S.E.2d 315 (1966); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581 (1971); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971); Rozier v.

State, 124 Ga. App. 481, 184 S.E.2d 203 (1971); Bush v. State, 129 Ga. App. 160, 199 S.E.2d 121 (1973); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404 (1975); James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977); Whitfield v. State, 143 Ga. App. 779, 240 S.E.2d 189 (1977).

O.C.G.A. § 24-9-61 gives either party the right to have witnesses sequestered, but it is subject to the discretion of the trial judge, who may make exceptions. Welch v. State, 251 Ga. 197, 304 S.E.2d 391 (1983).

Trial court is vested with broad discretion in enforcement of the sequestration rule. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981).

Application of the rule of sequestration is within the sound discretion of the trial court. Wilson v. State, 158 Ga. App. 174, 279 S.E.2d 345 (1981).

Enforcement of O.C.G.A. § 24-9-61 long has been vested in the discretion of the trial court. Croom v. State, 165 Ga. App. 676, 302 S.E.2d 598 (1983).

Both parties have the right of sequestration of witnesses, but the enforcement of the rule is vested in the discretion of the trial court; the orderly presentation of evidence being a proper reason for an exception to the rule. Kelly v. State, 182 Ga. App. 7, 354 S.E.2d 647 (1987).

State's explanation of the state's need for the deputy sheriff's assistance during trial can provide an acceptable reason for the trial court's exercise of the court's discretion in permitting the state's witness to remain in the courtroom and testify after another state witness has testified. Kelly v. State, 182 Ga. App. 7, 354 S.E.2d 647 (1987).

Rule not enforced until presentation of evidence has begun. — Trial court is not required to enforce the rule of sequestration until the presentation of evidence has begun. Blankenship v. State, 258 Ga. 43, 365 S.E.2d 265, cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988); Chastain v. State, 244 Ga. App. 84, 535 S.E.2d 25 (2000).

Rule of sequestration does not prohibit persons from remaining in courtroom dur-

ing proceedings, but merely gives a right to either party to have the witnesses for the other party examined out of the hearing of each other. *Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

Witnesses may not be told what prior witnesses have said. *O'Kelley v. State*, 175 Ga. App. 503, 333 S.E.2d 838 (1985).

Request denied when no previous notice that witness considered hostile or adverse. — In a garnishment proceeding, court did not err in denying plaintiff's request to sequester a witness (president of the judgment debtor) since the witness had been subpoenaed by plaintiff and when plaintiff did not announce or request that the witness be considered a hostile or an adverse witness. *Travelers Ins. Co. v. Trans State, Inc.*, 172 Ga. App. 763, 324 S.E.2d 585 (1984).

Failure of the district attorney to invoke sequestration of witnesses at the outset of the presentation of evidence constitutes a ground for new trial. *Parham v. State*, 135 Ga. App. 315, 217 S.E.2d 493 (1975).

When the rule of sequestration was never invoked by either the state or defendant, the trial court did not err by permitting a witness to testify as a rebuttal witness for the state after the witness had sat through the trial and heard the testimony of the state's previous witnesses. *Watson v. State*, 222 Ga. App. 158, 473 S.E.2d 262 (1996).

Time of request. — Since statute devolves upon each party who wishes to obtain the benefit of the rule to invoke the statute with respect to the separation of the witnesses of the party's adversary, the fact that the demand of the plaintiff was not entered until after one's own witnesses had testified would not militate against one's "right to have the witnesses of the other party examined out of the hearing of each other." *Blicht-Everett Co. v. Jackson*, 29 Ga. App. 440, 116 S.E. 47 (1923).

When at the close of evidence for propounders of a will, the propounders moved that witnesses for the caveator be sequestered and this was opposed by the caveator, on the ground that the motion came too late, the court was correct in ordering that the witnesses be sequestered. *Chedel v. Mooney*, 158 Ga. 297, 123 S.E. 300 (1924).

Judge may sequester witnesses on own motion. *Meeks v. State*, 51 Ga. 429 (1874).

Waiver of right. — When a defendant could not have known whether the district attorney was going to call the FBI agent even though the defendant was listed on the indictment it cannot be held as a matter of law that the defendant waived defendant's objection to the witness being in the courtroom by not objecting until the witness was called. *Parham v. State*, 135 Ga. App. 315, 217 S.E.2d 493 (1975).

Application of the rule to a particular witness is within the sound discretion of the trial court and since the defendant did not object to allowing the victim's father to remain in the courtroom, the defendant thereby waived the issue on appeal; without a showing of manifest abuse of discretion, the trial judge's decision will not be disturbed. *Earnest v. State*, 262 Ga. 494, 422 S.E.2d 188 (1992).

Sequestration at interlocutory hearing for injunction. — Since in all cases, either party shall have the right to have the witnesses of the other party examined out of the hearing of each other, the rule is applicable and mandatory in an interlocutory hearing for injunction. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *Hall v. Hobbs*, 107 Ga. App. 46, 129 S.E.2d 209 (1962).

Sequestration during videotaped testimony of expert witness. — Requiring sequestration of plaintiff's expert witness during the videotaped testimony of defendant's expert witness was not error since plaintiff's expert had already been allowed to review a transcript of the testimony. *Simonds v. Conair Corp.*, 185 Ga. App. 664, 365 S.E.2d 507 (1988).

Enforcement of rule by court. — When the rule of sequestration of witnesses is invoked by a defendant, it is the duty of the court to enforce the rule. *Norman v. State*, 121 Ga. App. 753, 175 S.E.2d 119 (1970), cert. denied, 401 U.S. 956, 91 S. Ct. 981, 28 L. Ed. 2d 240 (1971); *Stuart v. State*, 123 Ga. App. 311, 180 S.E.2d 581 (1971); *Nance v. State*, 123 Ga. App. 410, 181 S.E.2d 295 (1971); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Pearley v. State*, 235 Ga. 276, 219 S.E.2d 404 (1975); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979); *Mize v. State*, 152 Ga. App. 190, 262 S.E.2d 492 (1979); *Dampier v. State*, 245 Ga.

Right of Sequestration (Cont'd)

427, 265 S.E.2d 565 (1980), cert. denied, 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161, supplemented, 245 Ga. 882, 268 S.E.2d 349 (1980) (in light of Supreme Court opinion in *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)).

Effect of denial of sequestration. — Refusal of the trial judge to grant sequestration when requested deprives the party of substantial and positive rights and is an absolute ground for new trial. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *Smith v. State*, 215 Ga. 51, 108 S.E.2d 688 (1959); *Hall v. Hall*, 220 Ga. 677, 141 S.E.2d 400 (1965); *Stuart v. State*, 123 Ga. App. 311, 180 S.E.2d 581 (1971); *Rozier v. State*, 124 Ga. App. 481, 184 S.E.2d 203 (1971); *Childers v. State*, 130 Ga. App. 555, 203 S.E.2d 874 (1974); *James v. State*, 143 Ga. App. 696, 240 S.E.2d 149 (1977); *Whitfield v. State*, 143 Ga. App. 779, 240 S.E.2d 189 (1977).

Sequestration at later stage of trial. — Fact that the witnesses were sequestered at a later stage of the trial did not cure the error of the court in refusing to invoke the rule of sequestration upon timely request prior to allowing the defendant's witnesses to testify. *Hall v. Hobbs*, 107 Ga. App. 46, 129 S.E.2d 209 (1962).

Solitary defense expert witness. — O.C.G.A. § 24-9-61 authorizes sequestration of a solitary defense expert witness to prevent the expert's hearing the testimony of the other witnesses. Accordingly, the trial court did not err in presenting defense counsel with a choice of whether to use the defense expert to assist in cross-examination or as a witness, but forbidding his use for both. *Greenway v. State*, 207 Ga. App. 511, 428 S.E.2d 415 (1993).

Exceptions to Sequestration Rule

In general. — Whether such witnesses should be instructed not to converse with other persons or with each other, and whether the witnesses who have been examined should be allowed to return to the room in which the others are waiting, are questions within the sound discretion of the trial judge, to be determined in the light of one's knowledge of the witnesses and of the case. *Kelly v. State*, 118 Ga. 329, 45 S.E. 413

(1903); *Turbaville v. State*, 58 Ga. 545 (1877); *Carson v. State*, 80 Ga. 170, 5 S.E. 295 (1887); *Talley v. State*, 2 Ga. App. 395, 58 S.E. 667 (1907); *Hudgins v. State*, 13 Ga. App. 489, 79 S.E. 367 (1913).

Nothing prohibits anything other than the examination of witnesses out of the hearing of each other; statute says nothing about other types of contact. *Byrd v. Brand*, 140 Ga. App. 135, 230 S.E.2d 113 (1976).

In the absence of some allegation of impropriety as the result of granting an exception to the sequestration order the court will not find prejudicial harm. *Kendrick v. State*, 123 Ga. App. 785, 182 S.E.2d 525 (1971); *Smith v. State*, 244 Ga. 814, 262 S.E.2d 116 (1979).

No harmful error is shown in a case where, after the witnesses have been sequestered, the solicitor general (now district attorney) interviews a witness before placing the witness on the stand in the absence of an allegation that such witness was informed of what other witnesses had testified or what the witness was expected to testify. *Smith v. State*, 244 Ga. 814, 262 S.E.2d 116 (1979).

Trial court has discretion in permitting, upon request, counsel for one of the parties an opportunity to converse with a witness in the case for limited purposes, and that discretion will not be controlled unless abused. *Smith v. State*, 244 Ga. 814, 262 S.E.2d 116 (1979).

Orderly presentation of evidence is a proper reason for an exception to the rule of sequestration. *Hardy v. State*, 245 Ga. 673, 266 S.E.2d 489 (1980).

When the prosecutor stated that the prosecutor needed a witness for presentation of a case and that to require the witness to testify first would interfere with the orderly presentation of a case, the trial judge had discretion to except such witness from the rule of sequestration. *Blalock v. State*, 250 Ga. 441, 298 S.E.2d 477 (1983); *Fowler v. State*, 179 Ga. App. 492, 347 S.E.2d 322 (1986); *Denny v. State*, 210 Ga. App. 406, 436 S.E.2d 526 (1993).

O.C.G.A. § 24-9-61 does not prohibit the state from stating the case and allegations in front of the witnesses prior to sequestration. *Brewer v. State*, 162 Ga. App. 228, 291 S.E.2d 87 (1982).

Orderly presentation of evidence is a proper reason for permitting an

unsequestered witness, who is assisting the prosecutor, to testify after other witnesses. *Croom v. State*, 165 Ga. App. 676, 302 S.E.2d 598 (1983).

Based upon a showing by the state of some need not to call the unsequestered witness first, the trial court is authorized, in the court's discretion, to allow the unsequestered witness to be called to the stand after other witnesses have testified. *Law v. State*, 165 Ga. App. 687, 302 S.E.2d 570, *aff'd*, 251 Ga. 525, 307 S.E.2d 904 (1983).

It is within the discretion of the trial court to make exceptions in regard to the sequestration of nonparty witnesses, and unless that discretion is abused it will not be reversed. *Batten v. Batten*, 182 Ga. App. 442, 356 S.E.2d 228 (1987).

Request for exception. — Proper procedure in situations where this statute has been invoked and a party needs the assistance of a witness during the prosecution of a case is to specifically request that the trial judge make an exception to the rule at the commencement of the evidence. *Brown v. State*, 150 Ga. App. 116, 257 S.E.2d 25 (1979); *McCranie v. State*, 151 Ga. App. 871, 261 S.E.2d 779 (1979).

Exceptions are granted at court's discretion. — It is within the trial court's discretion to make exceptions to the sequestration rule, and unless that discretion has been abused the court's decision will not be reversed on appeal. *Jones v. State*, 75 Ga. App. 610, 44 S.E.2d 174 (1947); *Dye v. State*, 220 Ga. 113, 137 S.E.2d 465 (1964); *Cooper v. Butler*, 223 Ga. 797, 158 S.E.2d 244 (1967); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Parham v. State*, 135 Ga. App. 315, 217 S.E.2d 493 (1975); *Disby v. State*, 238 Ga. 178, 231 S.E.2d 763 (1977); *Lloyd v. State*, 146 Ga. App. 584, 246 S.E.2d 697 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979); *Horton v. Wayne County*, 243 Ga. 789, 256 S.E.2d 775 (1979); *Ratliff v. State*, 150 Ga. App. 695, 258 S.E.2d 324 (1979); *McCranie v. State*, 151 Ga. App. 871, 261 S.E.2d 779 (1979).

Excepted witnesses testify first. — When a witness has been excepted from the sequestration rule, that witness should be presented first or explanation made to the trial court why the witness cannot be called first. *Jones v. State*, 75 Ga. App. 610, 44 S.E.2d 174

(1947); *McCranie v. State*, 151 Ga. App. 871, 261 S.E.2d 779 (1970); *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Parham v. State*, 135 Ga. App. 315, 217 S.E.2d 493 (1975); *Pless v. State*, 142 Ga. App. 594, 236 S.E.2d 842 (1977); *James v. State*, 143 Ga. App. 696, 240 S.E.2d 149 (1977); *Whitfield v. State*, 143 Ga. App. 779, 240 S.E.2d 189 (1977); *Lloyd v. State*, 146 Ga. App. 584, 246 S.E.2d 697 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979); *Brown v. State*, 150 Ga. App. 116, 257 S.E.2d 25 (1979); *Ratliff v. State*, 150 Ga. App. 695, 258 S.E.2d 324 (1979); *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979).

Court may allow witness for prosecution to remain in courtroom in violation of the sequestration rule, if the prosecuting attorney states that the witness is needed to aid in the presentation of the case and that in the orderly presentation of the case cannot testify first. *Sweat v. State*, 203 Ga. App. 290, 416 S.E.2d 845 (1992).

Trial court did not abuse the court's discretion in defendant's criminal trial when the court denied defendant's sequestration request regarding one of the police officers involved in the arrest as the state's request that the officer stay in the court to assist was deemed reasonable given that defendant's trial counsel had the assistance of two other attorneys as well as a recent law graduate. *Warren v. State*, 281 Ga. App. 490, 636 S.E.2d 671 (2006).

State's lead detective was properly excepted from the rule of sequestration as the state adequately demonstrated that the state needed the presence of the primary investigator in the courtroom for an orderly presentation of the case. *Morgan v. State*, 287 Ga. App. 569, 651 S.E.2d 833 (2007).

Prosecutor requested that the chief investigating detective be excepted from the rule of sequestration to permit the detective to assist the prosecutor in presenting the case because of the detective's familiarity with the facts and the crime scene. In light of the prosecutor's request, allowing the detective to remain in the courtroom during the presentation of the state's case was not an abuse of discretion. *Hollis v. State*, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

The trial court did not abuse its discretion in allowing the lead investigative officer to

Exceptions to Sequestration Rule (Cont'd)

stay in the courtroom throughout a defendant's marijuana possession trial, although the defendant invoked sequestration, because the prosecutor designated the officer as the state's prosecuting witness. Moreover, defense counsel made no objection at the time of the designation. *Sirmans v. State*, 301 Ga. App. 756, 688 S.E.2d 669 (2009).

Witness allowed to remain in courtroom.

— When lead investigator testified first and was then permitted to remain in the courtroom during the remainder of the trial, and was twice recalled to the stand after having heard the testimony of the other witnesses, it was not an abuse of the trial court's discretion to permit the detective's testimony. *Dunbar v. State*, 209 Ga. App. 97, 432 S.E.2d 829 (1993); *Mitchell v. State*, 222 Ga. App. 878, 476 S.E.2d 604 (1996).

In a prosecution for child molestation, it was not an abuse of discretion to allow the mother of the victim to remain in the courtroom after the victim became upset while testifying. *Peters v. State*, 224 Ga. App. 837, 481 S.E.2d 898 (1997).

Parties as witnesses. — When a party to an action intends to be a witness personally and the court directs that the party's witnesses be separately examined under this statute, it is the proper rule, unless there be special reasons to the contrary, that such party should first be examined in the absence of the party's other witnesses, in order that the party may thereby be present, as is the party's right, during the whole trial of the party's case. *Tift v. Jones*, 52 Ga. 538 (1874); *Georgia R.R. & Banking Co. v. Tice*, 124 Ga. 459, 52 S.E. 916, 4 Ann. Cas. 200 (1905); *Massey v. State*, 220 Ga. 883, 142 S.E.2d 832 (1965); *Cochran v. State*, 151 Ga. App. 436, 260 S.E.2d 391 (1979).

In juvenile court trials the parents are parties and therefore not subject to sequestration. *D.C.A. v. State*, 135 Ga. App. 234, 217 S.E.2d 470 (1975).

When the plaintiff elects to call the plaintiff's own witnesses before testifying personally, the trial court has broad discretion to require either that the plaintiff testify prior to presenting the testimony of plaintiff's witnesses, or that the plaintiff be excluded from the courtroom prior to the time plaintiff chooses to testify. *Barber v. Barber*, 257

Ga. 488, 360 S.E.2d 574 (1987).

Assistance to either party. — It is within the discretion of the trial judge to permit a witness to remain in the courtroom to assist either party and the action of the court in this respect will not be reviewed. *Jones v. State*, 75 Ga. App. 610, 44 S.E.2d 174 (1947); *Justice v. State*, 213 Ga. 166, 97 S.E.2d 569 (1957); *Dye v. State*, 220 Ga. 113, 137 S.E.2d 465 (1964); *Radliff v. State*, 150 Ga. App. 695, 258 S.E.2d 324 (1970); *Stuart v. State*, 123 Ga. App. 311, 180 S.E.2d 581 (1971); *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974); *Parham v. State*, 135 Ga. App. 315, 217 S.E.2d 493 (1975); *James v. State*, 143 Ga. App. 696, 240 S.E.2d 149 (1977).

Assistance to opposite party. — Court may permit witnesses to remain in the courtroom to advise the opposite party, but the record must show that such was done for that purpose. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *Montos v. State*, 212 Ga. 764, 95 S.E.2d 792 (1956), overruled on other grounds, *White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001); *Smith v. State*, 215 Ga. 51, 108 S.E.2d 688 (1959); *Spurlin v. State*, 222 Ga. 179, 149 S.E.2d 315 (1966); *Kendrick v. State*, 123 Ga. App. 785, 182 S.E.2d 525 (1971); *Childers v. State*, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

Officer of the court. — When the rule requiring sequestration is invoked and one of the witnesses is an officer of the court the judge may allow that witness to remain in the courtroom so as not to impair the efficiency of the court. *Hoxie v. State*, 114 Ga. 19, 39 S.E. 944 (1901); *Askew v. State*, 3 Ga. App. 79, 59 S.E. 311 (1907); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *Montos v. State*, 212 Ga. 764, 95 S.E.2d 792 (1956), overruled on other grounds, *White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001); *Cornett v. State*, 218 Ga. 405, 128 S.E.2d 317 (1962); *Head v. State*, 111 Ga. App. 14, 140 S.E.2d 291 (1965); *Stuart v. State*, 123 Ga. App. 311, 180 S.E.2d 581 (1971); *Kendrick v. State*, 123 Ga. App. 785, 182 S.E.2d 525 (1971); *Bush v. State*, 129 Ga. App. 160, 199 S.E.2d 121 (1973); *Childers v. State*, 130 Ga. App. 555, 203 S.E.2d 874 (1974); *James v. State*, 143 Ga. App. 696, 240 S.E.2d 149 (1977).

Prosecutor. — Court may permit the prosecutor in the indictment to remain at the state's counsel table to assist in the trial of

the case, even though the prosecutor may be used as a witness. *Norman v. State*, 121 Ga. App. 753, 175 S.E.2d 119 (1970), cert. denied, 401 U.S. 959, 91 S. Ct. 981, 28 L. Ed. 2d 240 (1971); *Howard v. State*, 144 Ga. App. 31, 240 S.E.2d 589 (1977); *McCranie v. State*, 151 Ga. App. 871, 261 S.E.2d 779 (1979).

One long-standing exception to the sequestration rule exists in criminal cases for the prosecutor, that is, the one who signs the indictment bringing the charges. The prosecutor may testify as a witness after other witnesses for the state have testified. *Chastain v. State*, 255 Ga. 723, 342 S.E.2d 678 (1986); *Anderson v. State*, 200 Ga. App. 29, 406 S.E.2d 791 (1991); *Jackson v. State*, 222 Ga. App. 843, 476 S.E.2d 615 (1996).

Prosecuting witness. — It is within the trial court's discretion to allow the prosecuting witness to remain in the courtroom as an exception to the sequestration rule. *Jefferson v. State*, 159 Ga. App. 740, 285 S.E.2d 213 (1981).

It is within the trial court's discretion to allow a prosecuting witness to remain in the courtroom as an exception to the sequestration rule. *Law v. State*, 165 Ga. App. 687, 302 S.E.2d 570, aff'd, 251 Ga. 525, 307 S.E.2d 904 (1983).

Trial court may, in the court's discretion permit the prosecutor in the indictment to remain in the courtroom to assist in the trial of the case, even though the prosecutor may be used as a witness. *Edwards v. State*, 171 Ga. App. 264, 319 S.E.2d 101 (1984).

It was within the trial court's discretion to allow a police officer who was the nominal prosecutor to remain in the courtroom based on the district attorney's statement that the officer's presence was necessary for the orderly administration of the state's case. *Davis v. State*, 239 Ga. App. 318, 521 S.E.2d 368 (1999), rev'd on other grounds, 273 Ga. 14, 537 S.E.2d 663 (2000).

Victim's assistance coordinator. — Because the state's victim assistance coordinator was not a witness subject to sequestration, the trial court did not err in allowing the coordinator to remain in the courtroom during the trial. *Clements v. State*, 279 Ga. App. 773, 632 S.E.2d 702 (2006).

Reopening state's case so victim could make in-court identification. — Allowing the state to reopen the state's case so a robbery victim could make an in-court identification

based on the sound of defendant's voice did not violate the rule of sequestration since the victim was not recalled in order to further or alter the substance of defendant's own recounting of the incident in light of the substance of defendant's testimony but was recalled merely to testify about the similarity of the sound of defendant's voice to the sound of the gunman's voice during commission of the crime. *Stith v. State*, 201 Ga. App. 621, 411 S.E.2d 532 (1991).

Excepting witness testifying as to post-arrest event not error. — Trial court's excepting a state's witness from the rule of sequestration and, having done so, not requiring the witness to testify first was not an abuse of discretion, since the witness testified only about post-arrest events and not about the crime itself. *Mathews v. State*, 183 Ga. App. 224, 358 S.E.2d 639 (1987).

Investigating officer. — Appellate courts have found no abuse of discretion when the trial court permits the investigating officer to remain in the courtroom to assist in the trial of the case and testify after other state witnesses have testified. *Pless v. State*, 142 Ga. App. 594, 236 S.E.2d 842 (1977); *Lloyd v. State*, 146 Ga. App. 584, 246 S.E.2d 697 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979); *Brown v. State*, 150 Ga. App. 116, 257 S.E.2d 25 (1979); *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979).

Where witness police detective was permitted to remain in the courtroom to assist the prosecutor in spite of sequestration order, and where during course of trial the prosecutor sent the detective to telephone another police officer witness whose presence was needed, rule of sequestration was not violated. *McGarl v. State*, 165 Ga. App. 323, 301 S.E.2d 58 (1983).

When defendants contended that it was improper to exempt from the sequestration order two prospective prosecution witnesses, the county sheriff and the police officer who investigated the case, it was held that these exceptions were not an abuse of the court's discretion as the sheriff never testified and the investigator was shown to be needed to assist the district attorney in the trial of the case, an approved exception. *Welch v. State*, 251 Ga. 197, 304 S.E.2d 391 (1983).

Trial court may permit the investigating officer to remain at the counsel table and to

Exceptions to Sequestration Rule (Cont'd)

testify at trial. *Edwards v. State*, 171 Ga. App. 264, 319 S.E.2d 101 (1984).

Trial court is vested with the discretion to make an exception to the sequestration rule for the chief investigating officer and the discretion will not be reversed on appeal unless abused. *Norman v. State*, 255 Ga. 313, 338 S.E.2d 249 (1986); *Watson v. State*, 222 Ga. App. 814, 476 S.E.2d 96 (1996).

Trial court did not abuse the court's discretion in allowing an investigator to sit at counsel table with the prosecutor after the rule of sequestration had been invoked, even though the investigator was the last witness to testify for the state, since the prosecutor stated the prosecutor needed the investigator's assistance during the trial and that to compel the investigator to testify first would require the state to present the state's case out of sequence. *Mullen v. State*, 197 Ga. App. 26, 397 S.E.2d 487 (1990).

Trial court did not err in allowing an investigating officer to sit with the state's attorney during a trial as an exception to the rule of sequestration or in failing to require the officer to testify first as the trial court expressly recognized that the court was vested with discretion to do so; moreover, the investigating officer's testimony was primarily directed at the playing of the videotape interview with the child victim. *Howse v. State*, 273 Ga. App. 252, 614 S.E.2d 869 (2005).

Despite the defendant's contrary claims on appeal, the trial court properly allowed the lead investigating officer to remain in the courtroom during the presentation of evidence, based on the prosecutor's statement that the officer was necessary to assist in the orderly presentation of the case. *Stafford v. State*, 288 Ga. App. 733, 655 S.E.2d 221 (2007), cert. denied, 2008 Ga. LEXIS 489 (Ga. 2008).

Sheriff may be excepted on court's motion. — Since the sheriff is an officer of the court and may be excepted from the rule of sequestration on the court's own initiative, it is not necessary to evaluate the state's asserted need for the assistance of the sheriff, as a demonstration of such was unnecessary to the court's exercise of discretion. *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, cert.

denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Expert witnesses. — When it was necessary to offer a considerable body of technical information relating to the alleged eavesdropping device for jury consideration, and the solicitor (now district attorney) stated in the solicitor's place that the solicitor needed to confer with an expert in this field during the trial, it was not an abuse of discretion to allow such witness to remain in the courtroom after a motion for the sequestration of witnesses had in other respects been granted. *Kendrick v. State*, 123 Ga. App. 785, 182 S.E.2d 525 (1971).

Trial court did not err by refusing to allow defendant's accident reconstruction expert to hear the testimony of other witnesses, since the rule of sequestration was invoked, in view of the court's conclusion that granting the request would give the defense an unfair advantage. *Bartell v. State*, 181 Ga. App. 148, 351 S.E.2d 495 (1986).

An expert is not automatically excepted from the rule on sequestration because ordinarily it is not necessary for the expert to hear the testimony of other witnesses in order to form an opinion. *Bean v. Landers*, 215 Ga. App. 366, 450 S.E.2d 699 (1994).

Member of local police. — City or county police officer is not an officer of the court so as to merit an exception to the rule of sequestration as such. *Head v. State*, 111 Ga. App. 14, 140 S.E.2d 291 (1965); *Bush v. State*, 129 Ga. App. 160, 199 S.E.2d 121 (1973).

Rape victim. — In the absence of any such showing or statement of the solicitor general (now district attorney) and where the record is silent as to any reason a rape victim should be excepted from the rule of sequestration and allowed to remain in the courtroom, none will be assumed to exist. *Massey v. State*, 220 Ga. 883, 142 S.E.2d 832 (1965), cert. denied, 385 U.S. 36, 87 S. Ct. 241, 17 L. Ed. 2d 36 (1966).

O.C.G.A. § 24-9-61 does not prohibit discussions between attorney to the case and prospective witness, at least so long as the attorney talks to the witness separately from the other witnesses and does not inform the witness of previous testimony. *Ross v. State*, 254 Ga. 22, 326 S.E.2d 194, cert. denied, 472

U.S. 1022, 105 S. Ct. 3490, 87 L. Ed. 2d 623 (1985).

Testimony of Witnesses Not Sequestered

Liberal interpretation. — Legislative statement that “no mere irregularity shall exclude the witness” imports that a liberal interpretation should be given when applying this statute. *Pless v. State*, 142 Ga. App. 594, 236 S.E.2d 842 (1977).

Presumption of injury to party. — When a sequestration order is violated, there is a presumption of injury to the rights of a party unless the contrary plainly appears. *Hall v. Hobbs*, 107 Ga. App. 46, 129 S.E.2d 209 (1962).

Witness disregarding sequestration order. — When a witness was competent to testify, and the testimony was relevant, material, and necessary to an adequate defense of the charges against the defendant; only the witness’s credibility as a witness, not the witness’s competence, is affected by the witness’s disregard of a sequestration order. *Rooks v. State*, 65 Ga. 330 (1880); *Lassiter v. State*, 67 Ga. 739 (1881); *Bone v. State*, 86 Ga. 108, 12 S.E. 205 (1890); *May v. State*, 90 Ga. 793, 17 S.E. 108 (1893); *Hoxie v. State*, 114 Ga. 19, 39 S.E. 944 (1901); *McWhorter v. State*, 118 Ga. 55, 44 S.E. 873 (1903); *Phillips v. State*, 121 Ga. 358, 49 S.E. 290 (1904); *Davis v. State*, 120 Ga. 843, 48 S.E. 305 (1904); *Green v. State*, 125 Ga. 742, 54 S.E. 724 (1906); *Carter v. State*, 2 Ga. App. 254, 58 S.E. 532 (1907); *Thomas v. State*, 7 Ga. App. 615, 67 S.E. 707 (1910); *Whigby v. Burnham*, 135 Ga. 584, 69 S.E. 1114 (1911); *Benton v. State*, 9 Ga. App. 291, 71 S.E. 8 (1911); *Higdon v. State*, 46 Ga. App. 346, 167 S.E. 782 (1933); *Edwards v. State*, 55 Ga. App. 187, 189 S.E. 678 (1937); *McCartney v. McCartney*, 217 Ga. 200, 121 S.E.2d 785 (1961); *Hall v. Hobbs*, 107 Ga. App. 46, 129 S.E.2d 209 (1962); *Hall v. Hall*, 220 Ga. 677, 141 S.E.2d 400 (1965); *Shelton v. State*, 111 Ga. App. 351, 141 S.E.2d 776, cert. denied, 382 U.S. 917, 86 S. Ct. 291, 15 L. Ed. 2d 232 (1965); *Pippins v. State*, 224 Ga. 462, 162 S.E.2d 338 (1968); *Kendrick v. State*, 123 Ga. App. 785, 182 S.E.2d 525 (1971); *Rozier v. State*, 124 Ga. App. 481, 184 S.E.2d 203 (1971); *Baker v. State*, 131 Ga. App. 48, 205 S.E.2d 79 (1974); *Pearley v. State*, 235 Ga. 276, 219 S.E.2d 404 (1975); *Still v. State*, 142 Ga. App. 312, 235 S.E.2d 737 (1977); *Watts v.*

State, 239 Ga. 725, 238 S.E.2d 894 (1977); *Banks v. State*, 144 Ga. App. 471, 241 S.E.2d 587 (1978); *Bryan v. State*, 148 Ga. App. 428, 251 S.E.2d 338 (1978); *Dudley v. State*, 148 Ga. App. 560, 251 S.E.2d 815 (1978); *International Ass’n of Bridge Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 254 S.E.2d 438 (1979); *Smith v. State*, 244 Ga. 814, 262 S.E.2d 116 (1979); *Stroming v. State*, 152 Ga. App. 129, 262 S.E.2d 193 (1979); *Wright v. State*, 246 Ga. 53, 268 S.E.2d 645 (1980); *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981); *Blanchard v. State*, 247 Ga. 415, 276 S.E.2d 593 (1981); *Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982).

When the rule of sequestration is violated, the violation goes to the credibility rather than the admissibility of the witness’s testimony. *Johnson v. State*, 258 Ga. 856, 376 S.E.2d 356 (1989); *Lee v. State*, 214 Ga. App. 164, 447 S.E.2d 323 (1994).

In criminal cases, the violation of the rule of sequestration of any witness either for the defense or for the prosecution goes to the credibility rather than to the admissibility of the witness’s testimony. *O’Kelley v. State*, 175 Ga. App. 503, 333 S.E.2d 838 (1985); *State v. Marshall*, 195 Ga. App. 535, 394 S.E.2d 379 (1990), overruled on other grounds, *Armstrong v. State*, 209 Ga. App. 796, 434 S.E.2d 560 (1993); *Weathers v. State*, 202 Ga. App. 849, 415 S.E.2d 690, cert. denied, 202 Ga. App. 907, 415 S.E.2d 690 (1992).

Violation of sequestration does not render the offending witness incompetent to testify; defendant’s recourse is to seek instructions from the court informing the jury that the violation of the rule should be considered in determining the weight and credit to be given to the testimony of the witness. *Bradford v. State*, 182 Ga. App. 337, 355 S.E.2d 735 (1987).

Trial court did not err by refusing to exclude the testimony of a state’s witness for the witness’s alleged violation of the rule of sequestration, as exclusion of testimony simply is not an appropriate remedy for a violation of the rule. *Jefferson v. State*, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987).

Trial court did not err in denying defendant’s motion for mistrial after the court learned that witnesses in the witness room had been discussing testimony with each other in violation of the rule of sequestra-

Testimony of Witnesses Not Sequestered (Cont'd)

tion, since the only witness in the room who had not yet testified when these conversations allegedly occurred was a deputy who did not personally observe the crime but merely took the defendant into custody. *Hicks v. State*, 256 Ga. 715, 352 S.E.2d 762, cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987).

Trial court did not abuse the court's discretion in allowing the state to present a witness in violation of the sequestration rule as defense counsel's cross-examination cast doubt upon the witness's testimony and the jury knew that the witness was present during previous testimony. *Rakestraw v. State*, 278 Ga. 872, 608 S.E.2d 216 (2005).

Party's remedy for a violation of the sequestration rule is to request the trial court to charge the jury that the violation should be considered in determining the weight and credit to be given the testimony of the witness. *Johnson v. State*, 258 Ga. 856, 376 S.E.2d 356 (1989).

Witness not automatically disqualified if rule violated. — Generally, the testimony of a witness who has violated the rule of sequestration is admissible although the witness may be guilty of contempt. *Stephen W. Brown Radiology Assocs. v. Gowers*, 157 Ga. App. 770, 278 S.E.2d 653 (1981).

Even if the rule of sequestration has been violated, this does not automatically disqualify the witness or render the witness incompetent; the trial court is vested with broad discretion in this regard. *Stancil v. State*, 158 Ga. App. 147, 279 S.E.2d 457 (1981); *Hayes v. State*, 175 Ga. App. 135, 332 S.E.2d 917 (1985).

Admitting testimony of witnesses not placed under rule when invoked. — Witnesses who have not been called and put under the rule may testify in rebuttal of a prisoner's statement if the court is satisfied that the ends of justice require such testimony. *Metropolitan St. R.R. v. Johnson*, 90 Ga. 500, 16 S.E. 49 (1892); *Keiley v. Bristol*, 30 Ga. App. 725, 119 S.E. 334, cert. denied, 30 Ga. App. 801 (1923); *Edwards v. State*, 55 Ga. App. 187, 189 S.E. 678 (1937); *Ricks v. State*, 209 Ga. 2, 70 S.E.2d 373 (1952); *Dye v.*

State, 220 Ga. 113, 137 S.E.2d 465 (1964); *Shelton v. State*, 220 Ga. 610, 140 S.E.2d 839, answer conformed to, 111 Ga. App. 351, 141 S.E.2d 776, cert. denied, 382 U.S. 917, 86 S. Ct. 291, 15 L. Ed. 2d 232 (1965); *Pippins v. State*, 224 Ga. 462, 162 S.E.2d 338 (1968); *Stuart v. State*, 123 Ga. App. 311, 180 S.E.2d 581 (1971); *Still v. State*, 142 Ga. App. 312, 235 S.E.2d 737 (1977); *Banks v. State*, 144 Ga. App. 471, 241 S.E.2d 587 (1978); *Stroming v. State*, 152 Ga. App. 129, 262 S.E.2d 193 (1979); *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981); *Blanchard v. State*, 247 Ga. 415, 276 S.E.2d 593 (1981).

After the trial court conducted an evidentiary hearing out of the presence of the jury before permitting a witness to testify as a rebuttal witness, and although the witness had not been present in the courtroom prior to the time at which the witness was called to testify, the witness admitted to having conversations with fellow officers who had already testified or been present during testimony, there was no abuse of discretion in permitting the witness to testify. *Gibby v. State*, 166 Ga. App. 413, 304 S.E.2d 518 (1983).

When the assistant district attorney tried a case in another courtroom and was not present when the rule of sequestration was invoked, the fact that the assistant district attorney entered the courtroom and sat at the prosecution table, and was subsequently called to testify did not require the trial court to prohibit the assistant district attorney's testimony. *Cheeks v. State*, 203 Ga. App. 47, 416 S.E.2d 336, cert. denied, 203 Ga. App. 905, 416 S.E.2d 336 (1992).

Unsequestered witness may be called after others testify. — Based upon a showing by the state of some need not to call the unsequestered witness first, the trial court is authorized, in the court's discretion, to allow the unsequestered witness to be called to the stand after other witnesses have testified. *Jefferson v. State*, 159 Ga. App. 740, 285 S.E.2d 213 (1981).

Admitting testimony of witness who complied with sequestration rule after defendant insisted. — Trial court did not err in allowing the owner of a burglarized house to testify without a cautionary instruction to the jury because the owner had violated the

rule of sequestration by being present in court when the arresting officer testified; defendant did not show that the defendant insisted upon the rule until after the arresting officer had begun to testify, at which point it appeared the witnesses complied. *Johnson v. State*, 275 Ga. App. 21, 619 S.E.2d 731 (2005).

Excluding testimony of witnesses not sequestered. — Exclusion of testimony offered by a witness who has remained in the courtroom after grant of a sequestration order is within the discretion of the trial court. *May v. State*, 90 Ga. 793, 17 S.E. 108 (1893); *Groover v. Simmons*, 161 Ga. 93, 129 S.E. 778 (1925); *Star Jewelers, Inc. v. Durham*, 147 Ga. App. 68, 248 S.E.2d 51 (1978); *Dowdy v. State*, 154 Ga. App. 700, 269 S.E.2d 530 (1980).

Disregard of a sequestration order may subject the offender to punishment for contempt. *Hoxie v. State*, 114 Ga. 19, 39 S.E. 944 (1901); *McWhorter v. State*, 118 Ga. 55, 44 S.E. 873 (1903); *Phillips v. State*, 121 Ga. 358, 49 S.E. 290 (1904). See also *Rooks v. State*, 65 Ga. 330 (1880); *Lassiter v. State*, 67 Ga. 739 (1881); *Bone v. State*, 86 Ga. 108, 12 S.E. 205 (1890); *Green v. State*, 125 Ga. 742, 54 S.E. 724 (1906); *Thomas v. State*, 7 Ga. App. 615, 67 S.E. 707 (1919); *Higdon v. State*, 46 Ga. App. 346, 167 S.E. 782 (1933); *Edwards v. State*, 55 Ga. App. 187, 189 S.E. 678 (1937); *McCartney v. McCartney*, 217 Ga. 200, 121 S.E.2d 785 (1961); *Rozier v. State*, 124 Ga. App. 481, 184 S.E.2d 203 (1971); *Baker v. State*, 131 Ga. App. 48, 205 S.E.2d 79 (1974); *Pearley v. State*, 235 Ga. 276, 219 S.E.2d 404 (1975); *Watts v. State*, 239 Ga. 725, 238 S.E.2d 894 (1977); *Bryan v. State*, 148 Ga. App. 428, 251 S.E.2d 338 (1978); *International Ass'n of Bridge Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 254 S.E.2d 438 (1979).

Violation of sequestration by interested parties who are not witnesses. — By permitting persons actively interested in the result of the case to intermingle with witnesses who have been ordered to be sequestered there is a probability that their testimony may be influenced and molded to the prejudice of either of the parties in the cause. *Hightower v. State*, 14 Ga. App. 246, 80 S.E. 684 (1914).

Violation of sequestration after testifying.

— A sequestered witness is not disqualified for reintroduction even though the witness may have heard other witnesses after testifying. *Lyman v. State*, 69 Ga. 404 (1882); *Taylor v. State*, 132 Ga. 235, 63 S.E. 1116 (1909).

Since state's witnesses to whom sheriff talked were witnesses who had already testified, and, the sheriff, who was a witness, was allowed to stay in the courtroom by consent, and the witnesses involved for the state were not called to the stand again, there was no violation of the sequestration rule. *Talley v. State*, 2 Ga. App. 395, 58 S.E. 667 (1907). See also *Heywood v. State*, 12 Ga. App. 643, 77 S.E. 1130 (1913); *Hudgins v. State*, 13 Ga. App. 489, 79 S.E. 367 (1913); *Finley v. State*, 101 Ga. App. 61, 113 S.E.2d 144 (1960).

A sequestered witness is not disqualified for reintroduction even though the witness may have heard other witnesses after testifying. *Lyman v. State*, 69 Ga. 404 (1882); *Taylor v. State*, 132 Ga. 235, 63 S.E. 1116 (1909).

Preclusion of testimony of defendant's spouse under sequestration rule proper.

— Application of the O.C.G.A. § 24-9-61 sequestration rule was discretionary, and the trial court did not err by allowing the defendant's wife to sit at the defense table and assist in the defendant's defense of a driving under the influence charge, thereby precluding the wife's testimony under the sequestration rule; moreover, if there was error, the defendant induced the error. The issues were explained to the defendant, the defendant and the wife considered the pros and cons of the wife's role as a witness, and they decided that the wife would not testify. *Hernandez v. State*, 297 Ga. App. 177, 676 S.E.2d 795 (2009).

Jury instructions. — Violation of the sequestration rule does not affect admissibility of the testimony, but the party's recourse is to seek instructions from the court informing the jury that the presence of the witness in the courtroom in violation of the rule should be considered in determining the weight and credit to be given to the testimony of the witness. *Wright v. State*, 246 Ga. 53, 268 S.E.2d 645 (1980); *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

RESEARCH REFERENCES

ALR. — Exclusion from courtroom of expert witnesses during taking of testimony in civil case, 85 ALR2d 478.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 ALR3d 1360.

Effect of witness's violation of order of exclusion, 14 ALR3d 16.

Counsel's reference, in presence of se-

questered witness in state criminal trial, to testimony of another witness as ground for mistrial or reversal, 24 ALR4th 488.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case, 74 ALR4th 705.

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence, 181 ALR Fed. 549.

24-9-61.1. Presence in courtroom of victim of criminal offense.

Subject to the provisions of Code Section 17-17-9, the victim of a criminal offense shall be entitled to be present in any court exercising jurisdiction over such offense. (Code 1981, § 24-9-61.1, enacted by Ga. L. 1985, p. 744, § 2; Ga. L. 2010, p. 214, § 16/HB 567.)

The 2010 amendment, effective July 1, 2010, substituted the present provisions of this Code section for the former provisions, which read: "(a) The victim of a criminal offense may be entitled to be present in any court exercising jurisdiction over such offense. It shall be within the sole discretion of the judge to implement the provisions of this Code section and determine when to allow such victim to be present in such court and,

if such victim is permitted to be present, to determine the order in which the testimony of such victim shall be given.

"(b) The failure of a victim to exercise any right granted by this Code section shall not be a cause or ground for an appeal of a conviction by a defendant or for any court to set aside, reverse, or remand a criminal conviction."

JUDICIAL DECISIONS

Discretion of court. — In a prosecution for aggravated assault, the trial court did not abuse the court's discretion in allowing a victim, who was comatose and in a wheelchair, to remain in the courtroom since the victim's injuries as a result of the shooting were relevant to the accusation. *Lewis v. State*, 215 Ga. App. 161, 450 S.E.2d 448 (1994).

Trial court properly allowed the victim in defendant's child molestation trial to remain in court after the defense moved for sequestration, because O.C.G.A. § 24-9-61.1 provided that the victim of a criminal offense could be entitled to be present in any court exercising jurisdiction over such offense, and it was within the sole discretion of the trial judge to determine when to allow such

victim to be present in such court, and as the prosecutor had requested that the victim remain present to assist in the case, the trial court did not abuse the court's discretion. *Flowers v. State*, 255 Ga. App. 660, 566 S.E.2d 339 (2002).

Rule of sequestration was not violated. — Procedure of the trial judge in allowing the victim to remain in the courtroom while a detective and polygraph examiner testified, and then letting the victim give testimony was fully within the court's discretion and did not constitute reversible error. *Shepherd v. State*, 245 Ga. App. 386, 537 S.E.2d 777 (2000).

Cited in *Watts v. State*, 200 Ga. App. 54, 406 S.E.2d 562 (1991).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state constitutional or statutory victims' bill of rights, 91 ALR5th 343.

24-9-62. Treatment of witness.

It shall be the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor. (Civil Code 1895, § 5281; Civil Code 1910, § 5870; Code 1933, § 38-1704.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RELEVANT MATTER

IMPROPER QUESTIONS

HARSH OR INSULTING DEMEANOR

General Consideration

In general. — Right of a witness to be protected from improper questioning must be balanced against the right of parties to a thorough and sifting cross-examination. *White v. Knapp*, 31 Ga. App. 344, 120 S.E. 796 (1923); *Cohen v. Saffer*, 43 Ga. App. 746, 160 S.E. 130 (1931); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Thomas v. State*, 85 Ga. App. 868, 70 S.E.2d 131 (1952); *Cochran v. Neely*, 123 Ga. App. 500, 181 S.E.2d 511 (1971); *Wanzer v. State*, 232 Ga. 523, 207 S.E.2d 466 (1974); *Crawford v. State*, 144 Ga. App. 622, 241 S.E.2d 492 (1978), overruled on other grounds, *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980).

Witness's rights under O.C.G.A. § 24-9-62 must be balanced with the party's right under O.C.G.A. § 24-9-64 to a thorough and sifting cross-examination. *Carco Supply Co. v. Clem*, 194 Ga. App. 566, 391 S.E.2d 134 (1990); *Palmer v. Taylor*, 215 Ga. App. 546, 451 S.E.2d 486 (1994).

Discretion of judge. — Trial judge had discretion to control the scope and manner of cross-examination and this discretion will not be curtailed absent some clear abuse. *Cochran v. Neely*, 123 Ga. App. 500, 181 S.E.2d 511 (1971); *Whitley v. State*, 137 Ga. App. 68, 223 S.E.2d 17 (1975); *Redd v. State*, 141 Ga. App. 888, 234 S.E.2d 812 (1977).

As a general rule, it is better that cross-examination should be too free than too restricted. *Cochran v. Neely*, 123 Ga. App. 500, 181 S.E.2d 511 (1971).

Questioning reluctant witnesses. — It is the privilege of counsel and the duty of courts to propound such questions to reluctant witnesses as will strip the witnesses of the subterfuges to which the witnesses resort to evade telling the truth. *Kelly v. State*, 19 Ga. 425 (1856).

Repeated questions. — Trial court properly prevented a defendant from questioning a witness for the fourth time as to whether the witness would tell a lie after the witness had answered the first three times with some variant of the word "no." *Butler v. State*, 285 Ga. 518, 678 S.E.2d 92 (2009).

Cited in *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935); *Jones v. State*, 60 Ga. App. 828, 5 S.E.2d 404 (1939); *Post v. State*, 201 Ga. 81, 39 S.E.2d 1 (1946); *Ammons v. State*, 88 Ga. App. 791, 78 S.E.2d 63 (1953); *Georgia Power Co. v. Slappey*, 121 Ga. App. 534, 174 S.E.2d 361 (1970); *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972); *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 202 S.E.2d 540 (1973); *Dumas v. State*, 131 Ga. App. 79, 205 S.E.2d 119 (1974); *Cagle v. State*, 160 Ga. App. 803, 287 S.E.2d 660 (1982); *Logan v. Johnson*, 162 Ga. App. 777,

General Consideration (Cont'd)

293 S.E.2d 47 (1982); *Green v. State*, 221 Ga. App. 436, 472 S.E.2d 1 (1996).

Relevant Matter

Discretion of judge. — Relevancy and materiality of a line of question rests, even on cross-examination, largely within the discretion of the trial judge. *Lancette v. State*, 151 Ga. App. 740, 261 S.E.2d 405 (1979).

Trial court judge did not abuse the judge's discretion by refusing to allow the defendant to cross-examine robbery victims as to their immigration status because such testimony was not relevant to the case and there was no pending immigration proceedings against the victims. *Lemons v. State*, 270 Ga. App. 743, 608 S.E.2d 15 (2004).

Question for jury. — Evidence of doubtful relevancy or competency should be admitted and the weight left to the jury. *Crass v. State*, 150 Ga. App. 374, 257 S.E.2d 909 (1979).

Highway land condemnation. — When the question to be determined by the jury in condemnation proceedings was the value of the property at the time of the property's taking for public purposes on the date that the property was taken, which was the date that the property was condemned, the court did not err in restricting counsel in counsel's direct, rebuttal, and cross-examination of the witnesses with reference to knowledge of the condemnees that the highway was to be located at or near their property at the time they purchased the property, and in refusing to allow final argument thereon by counsel. *State Hwy. Dep't v. Owens*, 120 Ga. App. 647, 171 S.E.2d 770 (1969).

Improper Questions

Protection of witness. — It is the duty of the trial court to protect the witness on cross-examination from being unfairly dealt with. *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948).

Testing intelligence, memory, accuracy, or veracity. — Question propounded by counsel on cross-examination is allowable for the purpose of testing the intelligence of the witness, or memory, accuracy, and veracity, but must not be argumentative. *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948).

Illegal or immoral conduct. — Until a foundation showing the relevancy of a line

of questioning is established so as to come within the "other crime" exception, one may not, under the guise of attacking the witness's credibility, ask questions suggesting illegal or immoral conduct in areas other than that before the court. *Lancette v. State*, 151 Ga. App. 740, 261 S.E.2d 405 (1979).

Accuracy. — When in a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." *Cohen v. Saffer*, 43 Ga. App. 746, 160 S.E. 130 (1931).

Veracity. — It is not proper that a question to a witness should assume that the witness has made a statement which, the witness says, the witness has not made. *Sanderlin v. Sanderlin*, 24 Ga. 583 (1858).

When a witness testified that the witness had previously sworn in the case, a question by the counsel asking the witness if the witness had sworn the same then as the witness does now was properly objected to by the court. *Andrews v. State*, 118 Ga. 1, 43 S.E. 852 (1903).

Chastity. — Witnesses cannot be impeached by showing their lack of chastity since this bears no relevance to the case. *Smith v. State*, 235 Ga. 327, 219 S.E.2d 440 (1975).

In a prosecution for rape, the trial court properly barred defendant's cross-examination of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. *Lee v. State*, 241 Ga. App. 182, 525 S.E.2d 426 (1999).

Harsh or Insulting Demeanor

In general. — Courts will not violate the right of a witness to have excluded an irrelevant document, of an impeaching nature, for which no foundation has been laid for submission of this evidence to the jury. *Taylor v. Marsh*, 107 Ga. App. 575, 130 S.E.2d 770 (1963).

Speaking too loudly. — Trial court did not err by admonishing defendant's counsel for

speaking too loudly when counsel questioned a 12-year old witness since the trial court did limit the type of questions that defendant could ask or in any way comment on the evidence, but rather, the trial court merely exercised the court's broad discretion to protect a witness from harsh or

insulting demeanor. *Schneider v. State*, 267 Ga. App. 508, 603 S.E.2d 663 (2004).

Life style. — It is improper argument to infer that witnesses are not worthy of belief because the witnesses are living in the same apartment while unmarried. *Smith v. State*, 235 Ga. 327, 219 S.E.2d 440 (1975).

RESEARCH REFERENCES

ALR. — Abuse of witness by counsel as ground for new trial or reversal, 4 ALR 414.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 ALR3d 304.

24-9-63. When leading questions allowed generally; discretion of court.

Leading questions are generally allowed only in cross-examination. However, the court may exercise discretion in granting the right to the party calling the witness and in refusing it to the opposite party when, from the conduct of the witness or other reason, justice shall require it. (Orig. Code 1863, § 3789; Code 1868, § 3809; Code 1873, § 3865; Code 1882, § 3865; Civil Code 1895, § 5283; Penal Code 1895, § 1019; Civil Code 1910, § 5872; Penal Code 1910, § 1045; Code 1933, § 38-1706.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

LEADING QUESTIONS PERMITTED

LEADING QUESTIONS NOT PERMITTED

General Consideration

In general. — For a question to be objectionable it must be necessarily leading. *Allgood v. State*, 87 Ga. 668, 13 S.E. 569 (1891).

Question is leading when it is so framed as to suggest to the witness the answer which is desired; on the other hand, a question not suggesting the desired answer is not leading if it inquires only into a single fact. *Denson v. Miller*, 33 Ga. 275 (1862); *James v. State*, 215 Ga. 213, 109 S.E.2d 735 (1959); *Ealey v. State*, 139 Ga. App. 110, 227 S.E.2d 902 (1976).

Judge is given latitude and discretion in permitting leading questions, and unless there has been an abuse thereof resulting in prejudice and injury there is no reversible error. *Hill v. State*, 41 Ga. 484 (1871); *Burrus*

& *Williams v. Kyle & Co.*, 56 Ga. 24 (1876); *Parker v. Georgia Pac. Ry.*, 83 Ga. 539, 10 S.E. 233 (1889); *Doster v. State*, 93 Ga. 43, 18 S.E. 997 (1893); *Georgia R.R. & Banking Co. v. Churchill*, 113 Ga. 12, 38 S.E. 336 (1901); *City of Rome v. Stewart*, 116 Ga. 738, 42 S.E. 1011 (1902); *McBride v. Georgia Ry. & Elec. Co.*, 125 Ga. 515, 54 S.E. 674 (1906); *Lauchheimer & Sons v. Jacobs*, 126 Ga. 261, 55 S.E. 55 (1906); *Lyles v. State*, 130 Ga. 294, 60 S.E. 578 (1908); *Peterson v. State*, 6 Ga. App. 491, 65 S.E. 311 (1909); *Ethridge v. State*, 163 Ga. 186, 136 S.E. 72 (1926); *Peretzman v. Simon*, 185 Ga. 681, 196 S.E. 471 (1938); *Hanson v. State*, 86 Ga. App. 313, 71 S.E.2d 720 (1952); *English v. State*, 234 Ga. 602, 216 S.E.2d 851 (1975); *Hudson v. State*, 137 Ga. App. 439, 224 S.E.2d 48 (1976); *Clary Appliance & Furn. Ctr., Inc. v. Butler*, 139 Ga. App. 233, 228 S.E.2d 211

General Consideration (Cont'd)

(1976); *Tucker v. Mappin*, 149 Ga. App. 847, 256 S.E.2d 135 (1979); *Booker v. State*, 156 Ga. App. 40, 274 S.E.2d 84 (1980), rev'd on other grounds, 247 Ga. 74, 274 S.E.2d 334 (1981); *Hamby v. State*, 158 Ga. App. 265, 279 S.E.2d 715 (1981); *Rutland v. State*, 158 Ga. App. 315, 279 S.E.2d 757 (1981).

Court may, in the exercise of the court's discretion, permit a party calling a witness to propound leading questions. *Hamby v. State*, 158 Ga. App. 265, 279 S.E.2d 715 (1981).

Trial court is permitted to exercise the court's discretion in granting the right to the party calling the witness to ask leading questions, and reversible error occurs only if that discretion has been abused to the extent that the appealing party has been prejudiced and injured. *Blue Cross of Georgia/Columbus, Inc. v. Whatley*, 180 Ga. App. 93, 348 S.E.2d 459 (1986).

Objection required. — If no objection is made to the asking of leading questions, the allowance of such questions will furnish no ground for a new trial. *Cotton States Life Ins. Co. v. Edwards*, 74 Ga. 220 (1884).

Defendant must demonstrate specific instances of abuse of discretion on appeal. — When defendant fails to demonstrate that the trial court abused the court's discretion in permitting the state on specific occasions to lead the state's witnesses, this precludes the Court of Appeals from finding error in the trial court's exercise of discretion. *Hammond v. State*, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

Cited in *Caison v. State*, 171 Ga. 1, 154 S.E. 337 (1930); *Butler v. State*, 178 Ga. 700, 173 S.E. 856 (1934); *White v. State*, 203 Ga. 340, 46 S.E.2d 500 (1948); *Parks v. State*, 203 Ga. 302, 46 S.E.2d 504 (1948); *Smith v. Morning News, Inc.*, 99 Ga. App. 547, 109 S.E.2d 639 (1959); *Young v. State*, 220 Ga. 75, 137 S.E.2d 34 (1964); *Adkins v. State*, 134 Ga. App. 507, 215 S.E.2d 270 (1975); *Haralson v. State*, 234 Ga. 406, 216 S.E.2d 304 (1975); *McNeese v. State*, 236 Ga. 26, 222 S.E.2d 318 (1976); *Sherrell v. State*, 141 Ga. App. 502, 233 S.E.2d 869 (1977); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978); *Downs v. State*, 145 Ga. App. 583, 244 S.E.2d 109 (1978); *Burgess v. State*, 242 Ga. 889, 252 S.E.2d 391 (1979); *Sipple v. Fowler*, 151 Ga. App. 135, 259 S.E.2d 142 (1979); *Price v. Mitchell*, 154

Ga. App. 523, 268 S.E.2d 743 (1980); *Storm Sys. v. Kidd*, 157 Ga. App. 527, 278 S.E.2d 109 (1981); *Davis v. State*, 162 Ga. App. 190, 290 S.E.2d 124 (1982); *Williams v. State*, 164 Ga. App. 562, 298 S.E.2d 282 (1982); *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983); *Amerson v. State*, 177 Ga. App. 97, 338 S.E.2d 528 (1985); *Mason v. State*, 177 Ga. App. 184, 338 S.E.2d 706 (1985); *Grier v. State*, 257 Ga. 539, 361 S.E.2d 379 (1987); *Miller v. State*, 260 Ga. 191, 391 S.E.2d 642 (1990); *Knight v. State*, 266 Ga. 47, 464 S.E.2d 201 (1995); *Bryant v. State*, 226 Ga. App. 135, 486 S.E.2d 374 (1997); *Perkins v. State*, 226 Ga. App. 613, 487 S.E.2d 365 (1997); *Wozniuk v. Kitchin*, 229 Ga. App. 359, 494 S.E.2d 247 (1997); *Thomas v. State*, 238 Ga. App. 42, 517 S.E.2d 585 (1999).

Leading Questions Permitted

Bill for discovery. — Leading questions may be propounded in a bill for discovery. *Cade v. Hatcher*, 72 Ga. 359 (1884).

Leading questions were permitted on cross-examination, and a trial court did not err in allowing questions to a defendant on cross-examination about whether defendant had heard the testimony of an earlier witness. *Brown v. State*, 265 Ga. App. 613, 594 S.E.2d 770 (2004).

Judge may personally ask leading questions. *Smith v. State*, 11 Ga. App. 89, 74 S.E. 711 (1912). See also *White v. State*, 56 Ga. 358 (1876).

Interest adverse to questioning party. — When the vouchee was subpoenaed by plaintiff and sworn as his witness, his interest was adverse to that of defendant, and his testimony was material and relevant to defendant's defense, there is no abuse of discretion of the trial court in permitting the voucher to cross-examine the vouchee. *Clary Appliance & Furn. Ctr., Inc. v. Butler*, 139 Ga. App. 233, 228 S.E.2d 211 (1976).

Unfriendly witnesses may be asked leading questions. *Moore v. State*, 130 Ga. 322, 60 S.E. 544 (1908); *Morgan v. State*, 17 Ga. App. 124, 86 S.E. 281 (1915). See also *Nalley v. State*, 11 Ga. App. 15, 74 S.E. 567 (1912).

Unwilling witnesses may be led, as a rule, especially where contumacious or equivocal. *Durham v. State*, 70 Ga. 264 (1883).

Nervous, ignorant, or hostile witness. — Trial court has the discretion to allow leading questions on direct examination where,

for example, the witness is nervous, ignorant, or hostile. *Fugate v. State*, 263 Ga. 260, 431 S.E.2d 104 (1993); *Crowder v. State*, 222 Ga. App. 351, 474 S.E.2d 246 (1996); *Smith v. State*, 243 Ga. App. 331, 533 S.E.2d 431 (2000).

Favorable and willing witnesses. — Trial judge is given great latitude and discretion in permitting counsel to examine and lead a witness in an effort to get to the true facts, even though the witness may be a favorable and willing one; and, therefore, ordinarily, and unless there has been a palpable and illegal abuse of the above discretion resulting in prejudice and injury to the complaining party in a material manner, reversible error will not be predicated by this court upon rulings of the trial court as to allowance of leading questions in examination of a witness. *Hawthorne v. Pope*, 51 Ga. App. 498, 180 S.E. 920 (1935).

Favorable witness who has repudiated testimony. — When an alleged co-conspirator was sworn and testified as a witness for the state, but on cross-examination repudiated the witness's testimony given on direct examination, and testified that the witness's evidence on direct examination had been given on account of threats and intimidation made by a police officer who had told the witness what to say, it was proper to permit the prosecutor to cross-examine the witness for the purpose of showing entrapment, and in this way to prove that the accomplice witness had made statements after the pendency of the alleged conspiracy, but prior to the date of the witness's alleged intimidation, which corroborated the witness's testimony given on direct examination by the state. *Mitchell v. State*, 202 Ga. 247, 42 S.E.2d 767 (1947).

Witness sworn but not examined. — Witness who is sworn but not examined by a party may be asked leading questions by the opposing party. *Brown v. State*, 28 Ga. 199 (1859). See also *Lunday v. Thomas*, 26 Ga. 537 (1858).

Children and like minded persons. — Judge, when need appears, will ordinarily permit leading questions to children, or to witnesses so ignorant, timid, weakminded, or deficient in the English language that they cannot otherwise be brought to understand what information is sought. *McCrary v. State*, 137 Ga. 784, 74 S.E. 536 (1912); *Hayslip v. State*, 154 Ga. App. 835, 270 S.E.2d 61 (1980).

In a defendant's prosecution for aggravated child molestation under O.C.G.A. § 16-6-4(b), the prosecutor was properly permitted to use leading questions under O.C.G.A. § 24-9-63 during the victim's direct examination as the victim was only 14 at the time of trial, was often non-responsive, spoke very softly, and exhibited signs of timidity and fear. *Bell v. State*, 294 Ga. App. 779, 670 S.E.2d 476 (2008).

Questioning a young female relating to matters of a sexual character. *Keller v. State*, 102 Ga. 506, 31 S.E. 92 (1897); *Wade v. State*, 11 Ga. App. 411, 75 S.E. 494 (1912), later appeal, 13 Ga. App. 142, 78 S.E. 863 (1913); *Hanson v. State*, 86 Ga. App. 313, 71 S.E.2d 720 (1952).

Parties as witnesses. — Leading questions may be allowed although the witness called may be one of the opposite parties to the case. *Cade v. Hatcher*, 72 Ga. 359 (1884); *Cotton States Life Ins. Co. v. Edwards*, 74 Ga. 220 (1884).

Even though a witness is not hostile but is favorable, as if the witness is a party, or is the injured female in a criminal prosecution for seduction, the reviewing court will not control the trial judge's discretion in allowing leading questions, and a new trial will not be granted in such case unless it is plainly apparent that the judge in the exercise of that discretion manifestly abused the discretion, and that thereby the defendant suffered harm. *Hanson v. State*, 86 Ga. App. 313, 71 S.E.2d 720 (1952).

It was not objectionable as a leading question to ask a witness, "Do you know that boy over there?" pointing at the prisoner. *Paschal v. State*, 89 Ga. 303, 15 S.E. 322 (1892).

It was held not a leading question to ask a witness whether or not designated language was used in a given occasion. *Fountain v. State*, 7 Ga. App. 559, 67 S.E. 218 (1910).

Question, "You know anything about making up any money to buy whiskey?" was held not objectionable. *Hinsman v. State*, 14 Ga. App. 481, 81 S.E. 367 (1914).

When the plaintiff is called as a defense witness upon an objection to the witness being recalled for further cross-examination, this tactic entitles counsel for the plaintiff to cross-examine the witness just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing

Leading Questions Permitted (Cont'd)

leading questions, there is no abuse of discretion in allowing the questions. *Mercer v. Woodard*, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Witness with speech impediment. — It was not an abuse of the trial court's discretion to permit one instance of leading a witness who testified that the witness suffered from a speech impediment. *Parker v. State*, 172 Ga. App. 540, 323 S.E.2d 826 (1984).

Language barrier. — When a witness exhibited a language barrier, to the extent that the court reporter had a hard time understanding the witness's answers to be able to adequately transcribe the answers, despite the fact that the witness spoke English, the trial court properly allowed the state to ask the witness leading questions. *Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

Insurer's cross-examination of own witness. — Insurer was entitled to cross-examine insurer's own witness where witness was determined to have played a key part in case by, inter alia, finding items of importance matchable to plaintiff's car. Although witness did not concededly fall within the expressly authorized categories in O.C.G.A. § 24-9-81, O.C.G.A. § 24-9-63 permitted such testimony in the interests of justice. *Hicks v. Doe*, 206 Ga. App. 596, 426 S.E.2d 174 (1992).

Treatment of hostile witness. — When a state's witness was nervous, attempted to evade the prosecutor's questions, and, when asked if the witness would tell the jury what

happened at the time of the shooting, the witness said the witness would "rather not," the trial court properly allowed the state to treat the witness as a hostile witness and ask the witness leading questions. *Culler v. State*, 277 Ga. 717, 594 S.E.2d 631 (2004).

Cross-examination of one's own witness. — Trial court properly allowed a wife to cross-examine two of her own witnesses to show that the husband fraudulently conveyed marital assets to a close friend and to a sister in anticipation of the divorce, as such a determination was within the trial court's discretion pursuant to O.C.G.A. § 24-9-63. *Lanier v. Lanier*, 278 Ga. 881, 608 S.E.2d 213 (2005).

Leading Questions Not Permitted

Party's own witness. — When the question to which an objection was sustained was leading in nature, it was not properly propounded on redirect examination of defendant's own witness. *P.D. v. State*, 151 Ga. App. 662, 261 S.E.2d 413 (1979).

After unfavorable answer. — Mere fact that an unfavorable answer was given by the witness would not demand that counsel be allowed to ask leading questions of such witness so that a refusal to permit such questions would be an abuse of discretion. *Perkins v. Edwards*, 228 Ga. 470, 186 S.E.2d 109 (1971); *Tucker v. Mappin*, 149 Ga. App. 847, 256 S.E.2d 135 (1979).

On trial for assault with intent to rape, a question asked of prosecutor, "Did defendant attempt to strip up your clothes," was held too leading. *Wade v. State*, 12 Ga. 25 (1852).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 715.

ALR. — Assumption by question put to witness of fact in issue, 100 ALR 1067.

Right to cross-examine witness in respect of facts not included in his direct examination, but which negative a prima facie case, presumption, or inference otherwise made by his testimony on direct examination, 108 ALR 167.

Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner, 38 ALR2d 952.

Right to elicit expert testimony from adverse party called as witness, 88 ALR2d 1186.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 ALR3d 1060.

24-9-64. Right of cross-examination.

The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him. If several parties to the same case have distinct interests, each may exercise this right. (Orig. Code 1863, § 3788; Code 1868, § 3808; Code 1873, § 3864; Code 1882, § 3864; Civil Code 1895, § 5282; Penal Code 1895, § 1018; Civil Code 1910, § 5871; Penal Code 1910, § 1044; Code 1933, § 38-1705.)

Cross references. — Cross-examination of defendant at pretrial proceedings, § 17-7-28. Cross-examination of defendant testifying on own behalf, § 24-9-20. Right of thorough and sifting examination of all witnesses in civil cases, § 24-9-81.

Law reviews. — For article, “The Right of Confrontation: Its History and Modern Dress,” see 8 J. of Pub. L. 381 (1959). For article discussing cross-examination techniques, see 16 Ga. St. B.J. 117 (1980). For article, “An Analysis of Georgia’s Proposed Rules of Evidence,” see 26 Ga. St. B.J. 173 (1990). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007).

For comment on Frady v. State, 212 Ga.

84, 90 S.E.2d 664 (1955), holding that a defendant has the right to cross-examine all witnesses called against him in all material matters, including the past conduct of the prosecutrix in an action for rape, see 19 Ga. B.J. 95 (1956). For comment discussing the use of treatises in cross-examining an expert, in light of Hopkins v. Gromovsky, 198 Va. 389, 94 S.E.2d 190 (1956), see 20 Ga. B.J. 109 (1957). For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969) and the right to probe relationship of a witness to a party, see 21 Mercer L. Rev. 347 (1969). For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969), see 6 Ga. St. B.J. 294 (1970). For comment on Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974), appearing below, see 8 Ga. L. Rev. 973 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RIGHT OF CROSS-EXAMINATION

SCOPE OF CROSS-EXAMINATION

1. IN GENERAL
2. DISCRETION OF JUDGE
3. SPECIFIC APPLICATIONS

General Consideration

Purpose of cross-examination is to provide a searching test of the intelligence, memory, accuracy, and veracity of the witness, and it is better for cross-examination to be too free than too restricted. Carroll v. Hill, 80 Ga. App. 576, 56 S.E.2d 821 (1949); Russell v. Bass, 82 Ga. App. 659, 62 S.E.2d 456 (1950); Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952); Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828 (1954).

Exposure of blundering witness. — There must be allowed some degree of skill, if not sharpness, in conducting cross-examinations

because a witness, however fair and honest and truthful, may not be careful enough; and it is to the interest of justice to expose the blundering of a witness, as well as the witness’s willful departures from veracity. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948).

Exposure of a witness’s motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Hines v. State, 249 Ga. 257, 290 S.E.2d 911 (1982).

State’s right to cross-examine. — State, like any other party, has the right to conduct a thorough and sifting cross-examination of

General Consideration (Cont'd)

a witness. *Gentry v. State*, 226 Ga. App. 216, 485 S.E.2d 824 (1997).

More than one party examining witness.

— An appellate court will not interfere with the action of the trial judge in allowing “double” or “multiple” cross-examination of witnesses, particularly in a situation involving more than two parties, absent a showing of manifest abuse of discretion. *Smith v. Poteet*, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Second sentence, applicable in cases where there is more than one party on one side, requires only that those parties have “distinct interests,” not necessarily opposing interests. *Lavender v. Wilkins*, 237 Ga. 510, 228 S.E.2d 888 (1976).

Depositions. — When a witness is examined by commission, the party cross-examining may withdraw the party’s cross questions if the party chooses — the other party having the liberty to read them at that party’s option. *Williams v. C. & G.H. Kelsey & Halsted*, 6 Ga. 365 (1849).

Prior thorough cross-examination of a witness unavailable at a trial. — When the preliminary hearing testimony of an unavailable witness is subject to extensive cross-examination, its admission at trial does not abridge the defendant’s right of cross-examination. *Moody v. State*, 273 Ga. 24, 537 S.E.2d 666 (2000).

Ex parte affidavits should not be allowed in evidence in any trial since the evidence is finally adjudicated because admission denies the privilege of cross-examination. *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957); *Hunsucker v. Balkcom*, 220 Ga. 73, 137 S.E.2d 43 (1964); *Hartley v. Caldwell*, 233 Ga. 333, 155 S.E.2d 389 (1967).

Records in regular course of business. — Trial courts of the state may not consider reports of the welfare departments of the counties in the trial of a case involving the custody of minors, and it is reversible error to consider such matter. Rather, the person or persons who made the investigation should be produced in court and submitted to cross-examination. *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

Ga. L. 1952, p. 177, §§ 1-3 (see O.C.G.A. § 24-3-14) did not authorize the admission of a written record without cross-

examination of the author under former Code 1933, § 38-1705 (see O.C.G.A. § 24-9-64). *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957).

Statute sets forth the right of every party to cross-examination, thorough and sifting, of the witnesses called against that party, and a trial court’s consideration of an ex parte report submitted by a psychiatrist of the psychiatrist’s evaluation of defendant denied the defendant of this right. *Rudd v. State*, 150 Ga. App. 255, 257 S.E.2d 348 (1979).

Interrogatory procedure wherein a plaintiff propounded interrogatories to be answered by the plaintiff, with both the defendant and defendant’s counsel excluded, thus denying the defendant the right to cross-examination, is wholly void. *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961), overruled on other grounds, *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982).

Assignment of error. — Rule that a party who complains of the rejection of oral testimony must show that the court was informed as to what the witness would answer does not apply to cross-examination. *Macon Union Coop. Ass’n v. Chance*, 31 Ga. App. 636, 122 S.E. 66 (1924); *City of La Grange v. Pound*, 50 Ga. App. 219, 177 S.E. 762 (1934); *McKoy v. Enterkin*, 181 Ga. 447, 182 S.E. 518 (1935); *Harrison v. Regents of Univ. Sys.*, 99 Ga. App. 762, 109 S.E.2d 854 (1959); *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980).

State’s cross-examination of defendant’s spouse does not put the defendant’s character in evidence. There is no prejudice to the defendant arising from such cross-examination; thus, no rebuke of the district attorney, instruction of the jury, or mistrial is required. *Beasley v. State*, 168 Ga. App. 255, 308 S.E.2d 560 (1983).

Cited in *Daniel v. State*, 182 Ga. 875, 187 S.E. 36 (1936); *Burch v. Wade*, 58 Ga. App. 387, 198 S.E. 563 (1938); *Keene v. Lumbermen’s Mut. Ins. Co.*, 60 Ga. App. 864, 5 S.E.2d 379 (1939); *Kelly v. State*, 63 Ga. App. 231, 10 S.E.2d 417 (1940); *Henry Chanin Corp. v. Dumas*, 65 Ga. App. 820, 16 S.E.2d 603 (1941); *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51 (1946); *Glosson v. State*, 77 Ga. App. 705, 49 S.E.2d 691 (1948); *Weldon v. State*, 84 Ga. App. 634, 66 S.E.2d 920 (1951); *Rabun v. Wynn*, 209 Ga. 80, 70 S.E.2d 745

(1952); *Revill v. State*, 210 Ga. 139, 78 S.E.2d 12 (1953); *Ammons v. State*, 88 Ga. App. 791, 78 S.E.2d 63 (1953); *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955); *Lightfoot v. Applewhite*, 212 Ga. 136, 91 S.E.2d 37 (1956); *Tucker v. State*, 94 Ga. App. 468, 95 S.E.2d 296 (1956); *Carr v. State*, 95 Ga. App. 513, 98 S.E.2d 231 (1957); *Thomas v. State*, 213 Ga. 237, 98 S.E.2d 548 (1957); *Gordy v. Powell*, 95 Ga. App. 822, 99 S.E.2d 313 (1957); *Smith v. Morning News, Inc.*, 99 Ga. App. 547, 109 S.E.2d 639 (1959); *Lanthripp v. Lang*, 103 Ga. App. 602, 120 S.E.2d 59 (1961); *State Hwy. Dep't v. Weldon*, 107 Ga. App. 98, 129 S.E.2d 396 (1962); *Benefield v. Benefield*, 224 Ga. 208, 160 S.E.2d 895 (1968); *Black v. Aultman*, 120 Ga. App. 826, 172 S.E.2d 336 (1969); *Rogers v. Black*, 121 Ga. App. 299, 173 S.E.2d 431 (1970); *Georgia Power Co. v. Slappey*, 121 Ga. App. 534, 174 S.E.2d 361 (1970); *Blair v. State*, 127 Ga. App. 111, 192 S.E.2d 542 (1972); *Wallis v. Odom*, 130 Ga. App. 437, 203 S.E.2d 613 (1973); *Head v. State*, 235 Ga. 677, 221 S.E.2d 435 (1975); *Cross v. State*, 136 Ga. App. 400, 221 S.E.2d 615 (1975); *Gamble v. State*, 141 Ga. App. 304, 233 S.E.2d 264 (1977); *Lewis v. First Nat'l Bank*, 141 Ga. App. 338, 233 S.E.2d 465 (1977); *Redd v. State*, 141 Ga. App. 888, 234 S.E.2d 812 (1977); *Hodge v. State*, 239 Ga. 612, 238 S.E.2d 404 (1977); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Hunter v. State*, 143 Ga. App. 541, 239 S.E.2d 212 (1977); *Genins v. Geiger*, 144 Ga. App. 244, 240 S.E.2d 745 (1977); *Ervin v. State*, 144 Ga. App. 504, 241 S.E.2d 650 (1978); *Andrews v. Lovell*, 145 Ga. App. 246, 243 S.E.2d 666 (1978); *Leonard v. State*, 146 Ga. App. 439, 246 S.E.2d 450 (1978); *Smart v. State*, 147 Ga. App. 117, 248 S.E.2d 185 (1978); *Georgia Power Co. v. Busbin*, 149 Ga. App. 274, 254 S.E.2d 146 (1979); *Roberts v. State*, 243 Ga. 604, 255 S.E.2d 689 (1979); *Carter v. State*, 150 Ga. App. 119, 257 S.E.2d 11 (1979); *Martin v. State*, 151 Ga. App. 9, 258 S.E.2d 711 (1979); *Savage v. State*, 152 Ga. App. 392, 263 S.E.2d 218 (1979); *Brown v. State*, 245 Ga. 588, 266 S.E.2d 198 (1980); *Cagle v. State*, 160 Ga. App. 803, 287 S.E.2d 660 (1982); *Sustakovitch v. State*, 249 Ga. 273, 290 S.E.2d 77 (1982); *Williams v. State*, 162 Ga. App. 213, 290 S.E.2d 551 (1982); *W.B.S. v. State*, 163 Ga. App. 471, 294 S.E.2d 705 (1982); *Camp v. State*, 250 Ga. 228, 297

S.E.2d 26 (1982); *Stone v. State*, 250 Ga. 718, 300 S.E.2d 500 (1983); *Williams v. State*, 250 Ga. 664, 300 S.E.2d 685 (1983); *Underwood v. Butler*, 166 Ga. App. 527, 304 S.E.2d 729 (1983); *Growth Properties of Fla., Ltd. v. Wallace*, 168 Ga. App. 893, 310 S.E.2d 715 (1983); *Cheek v. State*, 170 Ga. App. 230, 316 S.E.2d 583 (1984); *Hooks v. State*, 253 Ga. 141, 317 S.E.2d 531 (1984); *Wright v. State*, 179 Ga. App. 325, 346 S.E.2d 361 (1986); *Hooper v. State*, 181 Ga. App. 645, 353 S.E.2d 843 (1987); *Carver v. State*, 185 Ga. App. 436, 364 S.E.2d 877 (1987); *Hamilton v. State*, 185 Ga. App. 536, 365 S.E.2d 120 (1987); *Butler v. State*, 185 Ga. App. 478, 364 S.E.2d 612 (1988); *McClintock v. Wellington Trade, Inc.*, 187 Ga. App. 898, 371 S.E.2d 893 (1988); *Crumbley v. Wyant*, 188 Ga. App. 227, 372 S.E.2d 497 (1988); *Grant v. State*, 197 Ga. App. 878, 399 S.E.2d 743 (1990); *Brantley v. State*, 262 Ga. 786, 427 S.E.2d 758 (1993); *Krause v. Vance*, 207 Ga. App. 615, 428 S.E.2d 595 (1993); *Kline v. State*, 269 Ga. 570, 501 S.E.2d 810 (1998); *Sewell v. State*, 244 Ga. App. 449, 536 S.E.2d 173 (2000); *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000); *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000); *Davis v. State*, 253 Ga. App. 803, 560 S.E.2d 711 (2002); *Craft v. State*, 254 Ga. App. 511, 563 S.E.2d 472 (2002); *Smith v. State*, 297 Ga. App. 300, 676 S.E.2d 750 (2009).

Right of Cross-Examination

In general. — Right of cross-examination is a substantial right, the preservation of which is essential to a proper administration of justice, and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy; and being a substantial right, it should never be abridged or denied by the court. *Lunday v. Thomas*, 26 Ga. 537 (1858); *News Publishing Co. v. Butler*, 95 Ga. 559, 22 S.E. 282 (1895); *Barnwell v. Hannegan*, 105 Ga. 396, 31 S.E. 116 (1898); *Huff v. State*, 106 Ga. 432, 32 S.E. 348 (1899); *Atlanta & B. Air-Line Ry. v. McManus*, 1 Ga. App. 302, 58 S.E. 258 (1907); *Becker v. Donaldson*, 133 Ga. 864, 67 S.E. 92 (1910); *Brundage v. State*, 14 Ga. App. 460, 81 S.E. 384 (1914); *Faulk v. State*, 47 Ga. App. 804, 171 S.E. 570 (1933); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935); *McGinty v.*

Right of Cross-Examination (Cont'd)

State, 59 Ga. App. 675, 2 S.E.2d 134 (1939); Owens v. Shugart, 61 Ga. App. 177, 6 S.E.2d 121 (1939); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947); Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955); Pittman v. West, 95 Ga. App. 149, 97 S.E.2d 387 (1957); Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819 (1966); Gunnells v. Cotton States Mut. Ins. Co., 117 Ga. App. 123, 159 S.E.2d 730 (1968); Miller v. Smith, 302 F. Supp. 385 (N.D. Ga. 1968); Boyles v. State, 120 Ga. App. 852, 172 S.E.2d 637 (1969); Georgia Power Co. v. Sinclair, 122 Ga. App. 305, 176 S.E.2d 639 (1970); Metts v. Easters, 229 Ga. 754, 194 S.E.2d 450 (1972); Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861 (1973); Gordon v. Gordon, 133 Ga. App. 520, 211 S.E.2d 374 (1974); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500 (1976); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152 (1976); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1 (1976); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395 (1977); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484 (1976), *aff'd*, 239 Ga. 336, 236 S.E.2d 580 (1977), *cert. denied*, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492 (1978); Goldgar v. Galbraith, 155 Ga. App. 429, 270 S.E.2d 833 (1980); Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719 (1980).

When a witness is sworn by one party, the other party has the right to cross-examine the witness at large. Lunday v. Thomas, 26 Ga. 537 (1858); Brown v. State, 28 Ga. 199 (1859); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), *rev'd* on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Although the defendant's plea had been stricken, and although the defendant had no right to introduce any evidence, yet when the plaintiff, in order to make out plaintiff's case and secure a verdict, found it necessary to impanel a jury and to introduce witnesses to testify to facts not appearing on the face of the notes sued upon, the defendant, through defense counsel, had a right to

cross-examine the witnesses. Daniel v. Georgia R.R. Bank, 44 Ga. App. 787, 163 S.E. 311 (1932).

Although the scope of the cross-examination is not unlimited, every party has a right to a thorough and sifting cross-examination of opposing witnesses, the scope of which examination rests largely within the discretion of the trial judge. Jackson v. State, 157 Ga. App. 604, 278 S.E.2d 5 (1981).

Party has the right to a thorough and sifting cross-examination of the witnesses called against the party and, usually, to conduct that examination by use of leading questions. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210, *cert. denied*, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984).

Witness's rights under O.C.G.A. § 24-9-62 must be balanced with the party's right under O.C.G.A. § 24-9-64 to a thorough and sifting cross-examination. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134 (1990); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486 (1994).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since the defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990).

Trial court committed plain error by improperly bolstering the victims' credibility when the judge asked a witness specific questions regarding the victims, in violation of O.C.G.A. § 17-8-57, and the error was compounded when the trial court denied defendant the right to cross-examine the witness, pursuant to O.C.G.A. § 24-9-64, in an attempt to rebut the bolstering of the victims' credibility that was performed by the trial court. Craft v. State, 274 Ga. App. 410, 618 S.E.2d 104 (2005).

Employer entitled to cross-examine in workers' compensation case. — In a worker's compensation case, the administrative law judge erred in preventing the employer from pursuing the employer's right to a thorough and sifting cross-examination of

the claimant because, as a defense, evidence tending to show a motive for malingering was relevant. *David Jordan Logging Co. v. Sales*, 203 Ga. App. 410, 416 S.E.2d 803, cert. denied, 203 Ga. App. 905, 416 S.E.2d 803 (1992).

Right does not apply to irrelevant information. — Judgment in favor of the plaintiffs in a medical malpractice action was affirmed; trial court did not prevent defendants from cross-examining plaintiffs' expert as to plaintiff's expert's mental illnesses in violation of O.C.G.A. § 24-9-64, but only from cross-examining the expert as to a prior suit for disability benefits which was irrelevant. *Fredericks v. Hall*, 275 Ga. App. 412, 620 S.E.2d 638 (2005).

Reliance of expert on report. — By giving a report written by the defendant and sent to plaintiff's counsel for "informational purposes" to plaintiff's expert, the defendant violated the agreement between the parties not to use it in the litigation, and reliance on the report by defendant's expert required allowing the plaintiff to cross-examine that expert using the report. *Lewis v. Emory Univ.*, 235 Ga. App. 811, 509 S.E.2d 635 (1998).

No cross-examination when no direct examination. — Trial court did not err in preventing the defendant from cross-examining the investigating officer, about an incriminating statement made by the defendant, after the state introduced evidence concerning the statement. O.C.G.A. § 24-3-38 ("When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence") and O.C.G.A. § 24-9-64 were inapplicable because there had been no direct examination relating to any part of the statement by the state. *Davis v. State*, 261 Ga. 382, 405 S.E.2d 648 (1991).

Designation of witness as hostile. — It was not error for trial judge to refuse to permit defendant to have police officer designated a hostile witness so that the officer could be called as a witness for cross-examination, where it was not shown that the witness was hostile; and where it appeared from the record that counsel was allowed to ask leading questions substantially identical to the question counsel complained was not per-

mitted. *Williams v. State*, 164 Ga. App. 562, 298 S.E.2d 282 (1982).

New trial for denial of right. — Substantial denial of the right of cross-examination is good cause for the grant of a new trial. *Hall v. State*, 117 Ga. 263, 43 S.E. 718 (1903); *Becker v. Donalson*, 133 Ga. 864, 67 S.E. 92 (1910); *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936); *Thompson v. State*, 181 Ga. 620, 183 S.E. 566 (1936); *Clifton v. State*, 187 Ga. 502, 2 S.E.2d 102 (1939); *Corley v. State*, 64 Ga. App. 841, 14 S.E.2d 121 (1941); *Cameron v. State*, 66 Ga. App. 414, 18 S.E.2d 16 (1941); *Pulliam v. State*, 196 Ga. 782, 28 S.E.2d 139 (1943); *Hyde v. State*, 70 Ga. App. 823, 29 S.E.2d 820 (1944); *Smith v. Davis*, 76 Ga. App. 154, 45 S.E.2d 237 (1947); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Western & Atl. R.R. v. Burnett*, 79 Ga. App. 530, 54 S.E.2d 357 (1949); *Russell v. Bass*, 82 Ga. App. 659, 62 S.E.2d 456 (1950); *Griffin v. State*, 85 Ga. App. 602, 69 S.E.2d 665 (1952); *Chambers v. State*, 88 Ga. App. 57, 76 S.E.2d 84 (1953); *Harrison v. Regents of Univ. Sys.*, 99 Ga. App. 762, 109 S.E.2d 854 (1959); *Sutton v. State Hwy. Dep't*, 103 Ga. App. 29, 118 S.E.2d 285 (1961); *Morris v. State*, 150 Ga. App. 94, 256 S.E.2d 674 (1979).

Motion for new trial was not granted when defendant learned after the trial that witness who testified at trial but was not cross-examined had information of value to defendant's case. *Hall v. State*, 117 Ga. 263, 43 S.E. 718 (1903).

Curing refusal to allow cross-examination. — Error in refusing to allow defendant to cross-examine a witness is not cured because the witness is subsequently introduced by defendant and examined as to the facts. *White v. Dinkins*, 19 Ga. 285 (1856).

Personal examination by defendant. — Prisoner's rights are not violated if the prisoner is refused the privilege of personally cross-examining a hostile witness after the prisoner has stood by approvingly while the prisoner's counsel has conducted a thorough cross-examination. *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528 (1853).

Codefendant's cross-examination of witness. — Trial court's sustaining of an objection by defendant's codefendant to the former's cross-examination of a police officer regarding a prior consistent statement

Right of Cross-Examination (Cont'd)

made to the officer did not violate defendant's right to cross-examination, since the court indicated that if defendant testified defendant could then cross-examine the officer on the statement. *Wilson v. State*, 227 Ga. App. 59, 488 S.E.2d 121 (1997).

Right to subpoena crime lab work product. — Broad right of cross-examination afforded by O.C.G.A. § 24-9-64 allows a defendant the right to subpoena data relied upon by the state crime lab chemist, including graphs generated from gas chromatography. *Price v. State*, 269 Ga. 222, 498 S.E.2d 262 (1998).

Calling witnesses. — It does not abridge the defendant's right of confrontation and cross-examination for the court to refuse to require the state to summon a witness not relied on by the state to make out its case before the jury as a witness. *Bonds v. State*, 232 Ga. 694, 208 S.E.2d 561 (1974).

Witness not called to testify. — Trial court did not err in refusing to allow defendant to cross-examine an officer who was present when the defendant made defendant's incriminating statement since this witness was not called to testify and did not present any direct testimony against defendant. *Billings v. State*, 212 Ga. App. 125, 441 S.E.2d 262 (1994).

Opposite party. — Defendant in a criminal case may be cross-examined with defendant's consent, but if defendant offers oneself for cross-examination there is no obligation upon the prosecution to conduct it. *Roberson v. State*, 12 Ga. App. 102, 76 S.E. 752 (1912); *Jones v. State*, 18 Ga. App. 285, 89 S.E. 303 (1916).

When counsel for plaintiff calls defendant as a witness against oneself in order to prove only one point, the law permits the counsel for defendant to cross-examine the client. *National Land & Coal Co. v. Zugar*, 171 Ga. 228, 155 S.E. 7 (1930).

When a party to a suit calls the opposing party to the stand as a witness, it is within the discretion of the judge to refuse to prohibit the counsel for the opposing party from asking leading questions on cross-examination, and the fact that the court allowed the cross-questions complained of does not show such abuse of discretion as to authorize the grant of a new

trial. *Akridge v. Atlanta Journal Co.*, 56 Ga. App. 812, 194 S.E. 590 (1937).

Right of cross-examination of the opposite party does not include the right to require that party's presence in court, and such party may not be compelled to attend court except in the manner as other witnesses are required to attend court by subpoena. *Johnston v. Dollar*, 89 Ga. App. 876, 81 S.E.2d 502 (1954).

Right to cross examine guardian ad litem. — Trial court erred in depriving one parent and grandparent of the opportunity to question the guardian ad litem regarding the results of an investigation as the burden was theirs to establish that the child would be harmed if returned to the other parent and that it was in the best interest of the child to remain with the grandparent. Thus, the trial court's order deprived them of the opportunity to establish facts in support of their position that the child should remain in the grandparent's custody. *Simmons v. Williams*, 290 Ga. App. 644, 660 S.E.2d 435 (2008).

Admission of hearsay evidence violates right to cross-examination. — When officer testified that witness told the officer that the defendant had sold the witness drugs, this hearsay evidence was improperly admitted and deprived defendant of the right to cross-examination. *Welch v. State*, 231 Ga. App. 74, 498 S.E.2d 555 (1998).

Hearsay evidence. — Excluding testimony that was purely hearsay did not deny the right of a thorough and sifting cross-examination. *Bell v. State*, 71 Ga. App. 430, 31 S.E.2d 109 (1944).

Scope of Cross-Examination**1. In General**

Thorough and sifting cross-examination. — Right of thorough and sifting cross-examination extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy. *Huff v. State*, 106 Ga. 432, 32 S.E. 348 (1899); *White v. State*, 121 Ga. 191, 48 S.E. 941 (1904); *Hagood v. State*, 5 Ga. App. 80, 62 S.E. 641 (1908); *Hart v. State*, 14 Ga. App. 364, 80 S.E. 909 (1913); *Richards v. Harpe*, 42 Ga. App. 123, 155 S.E. 85 (1930); *Faulk v. State*, 47 Ga. App. 804, 171 S.E. 570 (1933); *Williamson, Inman & Co. v. Thompson*, 50 Ga. App. 564, 179 S.E. 289 (1935); *McRae v.*

Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936); McGinty v. State, 59 Ga. App. 675, 2 S.E.2d 134 (1939); Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217 (1939); Owens v. Shugart, 61 Ga. App. 177, 6 S.E.2d 121 (1939); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943); First Nat'l Bank v. Carmichael, 198 Ga. 309, 31 S.E.2d 811 (1944); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665 (1952); Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131 (1952); Evans v. State, 210 Ga. 375, 80 S.E.2d 157 (1954); Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828 (1954); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954); Rooker v. State, 211 Ga. 361, 86 S.E.2d 307 (1955); Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955); Faircloth v. State, 95 Ga. App. 265, 97 S.E.2d 641 (1957); Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818 (1966); Sullivan v. State, 222 Ga. 691, 152 S.E.2d 382 (1966); Millhollan v. Watkins Motor Lines, 116 Ga. App. 452, 157 S.E.2d 901 (1967); Miller v. Smith, 302 F. Supp. 385 (N.D. Ga. 1968); State Hwy. Dep't v. Owens, 120 Ga. App. 647, 171 S.E.2d 770 (1969); Boyles v. State, 120 Ga. App. 852, 172 S.E.2d 637 (1969); Georgia Power Co. v. Sinclair, 122 Ga. App. 305, 176 S.E.2d 639 (1970); Locke v. State, 229 Ga. 110, 189 S.E.2d 410 (1972); Saks Fifth Ave. v. Edwards, 128 Ga. App. 380, 196 S.E.2d 879 (1973); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861 (1973); Casey v. State, 133 Ga. App. 161, 210 S.E.2d 375 (1974); Gordon v. Gordon, 133 Ga. App. 520, 211 S.E.2d 374 (1974); Luke v. McGuire Ins. Agency of Ga., Inc., 133 Ga. App. 948, 212 S.E.2d 889 (1975); Hobbs v. State, 134 Ga. App. 850, 216 S.E.2d 674 (1975); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152 (1976); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1 (1976); Southwire Co. v. Department of Transp., 147 Ga. App. 606, 249 S.E.2d 650 (1978); Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978); Williams v. Ricks, 152 Ga. App. 555, 263 S.E.2d 457 (1979); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980); Crawford v. State, 154 Ga. App. 362, 268 S.E.2d 414 (1980); Goldgar v. Galbraith, 155 Ga. App. 429, 270 S.E.2d 833 (1980);

Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981); McDaniel v. DOT, 200 Ga. App. 674, 409 S.E.2d 552 (1991); Sawyers v. State, 211 Ga. App. 668, 440 S.E.2d 256 (1994); Kier v. State, 247 Ga. App. 431, 543 S.E.2d 801 (2000).

When one side calls and examines a witness, though only on a single point, the other has the right to cross-examine the witness on every point. Dawson v. Callaway, 18 Ga. 573 (1855); Aiken v. Cato, 23 Ga. 154 (1857); News Publishing Co. v. Butler, 95 Ga. 559, 22 S.E. 282 (1895); National Land & Coal Co. v. Zugar, 171 Ga. 228, 155 S.E. 7 (1930); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Right of cross examination is a substantial right, the preservation of which is essential to the proper administration of justice and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy; this right should not be abridged. James v. State, 260 Ga. App. 536, 580 S.E.2d 334 (2003).

Right not unlimited. — Although it is true that the right to a thorough and sifting cross-examination may not be abridged, that right is not unlimited. Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57 (1983), rev'd on other grounds, 252 Ga. 103, 312 S.E.2d 113 (1984).

Court did not improperly restrict defendant's right of cross-examination of a state's witness since the testimony sought to be elicited would have been cumulative of other testimony. Gaither v. State, 259 Ga. 200, 378 S.E.2d 464 (1989).

Victim's probation status improperly examined. — Trial court did not abuse the court's discretion in limiting the scope of defendant's cross-examination of the alleged crime victim to exclude questioning the victim as to the victim's probation status. Bogan v. State, 206 Ga. App. 696, 426 S.E.2d 392 (1992).

Inquiry into domestic dispute disallowed in kidnapping case. — Trial court properly restricted defendant's cross-examination of wife's alleged affair, as the cause of the couple's separation was not relevant to the issues before the jury. Williams v. State, 207 Ga. App. 371, 427 S.E.2d 846 (1993).

Limiting examination to relevant matters by proper questioning. — Right of

Scope of Cross-Examination (Cont'd)**1. In General (Cont'd)**

cross-examination is not abridged when examination is limited by trial court to relevant matters by proper questioning. *Johnson v. State*, 158 Ga. App. 333, 280 S.E.2d 379 (1981); *Palmer v. State*, 186 Ga. App. 892, 369 S.E.2d 38, cert. denied, 186 Ga. App. 918, 369 S.E.2d 38 (1988); *Mitchell v. State*, 200 Ga. App. 146, 407 S.E.2d 115 (1991).

Cross-examination covers relevant subjects and not just matters elicited on direct examination. — Right of cross-examination in Georgia includes questioning a witness about subjects relevant to any of the issues in the case, not simply those matters elicited on direct examination. *James v. State*, 260 Ga. App. 536, 580 S.E.2d 334 (2003).

Privilege. — Right of cross-examination must be tempered and restricted so as not to infringe on privileged areas. *Hornsby v. State*, 139 Ga. App. 254, 228 S.E.2d 152 (1976).

Redirect examination. — Whether or not new matter is introduced on redirect and even though no reason shown why, through inadvertence or mistake, certain questions have been omitted, it is entirely within the discretion of the trial judge to permit further examination by either side. *King v. Thompson*, 59 Ga. 380 (1877); *Faulk v. State*, 47 Ga. App. 804, 171 S.E. 570 (1933).

Redirect examination and recross are, strictly speaking, not for the purpose of introducing new matter, but the judge in the judge's discretion may permit the questioner to inquire about something which the judge should have asked about during an earlier step but which was overlooked. *Goodrum v. State*, 158 Ga. App. 602, 281 S.E.2d 254 (1981).

Documents. — When the relevancy of documents which may be used as evidence appears, it is error to unduly restrict the cross-examination relating to such documents. *Ledford v. State*, 89 Ga. App. 683, 80 S.E.2d 828 (1954); *Snelling v. State*, 215 Ga. App. 263, 450 S.E.2d 299 (1994).

Prior drug sales. — Trial court did not err in permitting cross-examination of defendant regarding prior drug sales held admissible to prove identity. *Nuckles v. State*, 207 Ga. App. 63, 427 S.E.2d 54 (1993).

Conduct exceeding authorized scope. — Conduct of defense counsel exceeded the

authorized scope of cross-examination after counsel injected independent non-testimonial evidence by lifting defendant's shirt to show defendant's body brace. *State v. Battaglia*, 221 Ga. App. 283, 470 S.E.2d 755 (1996).

2. Discretion of Judge

In general. — Scope of cross-examination rests largely within the discretion of the trial judge to control this right within reasonable bounds, and this discretion will not be reviewed unless it is abused. *Woolfolk v. State*, 85 Ga. 69, 11 S.E. 814 (1890); *News Publishing Co. v. Butler*, 95 Ga. 559, 22 S.E. 282 (1895); *Fouraker v. State*, 4 Ga. App. 692, 62 S.E. 116 (1908); *Cohen v. Saffer*, 43 Ga. App. 746, 160 S.E. 130 (1931); *Fields v. State*, 46 Ga. App. 287, 167 S.E. 337 (1932); *Clifton v. State*, 187 Ga. 502, 2 S.E.2d 102 (1939); *Sweat v. State*, 63 Ga. App. 299, 11 S.E.2d 40 (1940); *Haugabrooks v. Metropolitan Life Ins. Co.*, 63 Ga. App. 829, 12 S.E.2d 163 (1940); *Corley v. State*, 64 Ga. App. 841, 14 S.E.2d 121 (1941); *Richter v. Atlantic Co.*, 65 Ga. App. 605, 16 S.E.2d 259 (1941); *Cameron v. State*, 66 Ga. App. 414, 18 S.E.2d 16 (1941); *Pulliam v. State*, 196 Ga. 782, 28 S.E.2d 139 (1943); *Hyde v. State*, 70 Ga. App. 823, 29 S.E.2d 820 (1944); *Post v. State*, 201 Ga. 81, 39 S.E.2d 1 (1946); *White v. State*, 74 Ga. App. 634, 40 S.E.2d 782 (1946); *Smith v. Davis*, 76 Ga. App. 154, 45 S.E.2d 237 (1947); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Western & Atl. R.R. v. Burnett*, 79 Ga. App. 530, 54 S.E.2d 357 (1949); *Carroll v. Hill*, 80 Ga. App. 576, 56 S.E.2d 821 (1949); *Owens v. State*, 81 Ga. App. 182, 58 S.E.2d 550 (1950); *Russell v. Bass*, 82 Ga. App. 659, 62 S.E.2d 456 (1950); *Griffin v. State*, 85 Ga. App. 602, 69 S.E.2d 665 (1952); *Rozar v. State*, 93 Ga. App. 207, 91 S.E.2d 131 (1956); *Pittman v. West*, 95 Ga. App. 149, 97 S.E.2d 387 (1957); *Gordy v. Powell*, 95 Ga. App. 822, 99 S.E.2d 313 (1957); *Sutton v. State Hwy. Dep't*, 103 Ga. App. 29, 118 S.E.2d 285 (1961); *Meeks v. Lunsford*, 106 Ga. App. 154, 126 S.E.2d 531 (1962); *Gravitt v. State*, 220 Ga. 781, 141 S.E.2d 893 (1965); *Mitchell v. Gay*, 111 Ga. App. 867, 143 S.E.2d 568 (1965); *Moore v. State*, 221 Ga. 636, 146 S.E.2d 895 (1966); *Sullivan v. State*, 222 Ga. 691, 152 S.E.2d 382 (1966); *Miller v. Smith*, 302 F. Supp. 385 (N.D. Ga. 1968); *Metts v. Easters*, 229 Ga. 754, 194 S.E.2d 450 (1972);

Goobar v. Nix, 128 Ga. App. 578, 197 S.E.2d 486 (1973); Howington v. Puckett, 130 Ga. App. 584, 203 S.E.2d 916 (1974); Weaver v. Georgia Power Co., 134 Ga. App. 696, 215 S.E.2d 503 (1975); Hobbs v. State, 134 Ga. App. 850, 216 S.E.2d 674 (1975); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975); Franklin v. State, 136 Ga. App. 47, 220 S.E.2d 60 (1975); Whitley v. State, 137 Ga. App. 68, 223 S.E.2d 17 (1975); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500 (1976); Mitchell v. State, 236 Ga. 251, 223 S.E.2d 650 (1976); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976); McCarty v. State, 139 Ga. App. 101, 227 S.E.2d 898 (1976); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152 (1976); Lindsey v. Guhl, 237 Ga. 567, 229 S.E.2d 354 (1976); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395 (1977); Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other grounds sub nom. Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979); Southwire Co. v. Department of Transp., 147 Ga. App. 606, 249 S.E.2d 650 (1978); Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979); Morris v. State, 150 Ga. App. 94, 256 S.E.2d 674 (1979); Dunn v. State, 152 Ga. App. 790, 264 S.E.2d 249 (1979); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980); Goldgar v. Galbraith, 155 Ga. App. 429, 270 S.E.2d 833 (1980); Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719 (1980); Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980); Mullins v. State, 157 Ga. App. 204, 276 S.E.2d 877 (1981); Johnson v. State, 158 Ga. App. 333, 280 S.E.2d 379 (1981); Goodrum v. State, 158 Ga. App. 602, 281 S.E.2d 254 (1981); Harris v. State, 160 Ga. App. 47, 285 S.E.2d 781 (1981); Hines v. State, 160 Ga. App. 546, 287 S.E.2d 584 (1981); Gibson v. State, 160 Ga. App. 615, 287 S.E.2d 595 (1981); Hines v. State, 249 Ga. 257, 290 S.E.2d 911 (1982); Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57 (1983), rev'd on other grounds, 252 Ga. 103, 312 S.E.2d 113 (1984); Price v. State, 179 Ga. App. 691, 347 S.E.2d 365 (1986).

Extent of cross-examination can be curtailed if the inquiry is not relevant or material, and such restriction lies within the discretion of the trial court which will not be disturbed on appeal unless manifestly abused. Fitzgerald v. State, 166 Ga. App. 307,

304 S.E.2d 114 (1983); Opatut v. Guest Pond Club, Inc., 188 Ga. App. 478, 373 S.E.2d 372 (1988); Stevens v. State, 213 Ga. App. 293, 444 S.E.2d 840 (1994).

Although a defendant is entitled to a thorough and sifting cross-examination of a witness, the scope of such cross-examination is within the sound discretion of the trial court. White v. State, 253 Ga. 106, 317 S.E.2d 196 (1984); Scott v. State, 178 Ga. App. 222, 343 S.E.2d 117 (1986).

Scope of cross-examination is within the sound discretion of the trial judge. This discretion will not be disturbed by an appellate court unless manifestly abused. Thomas v. Clark, 188 Ga. App. 606, 373 S.E.2d 668 (1988).

Although a defendant is entitled to a thorough and sifting cross-examination of the state's witnesses, within carefully protected legal parameters, the scope of cross-examination lies within the sound discretion of the trial court and this discretion will not be disturbed by an appellate court absent manifest abuse. There was no error in a trial court's restrictions of cross examination of the victims of sexual abuse relating to whether defendant had molested other children. Pope v. State, 266 Ga. App. 602, 597 S.E.2d 632 (2004).

Scope of cross-examination is not unlimited. The extent necessarily must rest largely within the discretion of the trial judge in order to keep the questioning within reasonable bounds. The extent of cross examination can be curtailed if the inquiry is not relevant nor material. Harris v. State, 168 Ga. App. 159, 308 S.E.2d 406 (1983); Williamson v. State, 186 Ga. App. 589, 367 S.E.2d 863 (1988).

Trial court can exercise the court's discretion in keeping the defendant's cross-examination of the state's witnesses within reasonable bounds and in curtailing the cross-examination if the inquiry is not relevant or material. Samuels v. State, 174 Ga. App. 684, 331 S.E.2d 62 (1985).

Regulation of scope of cross-examination is within sound discretion of trial court and this discretion will not be controlled unless it is manifestly abused. DOT v. 2.734 Acres of Land, 168 Ga. App. 541, 309 S.E.2d 816 (1983).

Extent of cross-examination can be curtailed if the inquiry is not relevant or mate-

Scope of Cross-Examination (Cont'd)**2. Discretion of Judge (Cont'd)**

rial, and such restriction lies within the discretion of the trial court, which will not be disturbed on appeal unless manifestly abused. *Fletcher v. State*, 197 Ga. App. 112, 397 S.E.2d 605 (1990); *Stevens v. State*, 213 Ga. App. 293, 444 S.E.2d 840 (1994).

Trial court abused the court's discretion in refusing to allow the defendant to use a videotape of the defendant's daughter, concerning the defendant's alleged sexual abuse of the defendant's daughter, in the cross-examination of the defendant's daughter; however, the error was harmless because the subject matter was covered later during the trial when the entirety of the videotape was played and because the defendant had the opportunity to verbally cross-examine the daughter during the state's case regarding the daughter's former statements to authorities. *Courrier v. State*, 270 Ga. App. 622, 607 S.E.2d 221 (2004).

Trial court did not abuse the court's discretion under O.C.G.A. § 24-9-64 in limiting defendant's ability to cross-examine a police officer as the limits were within the scope of the trial court's discretion and did not violate defendant's confrontation rights; the trial court allowed defendant to cross-examine the officer as to the officer's experience and training, but limited the questioning as to other DUI arrests that the officer had made. *Drogan v. State*, 272 Ga. App. 645, 613 S.E.2d 195 (2005).

Trial court judge did not abuse the court's discretion in limiting the defendant's cross-examination of a detective who had taken a statement from the defendant shortly after being apprehended because, even assuming the restriction was erroneous during the defendant's trial for involuntary manslaughter and reckless conduct, the overwhelming evidence established the defendant's guilt, including the uncontroverted evidence that the defendant brandished and fired the weapon at the deceased victim, which made the error harmless. *Anaya-Plasencia v. State*, 283 Ga. App. 728, 642 S.E.2d 401 (2007).

Trial court did not improperly limit the defendant's cross-examination to matters material to the issues as: (1) whether the victim had a boyfriend that a parent disap-

proved of was irrelevant; (2) there was no indication by the evidence that the victim was trying to explain away evidence of a relationship with one man by attributing that evidence to another; and (3) it was illogical for the victim to have fabricated a claim of child molestation. *Gaines v. State*, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

There was sufficient evidence to support a defendant's convictions on two counts of armed robbery, and the trial court did not err by failing to grant the defendant's motion for a directed verdict, based on both victims' identification of the defendant; the defendant being found in a nearby location to the truck stop where the attacks occurred walking rapidly away; and the defendant being found with exactly the amount of cash taken from one victim. The trial court properly limited the defendant's cross-examination of the arresting officer to the length of the police report and the lack of details therein, and did not abuse the court's discretion by refusing to allow defense counsel to ask the officer about the length of time that suspects may spend in custody pre-trial, as that issue was irrelevant to any issue in the case. *Burden v. State*, 296 Ga. App. 441, 674 S.E.2d 668 (2009).

Trial court may restrict scope of cross-examination to matters relevant to issues being tried, and results of the exercise of that discretion will not be interfered with unless the discretion was manifestly abused. *Ayers v. Carter*, 159 Ga. App. 680, 285 S.E.2d 55 (1981); *Fowler v. State*, 171 Ga. App. 491, 320 S.E.2d 219 (1984); *Banks v. State*, 178 Ga. App. 54, 341 S.E.2d 859 (1986); *Walker v. State*, 198 Ga. App. 422, 401 S.E.2d 613 (1991).

Trial court did not abuse the court's discretion by excluding reference to emails, admittedly containing mostly irrelevant material, between the victim and the victim's friend, the witness, but nevertheless allowed defense counsel to explore the subject areas desired, with the witness conceding the points raised. *Courrier v. State*, 270 Ga. App. 622, 607 S.E.2d 221 (2004).

Trial court did not abuse the court's discretion in rejecting the defendant's proposed line of cross-examination questioning as the trial court ruled that testimony involving a totally unrelated arrest was irrelevant to the defendant's case after first giving the

defendant the opportunity to establish its relevance. *Schlanger v. State*, 290 Ga. App. 407, 659 S.E.2d 823 (2008).

3. Specific Applications

Impeachment. — If the purpose in cross-examination is to impeach or discredit a witness, great latitude should be allowed for a thorough and sifting cross-examination. *Goodwyn v. Goodwyn*, 20 Ga. 600 (1856); *Floyd v. Wallace*, 31 Ga. 688 (1861); *Mitchell v. State*, 71 Ga. 128 (1883); *Atlanta & B. Air-Line Ry. v. McManus*, 1 Ga. App. 302, 58 S.E. 258 (1907); *Kimbrough v. State*, 9 Ga. App. 301, 70 S.E. 1127 (1911); *Smith v. State*, 12 Ga. App. 13, 76 S.E. 647 (1912); *Glover v. State*, 15 Ga. App. 44, 82 S.E. 602 (1914); *Boyett v. State*, 16 Ga. App. 150, 84 S.E. 613 (1915); *Griffin v. State*, 18 Ga. App. 462, 89 S.E. 537 (1916); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Western & Atl. R.R. v. Burnett*, 79 Ga. App. 530, 54 S.E.2d 357 (1949); *Wyatt v. State*, 206 Ga. 613, 57 S.E.2d 914 (1950); *Salisbury v. State*, 222 Ga. 549, 150 S.E.2d 819 (1966); *Bramblett v. State*, 139 Ga. App. 745, 229 S.E.2d 484 (1976), *aff'd*, 239 Ga. 336, 236 S.E.2d 580 (1977), *cert. denied*, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978); *Toney v. Johns*, 153 Ga. App. 880, 267 S.E.2d 298 (1980); *Horne v. State*, 155 Ga. App. 851, 273 S.E.2d 193 (1980).

On cross-examination the opposing party is entitled to a thorough and sifting examination of the witness, and, when the defendant's alibi witnesses were under cross-examination, the trial court correctly refused to grant a mistrial with reference to an effort to impeach those witnesses as to whether or not the testimony was fabricated before trial since the object of all legal investigation is the discovery of truth. *Mitchell v. State*, 157 Ga. App. 683, 278 S.E.2d 192 (1981).

Prosecutor's cross-examination of witness did not constitute impeachment of the witness by proof of a criminal conviction since the prosecutor was cross-examining the witness concerning the criminal charges surrounding incarceration, in order to reveal possible biases, prejudices, or ulterior motives of the witness as they might relate to the witness's testimony on direct examination. *Harrison v. State*, 259 Ga. 486, 384 S.E.2d 643 (1989).

Use of cross-examination in a good faith attempt to impeach a defendant, who on direct examination has voluntarily given testimony on direct examination obviously calculated to impress the jury as to certain traits of defendant's character, is not prohibited. *Butts v. State*, 193 Ga. App. 824, 389 S.E.2d 395 (1989).

When a defendant was charged with aggravated assault, but claimed self defense, the trial court erred in prohibiting the defendant from eliciting from the victim that the victim had pending a civil action against the defendant for the victim's injuries. The defendant wished to cross-examine the victim to establish this fact to prove the victim's interest in the outcome of the criminal trial and so attack the victim's credibility, and was entitled to show the state of the witness's feelings toward the defendant and the witness's relationship to the defendant. *Boggs v. State*, 195 Ga. App. 605, 394 S.E.2d 401 (1990).

Expert witnesses. — Permitting cross-examination directed specifically to testing the accuracy of an expert's opinion stated on direct examination was not an abuse of discretion as to scope of cross-examination. *Lane Drug Stores v. Brooks*, 70 Ga. App. 878, 29 S.E.2d 716 (1944); *Rozar v. State*, 93 Ga. App. 207, 91 S.E.2d 131 (1956); *Wooten v. Department of Human Resources*, 152 Ga. App. 304, 262 S.E.2d 583 (1979).

In a medical malpractice case, it was error to prevent plaintiffs from cross-examining defense experts about their personal practices, as such evidence, unless excludable on other evidentiary grounds, was admissible as substantive evidence and to impeach the experts' opinion as to the applicable standard of care. *Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667, 681 S.E.2d 152 (2009).

Police officer's training in field sobriety testing. — In a case in which defendant was tried for driving under the influence of alcohol to the extent of being a less safe driver, the trial court abridged defendant's substantial right to cross-examination under O.C.G.A. § 24-9-64 by precluding defendant from cross-examining the arresting officer about the officer's National Highway Traffic Safety Administration (NHTSA) training and NHTSA requirements for field sobriety

Scope of Cross-Examination (Cont'd)**3. Specific Applications (Cont'd)**

evaluations like the horizontal gaze nystagmus (HGN) test, as the officer gave detailed testimony about defendant's involuntary jerking of defendant's eyes during a prescribed pattern of HGN testing and asserted that this showed that defendant was under the influence of alcohol; the officer's NHTSA training and the NHTSA standards for conducting HGN testing were clearly material to the officer's opinion and to the controversy before the court, and the error was not harmless since the state's case relied entirely on the officer's testimony regarding the field sobriety tests. *James v. State*, 260 Ga. App. 536, 580 S.E.2d 334 (2003).

Character witnesses. — While the general character of the parties, and especially their conduct in other transactions, are irrelevant matters, it is proper on cross-examination to question a character witness regarding particular matters so as to test the extent and basis for the opinion given. *Haire v. State*, 209 Ga. 378, 72 S.E.2d 707 (1952); *Compher v. Georgia Waste Sys.*, 155 Ga. App. 819, 273 S.E.2d 200 (1980); *Curry v. State*, 155 Ga. App. 829, 273 S.E.2d 411 (1980).

Use of videotape. — In a prosecution for criminal attempt to process cocaine, stemming from a reverse sting operation, it would have been proper to allow defense counsel to play a videotape of the attempted purchase during the cross-examination of a police officer. *Givens v. State*, 264 Ga. 522, 448 S.E.2d 687 (1994).

Repetitious questions. — Exclusion of unnecessarily repetitious questions in the cross-examination which have been previously propounded and answered does not constitute an abuse of discretion. *Clifton v. State*, 187 Ga. 502, 2 S.E.2d 102 (1939); *Griffin v. State*, 85 Ga. App. 602, 69 S.E.2d 665 (1952); *Hamilton v. State*, 91 Ga. App. 295, 85 S.E.2d 496 (1954); *Pittman v. West*, 95 Ga. App. 149, 97 S.E.2d 387 (1957); *Harrison v. Regents of Univ. Sys.*, 99 Ga. App. 762, 109 S.E.2d 854 (1959); *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966); *Sullivan v. State*, 222 Ga. 691, 152 S.E.2d 382 (1966); *Goobar v. Nix*, 128 Ga. App. 578, 197 S.E.2d 486 (1973); *Geiger v. State*, 129 Ga. App. 488, 199 S.E.2d 861 (1973); *Reid v. State*, 129 Ga. App. 660, 200 S.E.2d 456 (1973); *Luther*

v. DeKalb County, 131 Ga. App. 25, 205 S.E.2d 70 (1974); *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975); *Johnson v. State*, 137 Ga. App. 308, 223 S.E.2d 500 (1976); *Hudson v. State*, 137 Ga. App. 439, 224 S.E.2d 48 (1976).

When a question has been asked of and answered by a witness, the trial court does not unduly limit the right to a thorough cross-examination by disallowing its repetition. *Fitzgerald v. State*, 166 Ga. App. 307, 304 S.E.2d 114 (1983).

Argumentative questions. — Questions which are argumentative are properly excluded. *Haralson v. State*, 234 Ga. 406, 216 S.E.2d 304 (1975), overruled on other grounds, *White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001).

Hypothetical questions to determine the witnesses' knowledge must embody the facts offered in evidence. *Clackum v. State*, 55 Ga. App. 44, 189 S.E. 397 (1936); *Curry v. State*, 155 Ga. App. 829, 273 S.E.2d 411 (1980).

Conclusion of witness. — Right to a thorough and sifting cross-examination is not abridged if the question propounded calls for a conclusion by the witness. *Proctor v. State*, 235 Ga. 720, 221 S.E.2d 556 (1975).

Insanity. — Great latitude should be allowed by the court when confronting witnesses as to the defendant's present insanity. *Polk v. State*, 18 Ga. App. 324, 89 S.E. 437 (1916), later appeal, 19 Ga. App. 332, 148 Ga. 34, 91 S.E. 439 (1917); 148 Ga. 34, 95 S.E. 988 (1918).

Victim's state of mind. — In a prosecution for child molestation, the trial court properly limited the cross-examination of witnesses as to the victim's state of mind, use of drugs, and psychiatric treatment because such inquiry had no relevance to the charges against defendant. *Davidson v. State*, 232 Ga. App. 250, 501 S.E.2d 510 (1998).

Prior sexual activity. — Victim of an alleged rape may not be cross-examined as to specific acts of prior sexual intercourse with men other than the accused. *Thomas v. State*, 234 Ga. 635, 217 S.E.2d 152 (1975).

Since defendant had known the victim for only one hour before the alleged rape occurred, and since in that time, it was unlikely that the defendant discovered any past sexual activity on the part of his victim that could justify his claim that she consented to intercourse, the trial court's refusal to admit

evidence as to the victim's prior sexual experience was not a denial of defendant's right to a thorough and sifting cross-examination. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353 (1979).

In a child molestation case, defendant was properly precluded from inquiring into the victim's family lifestyle and sexual history. *Schwindler v. State*, 254 Ga. App. 579, 563 S.E.2d 154 (2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed. 2d 854 (2003).

Seduction. — On trial of the defendant under an indictment charging him with seduction of the prosecutor by persuasion and promise of marriage, where such prosecutor was the only witness for the state and her testimony was self-contradictory as to whether or not she knew, at the time of the alleged seduction, that the defendant was a married man, it was error to deny to defendant's counsel the right to a thorough and sifting cross-examination as provided by statute. *Chambers v. State*, 88 Ga. App. 57, 76 S.E.2d 84 (1953).

Admission of crime. — In a trial for murder, since the state has introduced an admission by the accused of a willful and intentional killing unaccompanied with any justification or mitigation, it is the accused's right, by cross-examination, to elicit a previous conversation with the same witness in which the admission of the homicide was accompanied by a statement giving the reason therefor. *West v. State*, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946).

Prior convictions. — After the defendant's sister testified on direct examination that her brothers were often accused of doing things they did not do, such testimony opened the door to cross-examination about convictions of the defendant's brothers. *Pye v. State*, 269 Ga. 779, 505 S.E.2d 4 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999).

Codefendant's plea agreement. — Cross-examination of an accomplice regarding a deal the accomplice made with the prosecution, including the potential sentence the accomplice could receive and the fact that the accomplice would not be eligible for parole, is constitutionally protected because it shows the witness's motive, bias or interest in cooperating with the state and

testifying against defendant. The fact that a witness faces a sentence without eligibility for parole, or a mandatory minimum sentence, gives the witness much more incentive to give favorable testimony. *Vogleson v. State*, 250 Ga. App. 555, 552 S.E.2d 513 (2001).

Defendant has a constitutionally protected right to explore on cross-examination a codefendant's or an accomplice's agreement with the state, including the amount of prison time the codefendant or accomplice would avoid by agreeing to cooperate with the state and testify against the defendant. *Perez v. State*, 254 Ga. App. 872, 564 S.E.2d 208 (2002).

Fact that counsel abandons line of inquiry presents nothing for review. — Since the trial court did not curtail proper examination but simply exercised the court's discretion to require counsel to obtain the information through proper questions, the fact that counsel abandoned the line of inquiry presents nothing for review. *Johnson v. State*, 158 Ga. App. 333, 280 S.E.2d 379 (1981).

When the plaintiff is called as a defense witness upon an objection to the witness being recalled for further cross-examination, this tactic entitles counsel for the plaintiff to cross-examine the witness just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there is no abuse of discretion in allowing the questions. *Mercer v. Woodard*, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

State is not required to reveal the identity of an informant. *Montford v. State*, 168 Ga. App. 394, 309 S.E.2d 650 (1983).

Defendant's testimony on direct examination that defendant had previously been in "some trouble" did not place defendant's character in issue, but it was not error to allow defendant to be cross-examined as to the specific circumstances surrounding the "trouble" to which defendant testified. *Richardson v. State*, 173 Ga. App. 695, 327 S.E.2d 813 (1985).

Defendant's intent. — State's objection to defendant's cross-examination under O.C.G.A. § 24-9-64 of the victim was properly sustained as defendant's intent to commit the crime was a jury question; even if there were error, it was harmless, as defendant obtained the requested information

Scope of Cross-Examination (Cont'd)
3. Specific Applications (Cont'd)

through another line of questioning. *Burdette v. State*, 259 Ga. App. 59, 576 S.E.2d 47 (2002).

Generally, the wealth or worldly circumstances of a party litigant is never admissible, except in those cases where position or wealth is necessarily involved. *First Fed. Sav. & Loan Ass'n v. Jones*, 173 Ga. App. 356, 326 S.E.2d 554 (1985).

Minors as witnesses. — Trial court did not abuse court's discretion in refusing to allow defense counsel, while cross-examining a 16-year-old witness, to repeat questions that had been asked and fully answered or from asking questions in a "rapid-fire" method, especially in light of the witness's youth. *Phyfer v. State*, 259 Ga. App. 356, 577 S.E.2d 56 (2003).

Specific questions. — In a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." *Cohen v. Saffer*, 43 Ga. App. 746, 160 S.E. 130 (1931).

If upon cross-examination of a hostile witness it is shown that the witness has testified to a contradictory statement on a former trial of a codefendant, and the attention of the witness is called to the alleged contradictions and the contradictory statements are admitted by the witness, it is within the legitimate scope of the right of cross-examination to ask the witness upon which occasion the witness was testifying to the truth. *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948).

Questions involving prior crimes are not admissible when the sole purpose is to show that defendant is guilty of such other crimes; however, questions as to other offenses may be asked in rebuttal to testimony of another witness. *Wyatt v. State*, 206 Ga. 613, 57 S.E.2d 914 (1950); *Casey v. State*, 133 Ga. App. 161, 210 S.E.2d 375 (1974).

It was not error for the court, in cross-examination of a police officer, to refuse to require the officer to disclose the name of the person who had given the officer information which led to the arrest of defendant. *Morgan v. State*, 211 Ga. 172, 84 S.E.2d 365 (1954).

Judgment of the trial court refusing to permit the condemnnee to cross-examine witness as to whether the witness had testified as a witness in all other condemnation cases tried in the same court was error and the judgment overruling the motion for new trial on such ground would be reversed. *Sutton v. State Hwy. Dep't*, 103 Ga. App. 29, 118 S.E.2d 285 (1961).

It is not error to permit the defendant's trial attorney as witness to answer the question why the attorney did not raise the issue of insanity as a defense. *Chaffin v. State*, 227 Ga. 327, 180 S.E.2d 741 (1971).

Questions which are a misstatement of the witnesses' testimony or matters not within the witnesses' knowledge are properly excluded. *Haralson v. State*, 234 Ga. 406, 216 S.E.2d 304 (1975), overruled on other grounds, *White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001).

Right to a thorough and sifting cross-examination is not abridged since the question propounded calls for a conclusion by the witness as to matters which can be determined only by the jury, such as whether there was provocation or justification of a homicide. *Proctor v. State*, 235 Ga. 720, 221 S.E.2d 556 (1975).

It is error to permit cross-examination of a defendant for impeachment purposes regarding defendant's silence, or failure to offer an exculpatory statement, at the time of defendant's arrest, including a defendant who was not apprised of defendant's Miranda rights. *Harrison v. State*, 154 Ga. App. 343, 268 S.E.2d 396 (1980).

On cross-examination, the state may inquire with particularity to test the witness's basis for the opinion given, and may inquire if the witness has not heard particular persons speak ill of the witness, or if the witness has not been known to be accused of particular crimes. *Horne v. State*, 155 Ga. App. 851, 273 S.E.2d 193 (1980).

In action for deceit in connection with purchase of used car, where purchase and resale of trade-in vehicle were already in

evidence, there was no error in allowing jury to know monetary details of that transaction. *Bill Spreen Toyota, Inc. v. Jenquin*, 163 Ga. App. 855, 294 S.E.2d 533 (1982).

In prosecution for criminal trespass at welcome center, trial court acted incorrectly when the court curtailed attempts of appellant's counsel to impeach a witness by means of the witness's apparent prior inconsistent statements on issue, on issue of whether the witness had authorized a police officer to act as the witness's representative in giving notice to appellant that appellant was not to return to the center. *Joiner v. State*, 163 Ga. App. 521, 295 S.E.2d 219 (1982).

As one need not be the owner of premises in order to be deemed in possession of the goods contained therein, the right to a thorough and sifting cross-examination is not abridged by the sustaining of an objection when counsel is trying to elicit from a witness the extent of the witness's knowledge as to the proof of ownership of a home where stolen property was found. *Brady v. State*, 169 Ga. App. 316, 312 S.E.2d 632 (1983).

In an action seeking damages for injuries sustained when a motorcycle collided with an automobile, the trial court did not abuse the court's discretion in excluding a merely speculative, suggested line of questioning of the defendant, whose defense was that the plaintiff's own negligence caused the injury, about why defendant had failed or chosen not to instigate legal process against the plaintiff. *Corley v. Harris*, 171 Ga. App. 688, 320 S.E.2d 833 (1984).

When on cross-examination an agent was asked if the agent occupied the lowest position, as far as salary was concerned, in the GBI, there was no abuse of discretion in sustaining the state's objection on the ground of relevancy. *Anderson v. State*, 165 Ga. App. 885, 303 S.E.2d 57 (1983), *rev'd* on other grounds, 252 Ga. 103, 312 S.E.2d 113 (1984).

In view of the evidence connecting a witness with the crime and the witness's prior inconsistent statements, the defendant properly inquired into the witness's veracity and the extent of the witness's actual participation. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210, *cert. denied*, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984).

When the defendant's attorney "opened

the door" regarding the defendant's status as a licensed insurance agent in this state, the state's attorney was entitled to a thorough and sifting cross-examination regarding this issue. The fact that the defendant's insurance license was temporarily revoked by an administrative order issued by the Insurance Commissioner may have incidentally placed the defendant's character in issue; however, since the defendant's attorney "opened the door" to this issue, the testimony was not inadmissible. *Mason v. State*, 180 Ga. App. 235, 348 S.E.2d 754 (1986).

Trial court's refusal to allow defendant to ask a witness, who had entered a guilty plea and was cooperating with the prosecution prior to defendant's sentencing, if the defendant had been told what period of time Georgia law prescribed as the mandatory minimum sentence for defendant's crime, was not error since the court did allow defendant to establish the basis for possible bias or interest of the witness. *Matthews v. State*, 194 Ga. App. 386, 390 S.E.2d 873 (1990).

In a prosecution for violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-1 *et seq.*, and obstruction of an officer, the court did not abuse the court's discretion by restricting defendant's cross-examination of the state's crime lab witness when the court refused to allow defendant to examine the witness regarding another crime lab scientist who testified at a hearing in another county in an unrelated case that a substance was cocaine when in fact it was soap, since the crime lab witness testified, during proffer, that the witness had "no personal knowledge" of the incident and all the information be possessed about it was "secondary information" which was told to the witness at a crime lab meeting conducted by the witness's supervisor. *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).

When the trial court did not restrict defendant's counsel from questioning police officers regarding any bias the officer had toward black males, but merely restricted defendant's counsel from questioning police officers regarding an alleged prior brutality incident, in which no formal complaint had apparently been filed, there was no abuse of the trial court's decision. *Harris v. State*, 216 Ga. App. 297, 454 S.E.2d 146 (1995).

Scope of Cross-Examination (Cont'd)
3. Specific Applications (Cont'd)

State was entitled to cross-examine the defendant about why defendant had been in jail prior to defendant's prosecution for burglary and kidnapping, since the defendant introduced the topic of defendant's incarceration by testifying that the defendant had told the gunmen, who allegedly forced the defendant to accompany them to the victims' apartment, that the defendant could not have sold drugs for the victim because the defendant had been in jail. *Cosby v. State*, 234 Ga. App. 723, 507 S.E.2d 551 (1998).

In a malpractice action, the court properly excluded the following question put to defendants' expert, i.e., "whether hospitals all over the country admit people to find out what is causing abdominal pain" because the expert had earlier answered a similar question that asked "whether people were admitted to a hospital to find out what was causing a problem." *Cornelius v. Macon-Bibb County Hosp. Auth.*, 243 Ga. App. 480, 533 S.E.2d 420 (2000).

When defendant was charged with raping a victim who accepted defendant's offer of a ride as the victim was on her way to return a jacket to a former boyfriend, the rape shield law, O.C.G.A. § 24-2-3(a), did not prohibit defendant from inquiring of the victim about a theory that the victim fabricated the rape charge to explain semen stains on the boyfriend's jacket, resulting from the sexual encounter, because she wanted to reestablish

a romantic relationship with the boyfriend, because defendant was not seeking to inquire about the victim's character for sexual behavior. *Richardson v. State*, 276 Ga. 639, 581 S.E.2d 528 (2003).

Trial court did not abuse court's discretion in limiting defendant's cross-examination of one detective about how another detective, who was unavailable at trial, formed that detective's opinions and impressions regarding how defendant's spouse was killed as such questioning was beyond the detective's personal knowledge. *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119 (2003).

In a suit brought for specific performance of a contract provision and damages, the trial court did not err in preventing the defendant from cross-examining the plaintiff regarding the fairness of the provision; the suit involved a single provision in a written contract reflecting an arm's length transaction terminating a business relationship, and it was not incumbent upon the plaintiff to prove the fairness of the provision. *Hibbard v. McMillan*, 284 Ga. App. 753, 645 S.E.2d 356 (2007).

A trial court did not err in sustaining the state's objection to defense counsel's questioning of a police officer regarding his observation of other men on a defendant's property at the time the police began watching the property, because the officer had not testified that the officer saw other men at the time the officer began the surveillance. *Price v. State*, No. A10A0448, 2010 Ga. App. LEXIS 377 (Apr. 7, 2010).

OPINIONS OF THE ATTORNEY GENERAL

Purpose behind cross-examination is to see whether the same answer is forthcoming each time the question is asked, and thus to test the credibility of the witness; the repetition of questions or subject matter on direct

examination is to be prevented, and redirect examination is designed to give a party the right to explain the direct testimony, or to rebut the cross-examination. 1965-66 Op. Att'y Gen. No. 66-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 771.

Am. Jur. Proof of Facts. — Criminal Law — Need for Disclosure of Identity of Informant, 33 POF2d 549.

C.J.S. — 32 C.J.S., Evidence, §§ 720, 735 et seq., 750, 757, 760, 769, 770.

ALR. — Cross-examination of witness called to testify on particular point or under order of court, 7 ALR 1116.

Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf, 33 ALR 826.

Cross-examination as to sexual morality

for purpose of affecting credibility of witness, 65 ALR 410.

Right of defendant in criminal case to cross-examine police officials regarding conduct or practices by them calculated to contribute to delinquency of other persons, 68 ALR 1043.

Right of party surprised by unfavorable testimony of own witness to ask him concerning previous inconsistent statements, 74 ALR 1042.

Right to test qualifications of witness to testify as to genuineness of handwriting by cross-examining him as to the genuineness of other handwriting not the subject of his direct examination, 128 ALR 1329.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 ALR 604.

Cross-examination to dispel favorable inference which jury might draw from appearance of witness on witness-stand, 159 ALR 201.

Cross-examination of expert witness as to fees, compensation, and the like, 33 ALR2d 1170.

Cross-examination of witness in criminal case as to whether, and with whom, he has discussed facts of case, 35 ALR2d 1045.

Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner, 38 ALR2d 952.

Right of a defendant in personal injury or death action to cross-examine codefendant, 43 ALR2d 1000.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 ALR2d 610.

Cross-examination of plaintiff in personal injury action as to his previous injuries, physical condition, claims, or actions, 69 ALR2d 593.

Propriety of hypothetical question to expert witness on cross-examination, 71 ALR2d 6.

Right to elicit expert testimony from adverse party called as witness, 88 ALR2d 1186.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 ALR3d 1203.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Right to cross-examine witness as to his place of residence, 85 ALR3d 541.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 ALR3d 1060.

Cross-examination of character witness for accused with reference to particular acts or crimes — modern state rules, 13 ALR4th 796.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 ALR4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

24-9-65. When opinion evidence admissible.

Where the question under examination, and to be decided by the jury, shall be one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor. If the issue shall be as to the existence of a fact, the opinions of witnesses shall be generally inadmissible. (Orig. Code 1863, § 3791; Code 1868, § 3811; Code 1873, § 3867; Code 1882, § 3867; Civil Code 1895, § 5285; Penal Code 1895, § 1021; Civil Code 1910, § 5874; Penal Code 1910, § 1047; Code 1933, § 38-1708.)

Law reviews. — For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For annual survey of

evidence law, see 56 Mercer L. Rev. 235 (2004); 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006). For annual 11th

Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005); and 57 Mercer L. Rev. 1083 (2006).

For note on admissibility of expert psychological testimony in Georgia, see 4 Ga. St. U.L. Rev. 117 (1988).

For comment on *Caldwell v. State*, 82 Ga. App. 480, 61 S.E.2d 543 (1950), see 14 Ga. B.J. 241 (1951). For comment on *Corley v. Russell*, 92 Ga. App. 417, 88 S.E.2d 470 (1955), holding that the opinion of an expert is inadmissible in a negligence action, as that is the very issue the jury is impaneled to try, see 18 Ga. B.J. 338 (1956). For comment on *Northwestern Univ. v. Crisp*, 211 Ga. 636,

88 S.E.2d 26 (1955), concerning the admissibility of lay opinions regarding the sanity of a testator, see 19 Ga. B.J. 82 (1956). For comment discussing the use of hypothetical questions to avoid the requirements of first-hand knowledge, see 19 Ga. B.J. 346 (1957). For comment on *Western & A.R.R. v. Hart*, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12-year-old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958). For comment on *Hoard v. Wiley*, 113 Ga. App. 328, 147 S.E.2d 782 (1966), see 3 Ga. St. B.J. 476 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

OPINION TESTIMONY ADMISSIBLE

1. IN GENERAL
2. SPECIFIC EXAMPLES

OPINION TESTIMONY NOT ADMISSIBLE

1. IN GENERAL
2. SPECIFIC EXAMPLES

General Consideration

In general. — Class of questions here referred to must be such as lie within the range of common opinion, that is, an opinion which is supposed to be within the common knowledge, experience, and education of men. *Cone v. Davis*, 66 Ga. App. 229, 17 S.E.2d 849 (1941).

Former Code 1933, § 38-1710 (see O.C.G.A. § 24-9-67) dealt with science, skill, trade, or like questions, in which matters experts may give their opinion based on facts as proved by other witnesses, but former Code 1933, § 38-1703 (see O.C.G.A. § 24-9-65) dealt with opinions of lay witnesses. *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944).

Statute plainly refers to two separate and distinct situations, and declares different rules in reference thereto: (1) where the question under examination and to be decided by the jury shall be one of opinion; and (2) where the issue shall be as to the existence of a fact. *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945).

Whether a question calls for a legal conclusion or principally a fact which incidentally involves a legal word or phrase is within the sound discretion of the trial court. *Gage v. Tiffin Motor Homes, Inc.*, 153 Ga. App. 704, 266 S.E.2d 345 (1980).

History. — Statute is but a compendium of the common law. *Central R.R. & Banking Co. v. Kelly*, 58 Ga. 107 (1877) (see O.C.G.A. § 24-9-65).

Duty of trial court. — Determination as to whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis for expressing an opinion is for the trial court. *DOT v. McLaughlin*, 163 Ga. App. 1, 292 S.E.2d 435, cert. denied, 250 Ga. 10, 297 S.E.2d 217 (1982), overruled on other grounds, 264 Ga. 393, 444 S.E.2d 734 (1994).

Witness's opinion must be witness's own and the witness cannot act as a mere conduit for the opinions of others. *Stephen W. Brown Radiology Assocs. v. Gowers*, 157 Ga. App. 770, 278 S.E.2d 653 (1981).

Qualifying words. — An answer of a witness is not to be struck out because the witness qualified the witness's statement of fact by such statements as "I would judge," and "I think," nor because the witness used the word "opinion," since, from the context,

the witness was merely qualifying the witness's statement of fact. *Faucette v. State*, 71 Ga. App. 331, 30 S.E.2d 808 (1944).

Plaintiff may not establish variance from standard of care in medical or legal malpractice cases without expert opinion testimony from which the jury could determine malpractice. This latter requirement is properly a prerequisite for the submission of a case to the jury. *Savannah Valley Prod. Credit Ass'n v. Cheek*, 248 Ga. 745, 285 S.E.2d 689 (1982).

Status of witness as lay or expert goes not to admissibility, but credibility. *McLelland v. State*, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992).

Weight of opinion evidence is matter for jury. — Probative value and weight to be given the evidence and the credibility of the witness are matters to be determined by the jury. *Blackman v. State*, 80 Ga. 785, 7 S.E. 626 (1888); *Caswell v. State*, 5 Ga. App. 583, 63 S.E. 566 (1909); *Glover v. State*, 15 Ga. App. 44, 82 S.E. 602 (1914); *Hayes v. State*, 16 Ga. App. 20, 84 S.E. 497 (1915); *Bugg v. State*, 17 Ga. App. 211, 86 S.E. 405 (1915); *Hansberger Motor Transp. Co. v. Pate*, 51 Ga. App. 877, 181 S.E. 796 (1935); *Simmons v. Simmons*, 194 Ga. 649, 22 S.E.2d 399 (1942); *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944); *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945); *Barnes v. Thomas*, 72 Ga. App. 827, 35 S.E.2d 364 (1945); *Ford Motor Co. v. Hanley*, 128 Ga. App. 311, 196 S.E.2d 454 (1973); *Galloway v. Banks County*, 139 Ga. App. 649, 229 S.E.2d 127 (1976); *Tam v. Newsome*, 141 Ga. App. 76, 232 S.E.2d 613 (1977).

Jury instructions. — In the absence of a timely written request, the mere fact that opinion evidence was introduced does not require an instruction as to the weight of such evidence. *Fountain v. Smith*, 103 Ga. App. 192, 118 S.E.2d 852 (1961); *Vandable v. State*, 127 Ga. App. 306, 193 S.E.2d 197 (1972).

Harmless error. — Expression of the opinion of a witness amounting to conclusion is harmless since there is ample evidence to support the inference. *Jones v. State*, 75 Ga. App. 610, 44 S.E.2d 174 (1947).

Statement not an opinion. — Building contractor was not asked to give contractor's opinion but was asked for the contractor's

impression, i.e., the contractor's understanding, of what a bid was to be based upon. This evidence was properly admitted to explain the contractor's future conduct and show contractor's understanding of the parties' oral agreement. *Carco Supply Co. v. Clem*, 194 Ga. App. 566, 391 S.E.2d 134 (1990).

Question not eliciting opinion. — State's question to victim's mother as to whether she believed victim's earlier allegation that she was molested by her natural father did not elicit inadmissible opinion evidence, and did not constitute impermissible bolstering of victim's credibility. *Yebra v. State*, 206 Ga. App. 12, 424 S.E.2d 318 (1992).

Cited in *Humphreys v. State*, 35 Ga. App. 386, 133 S.E. 518 (1926); *Tanner v. State*, 163 Ga. 121, 135 S.E. 917 (1926); *Monroe v. Guess*, 41 Ga. App. 697, 154 S.E. 301 (1930); *Southern Ry. v. Cowan*, 52 Ga. App. 360, 183 S.E. 331 (1936); *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939); *New York Life Ins. Co. v. Ittner*, 62 Ga. App. 31, 8 S.E.2d 582 (1940); *Hadden v. Fuqua*, 194 Ga. 621, 22 S.E.2d 377 (1942); *Kennedy v. State*, 68 Ga. App. 852, 24 S.E.2d 321 (1943); *United States ex rel. TVA v. Phillips*, 50 F. Supp. 454 (N.D. Ga. 1943); *Albany Fed. Sav. & Loan Ass'n v. Henderson*, 200 Ga. 79, 36 S.E.2d 330 (1945); *Loughridge v. State*, 201 Ga. 513, 40 S.E.2d 544 (1946); *Lester v. State*, 75 Ga. App. 42, 42 S.E.2d 141 (1947); *Johnson v. Woodward Lumber Co.*, 76 Ga. App. 152, 45 S.E.2d 294 (1947); *Haynes v. State*, 80 Ga. App. 99, 55 S.E.2d 646 (1949); *Royal Crown Bottling Co. v. Stiles*, 82 Ga. App. 254, 60 S.E.2d 815 (1950); *Garner v. State*, 83 Ga. App. 178, 63 S.E.2d 225 (1951); *Holloway v. State*, 90 Ga. App. 86, 82 S.E.2d 235 (1954); *Henderson v. State*, 210 Ga. 680, 82 S.E.2d 638 (1954); *Fulton Bag & Cotton Mills v. Speaks*, 90 Ga. App. 685, 83 S.E.2d 872 (1954); *Atlantic Coast Line R.R. v. Clements*, 92 Ga. App. 451, 88 S.E.2d 809 (1955); *City of Summerville v. Sellers*, 94 Ga. App. 152, 94 S.E.2d 69 (1956); *Meeks v. Lunsford*, 106 Ga. App. 154, 126 S.E.2d 531 (1962); *Agnew v. Hamel*, 107 Ga. App. 221, 129 S.E.2d 574 (1963); *Clemones v. Alabama Power Co.*, 107 Ga. App. 489, 130 S.E.2d 600 (1963); *Wells v. Metropolitan Life Ins. Co.*, 107 Ga. App. 826, 131 S.E.2d 634 (1963); *Lewis v. State Hwy. Dep't*, 110 Ga. App. 845, 140 S.E.2d 109 (1964); *Sears v. Smith*, 221 Ga. 47, 142 S.E.2d 792 (1965); *Hoard v.*

General Consideration (Cont'd)

Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966); Jones v. Bradley, 113 Ga. App. 338, 147 S.E.2d 853 (1966); Wright v. Wright, 222 Ga. 777, 152 S.E.2d 363 (1966); Harper v. Green, 115 Ga. App. 525, 154 S.E.2d 762 (1967); Taber Pontiac, Inc. v. Osborne, 116 Ga. App. 274, 157 S.E.2d 33 (1967); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771 (1967); Callaway v. Miller, 118 Ga. App. 309, 163 S.E.2d 336 (1968); McKeever v. State, 118 Ga. App. 386, 163 S.E.2d 919 (1968); Wilkins v. Hester, 119 Ga. App. 389, 167 S.E.2d 167 (1969); Harrison v. Tuggle, 225 Ga. 211, 167 S.E.2d 395 (1969); Carpet Shop, Inc. v. Powell, 119 Ga. App. 499, 167 S.E.2d 718 (1969); Foster v. National Ideal Co., 119 Ga. App. 773, 168 S.E.2d 872 (1969); Georgia S. & Fla. Ry. v. Blanchard, 121 Ga. App. 82, 173 S.E.2d 103 (1970); State Hwy. Dep't v. Peters, 121 Ga. App. 167, 173 S.E.2d 253 (1970); American Home Assurance Co. v. Stephens, 121 Ga. App. 306, 174 S.E.2d 186 (1970); Crowe v. Harrell, 122 Ga. App. 7, 176 S.E.2d 190 (1970); Tri-County Gas Co. v. Brooker, 122 Ga. App. 522, 177 S.E.2d 806 (1970); State Hwy. Dep't v. Chance, 122 Ga. App. 600, 178 S.E.2d 212 (1970); Smith v. Smith, 125 Ga. App. 257, 187 S.E.2d 330 (1972); Rutledge v. Glass, 125 Ga. App. 549, 188 S.E.2d 261 (1972); Fishman v. State, 128 Ga. App. 505, 197 S.E.2d 467 (1973); DeKalb County v. McFarland, 231 Ga. 649, 203 S.E.2d 495 (1974); Oak Ridge Village, Inc. v. La Siesta Mobile Home Park, 130 Ga. App. 539, 203 S.E.2d 748 (1974); Abbott v. State, 130 Ga. App. 891, 205 S.E.2d 14 (1974); Tenney v. Mobile Oil Corp., 133 Ga. App. 631, 211 S.E.2d 900 (1974); Brookhaven Supply Co. v. DeKalb County, 134 Ga. App. 878, 216 S.E.2d 694 (1975); Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975); Graham v. State, 236 Ga. 378, 223 S.E.2d 803 (1976); King v. Sinyard, 139 Ga. App. 14, 227 S.E.2d 834 (1976); Midtown Properties, Inc. v. George F. Richardson, Inc., 139 Ga. App. 182, 228 S.E.2d 303 (1976); Gordon County Bd. of Tax Assessors v. Aldon Indus., 237 Ga. 527, 228 S.E.2d 905 (1976); Harper v. Georgia S. & Fla. Ry., 140 Ga. App. 802, 232 S.E.2d 118 (1976); Hutchins v. State, 141 Ga. App. 197, 232 S.E.2d 925 (1977); Porter v. State, 141 Ga. App. 602, 234 S.E.2d 100 (1977); Smith v. General Fin. Corp., 143 Ga. App. 390, 238 S.E.2d 694 (1977); Appling Motors, Inc. v. Todd, 143 Ga. App. 644, 239 S.E.2d 537 (1977); Calloway v. State, 144 Ga. App. 457, 241 S.E.2d 575 (1978); DOT v. Turner, 148 Ga. App. 354, 251 S.E.2d 182 (1978); Brooks v. Fincher, 150 Ga. App. 201, 257 S.E.2d 326 (1979); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35 (1979); Cunningham v. Hodges, 150 Ga. App. 827, 258 S.E.2d 631 (1979); Cawthon Motor Co. v. Scheufler, 153 Ga. App. 282, 265 S.E.2d 96 (1980); South Ga. Brokers, Inc. v. Fidelity Bankers Life Ins. Co., 153 Ga. App. 503, 265 S.E.2d 815 (1980); State Farm Mut. Auto. Ins. Co. v. Chadwick, 154 Ga. App. 394, 268 S.E.2d 436 (1980); Jackson v. State, 154 Ga. App. 514, 268 S.E.2d 784 (1980); Stewart v. State, 246 Ga. 70, 268 S.E.2d 906 (1980); Morris v. State, 164 Ga. App. 42, 296 S.E.2d 247 (1982); Hampton v. State, 250 Ga. 805, 301 S.E.2d 274 (1983); Underwood v. Butler, 166 Ga. App. 527, 304 S.E.2d 729 (1983); McGhee v. State, 253 Ga. 278, 319 S.E.2d 836 (1984); Getz Servs., Inc. v. Perloe, 173 Ga. App. 532, 327 S.E.2d 761 (1985); Nichols v. State, 177 Ga. App. 689, 340 S.E.2d 654 (1986); Petty v. State, 179 Ga. App. 767, 347 S.E.2d 663 (1986); Horton v. State, 258 Ga. 489, 371 S.E.2d 384 (1988); Doughty v. Simpson, 190 Ga. App. 718, 380 S.E.2d 57 (1989); Sweet v. State, 191 Ga. App. 516, 382 S.E.2d 376 (1989); Peebles v. State, 260 Ga. 430, 396 S.E.2d 229 (1990); DOT v. Bales, 197 Ga. App. 862, 400 S.E.2d 21 (1990); Calloway v. State, 199 Ga. App. 272, 404 S.E.2d 811 (1991); Roberts v. State, 261 Ga. 813, 411 S.E.2d 496 (1992); Zampatti v. Tradebank Int'l Franchising Corp., 235 Ga. App. 333, 508 S.E.2d 750 (1998); Mayer v. Wylie, 244 Ga. App. 481, 535 S.E.2d 816 (2000); Roberts v. State, 272 Ga. 822, 537 S.E.2d 86 (2000).

Opinion Testimony Admissible**1. In General**

Admissibility generally. — Opinion testimony is admissible when the question under examination is one of opinion. *Alexander v. State*, 118 Ga. 26, 44 S.E. 851 (1903); *Klein v. State*, 104 Ga. App. 126, 121 S.E.2d 253 (1961); *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

Opinions, even expert opinions, are al-

lowed by way of exception to the general rule that a witness is to give facts observed, but not the expert's conclusions from those facts, and opinions are to be allowed only when there is real helpfulness or necessity to resort to the opinions. *Barnes v. Thomas*, 72 Ga. App. 827, 35 S.E.2d 364 (1945).

Testimony which in the main is a mere statement of fact may be admitted, even though it rests to a certain extent on the application of legal principles. *Gage v. Tiffin Motor Homes, Inc.*, 153 Ga. App. 704, 266 S.E.2d 345 (1980).

Defendant failed to show that defense counsel rendered ineffective assistance, in violation of U.S. Const., amend. 6, on the basis that counsel did not object when one of the victims testified that defendant stabbed the victim on purpose and not by accident, as there was no support for the proposition that such a statement was inadmissible opinion testimony under O.C.G.A. § 24-9-65; even if it were deemed inadmissible, no prejudice was shown to defendant. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

State of mind or mental condition generally. — Person's state of mind or mental condition is properly the subject of opinion testimony, and after narrating the facts and circumstances upon which the person's conclusion is based, a nonexpert witness may express the witness's opinion as to the state of mind or mental condition of another. *O'Kelley v. State*, 175 Ga. App. 503, 333 S.E.2d 838 (1985).

Evidence not challenged. — An opinionative statement of a witness, even though it is a conclusion unsupported by such facts as are necessary to show its correctness, where no objection is urged thereto upon the trial, cannot be challenged for the first time upon review as incompetent and insufficient. *Bailey v. Newberry*, 52 Ga. App. 693, 184 S.E. 357 (1935); *Johnson v. Woodward Lumber Co.*, 76 Ga. App. 152, 45 S.E.2d 294 (1947); *Gazaway v. Secured Ins. Co.*, 109 Ga. App. 428, 136 S.E.2d 531 (1964).

After providing supporting facts. — Witness may give witness's belief or opinion when it is in connection with, and a mental deduction from, the facts which come within the witness's knowledge and to which the witness has testified. *McGinnis v. State*, 31 Ga. 236 (1860); *Executors of Riggins v.*

Brown, 12 Ga. 271 (1862); *Macon & W.R.R. v. Johnson*, 38 Ga. 409 (1868); *Ryder v. State*, 100 Ga. 528, 28 S.E. 246, 62 Am. St. R. 334, 38 L.R.A. 721 (1897); *Yates v. State*, 127 Ga. 813, 56 S.E. 1017 (1907); *Cranshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S.E. 222 (1907); *Glover v. State*, 129 Ga. 717, 59 S.E. 816 (1907); *Ray v. State*, 142 Ga. 655, 83 S.E. 518 (1914); *Bennett v. American Bank & Trust Co.*, 162 Ga. 718, 134 S.E. 781 (1926); *Hill v. State*, 50 Ga. App. 191, 177 S.E. 270 (1934); *Roberts v. Hardin*, 180 Ga. 757, 180 S.E. 634 (1935); *Musselwhite v. Ricks*, 55 Ga. App. 58, 189 S.E. 597 (1936); *Pollard v. Page*, 56 Ga. App. 503, 193 S.E. 117 (1937); *Morgan v. Bell*, 189 Ga. 432, 5 S.E.2d 897 (1939); *Faucette v. State*, 71 Ga. App. 331, 30 S.E.2d 808 (1944); *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944); *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945); *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51 (1946); *Sellers v. Johnson*, 207 Ga. 166, 60 S.E.2d 352 (1950); *McGahee v. Phillips*, 211 Ga. 118, 84 S.E.2d 19 (1954); *Atlantic Coast Line R.R. v. Godard*, 211 Ga. 373, 86 S.E.2d 311 (1955), later appeal, 93 Ga. App. 671, 92 S.E.2d 626 (1956); *Adams v. Adams*, 213 Ga. 875, 102 S.E.2d 566 (1958); *Jones v. State*, 101 Ga. App. 851, 115 S.E.2d 576 (1960); *Wright v. Concrete Co.*, 107 Ga. App. 190, 129 S.E.2d 351 (1962); *English v. Shivers*, 220 Ga. 737, 141 S.E.2d 443 (1965); *Atlanta Stove Works, Inc. v. Hollon*, 112 Ga. App. 862, 146 S.E.2d 358 (1965); *Sasser v. Coastal States Life Ins. Co.*, 113 Ga. App. 17, 147 S.E.2d 5 (1966); *Southern Ry. v. Grogan*, 113 Ga. App. 451, 148 S.E.2d 439 (1966); *Griffin v. State*, 123 Ga. App. 820, 182 S.E.2d 498 (1971); *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973); *State Hwy. Dep't v. Raines*, 129 Ga. App. 123, 199 S.E.2d 96 (1973); *Spencer v. State*, 236 Ga. 697, 224 S.E.2d 910, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 302 (1976); *Galloway v. Banks County*, 139 Ga. App. 649, 229 S.E.2d 127 (1976); *Gaines v. DOT*, 140 Ga. App. 741, 231 S.E.2d 829 (1976); *Allen v. State*, 152 Ga. App. 481, 263 S.E.2d 259 (1979); *Security Life Ins. Co. v. Blich*, 155 Ga. App. 167, 270 S.E.2d 349 (1980); *Classic Restorations, Inc. v. Bean*, 155 Ga. App. 694, 272 S.E.2d 557 (1980); *Leonard v. State*, 157 Ga. App. 37, 276 S.E.2d 94 (1981); *Peterson v.*

Opinion Testimony Admissible (Cont'd)**1. In General** (Cont'd)

RTM Mid-America, Inc., 209 Ga. App. 691, 434 S.E.2d 521 (1993).

Witness may give an opinion on facts stated hypothetically in a question even though those facts have been offered in evidence by other witnesses. *Taylor v. Warren*, 175 Ga. 800, 166 S.E. 225 (1932).

When facts cannot be demonstrated. — Opinion of a nonexpert witness may be received in evidence if the witness observed the matter in issue and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness's place and enable them to equally well draw the inference. *Pride v. State*, 133 Ga. 438, 66 S.E. 259 (1909); *Taylor v. State*, 135 Ga. 622, 70 S.E. 237 (1911); *Jackson v. State*, 148 Ga. 519, 97 S.E. 525 (1918); *Jefferson v. State*, 56 Ga. App. 383, 192 S.E. 644 (1937); *Harris v. State*, 188 Ga. 745, 4 S.E.2d 651 (1939); *Tillman v. State*, 61 Ga. App. 724, 7 S.E.2d 285 (1940); *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944); *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945); *McGahee v. Phillips*, 211 Ga. 118, 84 S.E.2d 19 (1954); *Wilson v. Garrett*, 92 Ga. App. 820, 90 S.E.2d 74 (1955); *Atlantic Coast Line R.R. v. Blount*, 116 Ga. App. 86, 156 S.E.2d 409 (1967).

Opinions from lay witnesses. — Lay witnesses may relate their opinions as to the existence of a fact so long as the opinions are based upon the witnesses' own observations, provided that the witnesses cannot adequately relate those observations without also relating a personal opinion formed through such observations. *Johnson v. Knebel*, 267 Ga. 853, 485 S.E.2d 451 (1997).

2. Specific Examples

Appearance and conduct. — See *Perdue v. State*, 135 Ga. 277, 69 S.E. 184 (1910); *Leonard v. State*, 157 Ga. App. 37, 276 S.E.2d 94 (1981); *Roberts v. State*, 232 Ga. App. 745, 503 S.E.2d 614 (1998); *Thompson v. State*, 240 Ga. App. 26, 521 S.E.2d 876 (1999).

Trial court properly admitted a witness's testimony about the witness's observations of defendant's appearance and behavior and the assumptions that the witness made based upon such observations; the witness was not asked to, nor did the witness, express an opinion about whether defendant shot ei-

ther or both of the victims or whether defendant possessed a firearm during the commission of any felony. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Cause of collision. — See *Avant Trucking Co. v. Stallion*, 159 Ga. App. 198, 283 S.E.2d 7 (1981).

Cause of death. — See *Everett v. State*, 62 Ga. 65 (1878); *McLain v. State*, 71 Ga. 279 (1883); *Lanier v. State*, 141 Ga. 17, 80 S.E. 5 (1913); *Bullard v. Metropolitan Life Ins. Co.*, 31 Ga. App. 641, 122 S.E. 75 (1924).

Correctional officer's testimony. — With regard to a defendant's habeas corpus challenge to a finding that the defendant was not mentally retarded, a trial court did not err in the admission of the testimony of a correctional officer, who was called by the state to testify regarding the defendant's behavior while incarcerated with regard to testimony that the defendant was not housed in the area of the institution with those inmates the officer had been told were mentally retarded, as the officer's testimony was relevant to the issue of the defendant's adaptive skills and was not unduly prejudicial because the officer clarified that the officer was not diagnosing anyone. The testimony also did not constitute an impermissible lay opinion because the officer was never asked for, nor did the officer ever give, an opinion as to the ultimate issue, namely whether the defendant was or was not mentally retarded. *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, U.S. , 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008).

Damages. — See *Atlanta S.R.R. v. Walker*, 93 Ga. 462, 21 S.E. 48 (1893); *City Elec. Ry. v. Smith*, 121 Ga. 663, 49 S.E. 724 (1905).

Owners failed to present competent evidence of damages under O.C.G.A. § 11-2-714(2) because an owner's affidavit lacked a proper foundation as the owner failed to testify that any of the owner's past purchases included the purchase of a vehicle with the defects at issue, the owner did not have any specialized knowledge, and the owner's testimony was not supported by objective information on vehicles found in published valuation guides, such as the "Blue Book"; the value of the defective vehicle could not be established by the repair invoices as few, if any, of the repairs

reflected costs incurred by the owners. *Hill v. Mercedes-Benz USA, LLC*, 274 Ga. App. 826, 619 S.E.2d 353 (2005).

Trial court erred in entering summary judgment for a manufacturer on the owners' claim for damages due to the diminished value of a vehicle since the owner's opinion as to the diminished value of the vehicle was supported by: (1) experience in purchasing three other cars; (2) familiarity with information relating to the value of the vehicle; (3) research into the manufacturer's cars; (4) discussions as to price and features with several dealerships; (5) knowledge and familiarity with the vehicle and the vehicle's defects acquired over a three-year time period; and (6) use of the car, the car's mileage, and purchase price. *Hill v. Mercedes Benz USA, LLC*, 274 Ga. App. 826, 619 S.E.2d 353 (2005).

Dangerousness. — Testimony of a golf course architect as to the dangerousness of a golf cart path was the architect's opinion and was admissible as such. *American Golf Corp. v. Manley*, 222 Ga. App. 7, 473 S.E.2d 161 (1996).

Defendant's actions not accidental. — Any error in allowing a police officer to testify to the officer's opinion that defendant did not accidentally accelerate and hit another officer's car was harmless as the officer could properly testify that defendant could have escaped without driving straight at the other officer and the officer's car, and there was ample evidence to support the officer's opinion as two officers testified that defendant accelerated straight toward the officer and the officer's car, even though there was room for defendant to drive away without hitting the officer's car, a videotape was played for the jury, and there was testimony that the videotape showed that when defendant accelerated, defendant aimed defendant's car straight toward the officer and the officer's car. *Lopez v. State*, 267 Ga. App. 178, 598 S.E.2d 898 (2004).

Distance. — See *Hansberger Motor Transp. Co. v. Pate*, 51 Ga. App. 877, 181 S.E. 796 (1935).

Divorce. — See *West v. West*, 199 Ga. 378, 34 S.E.2d 545 (1945).

Driving too fast for conditions testimony from expert. — In a personal injury case brought against a driver, a police officer, testifying as an expert on automobile colli-

sions, stated in response to a hypothetical question that the driver was driving too fast for conditions if the driver was driving 55 miles per hour. As the officer did not offer an ultimate opinion as to whether the driver was at fault in the accident or was negligent, the officer's testimony was admissible. *Kennebeck v. Glover*, 294 Ga. App. 822, 670 S.E.2d 459 (2008).

Embarrassment. — See *Glover v. State*, 15 Ga. App. 44, 82 S.E. 602 (1914).

Excitement and alarm. — See *Roberts v. State*, 123 Ga. 146, 51 S.E. 374 (1905).

Expert witnesses. — See *Hook v. Stovall, Dunn & Co.*, 30 Ga. 418 (1860); *Allison v. Wall*, 121 Ga. 822, 49 S.E. 831 (1905); *Morgan v. Bell*, 189 Ga. 432, 5 S.E.2d 897 (1939); *State Hwy. Dep't v. Parker*, 114 Ga. App. 270, 150 S.E.2d 875 (1966); *Lingo v. State*, 224 Ga. 333, 162 S.E.2d 1, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455 (1968); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981).

Expert on similarly situated driver. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the spouse's expert to testify as to whether a driver in the victim's position could discern that the victim was approaching a more major road and would therefore be required to yield. In light of the witness's familiarity with the intersection gained during a site visit, as well as the photographs presented, it could not be said that the trial court abused the court's discretion in allowing the witness to testify as to a similarly-situated driver's opportunity to discern the nature of the upcoming intersection. *DOT v. Baldwin*, 292 Ga. App. 816, 665 S.E.2d 898 (2008).

Fair trial issue. — See *Jones v. State*, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

Gunshot wounds. — See *Nunn v. State*, 143 Ga. 451, 85 S.E. 346 (1915); *Harris v. State*, 74 Ga. App. 614, 40 S.E.2d 664 (1946).

Health of witness. — See *Head v. Georgia Power Co.*, 70 Ga. App. 32, 27 S.E.2d 339 (1943).

Hearsay. — See *Hiatt v. State*, 133 Ga. App. 111, 210 S.E.2d 22 (1974).

Hypothetical questions. — See *Taylor v. Warren*, 175 Ga. 800, 166 S.E. 225 (1932); *Lingo v. State*, 224 Ga. 333, 162 S.E.2d 1, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455 (1968); *Lashley v. Ford Motor*

Opinion Testimony Admissible (Cont'd)

2. Specific Examples (Cont'd)

Co., 359 F. Supp. 363 (M.D. Ga. 1972), *aff'd*, 480 F.2d 158 (5th Cir.), *cert. denied*, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973); *Bowers v. State*, 153 Ga. App. 894, 267 S.E.2d 309 (1980); *Xiong v. Landford*, 226 Ga. App. 126, 485 S.E.2d 534 (1997).

Identity. — Under O.C.G.A. § 24-9-65, a lay witness who had been a friend of the defendant's for 22 years could give an opinion as to whether the defendant was the person pictured in a videotape. The quality of the videotape and still photos taken from the videotape was such that it was not within the ability of average jurors to decide the issue for themselves; the witness testified that the defendant's appearance had changed in the four years between the recording and the trial; and the witness's testimony was based on the witness's personal observations of the defendant over the years. *Dawson v. State*, 283 Ga. 315, 658 S.E.2d 755 (2008), *cert. denied*, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Trial court did not abuse its discretion in admitting a deputy's lay opinion testimony identifying the defendant on a surveillance videotape because the deputy's testimony was sufficient to identify the defendant as the perpetrator of the crime pursuant to O.C.G.A. § 24-4-8, and the testimony was probative of a fact in issue and based on the deputy's observations of the defendant at the time the surveillance photograph was taken; because the deputy testified to having previously worked at the police department and had met the defendant on several occasions, the deputy was in a unique position to recognize the defendant, given the deputy's familiarity with the defendant's personal appearance before and at the time of the offense. *Strickland v. State*, 302 Ga. App. 44, 690 S.E.2d 638 (2010).

Identity of material. — See *Faucette v. State*, 71 Ga. App. 331, 30 S.E.2d 808 (1944); *Wortham v. State*, 158 Ga. App. 19, 279 S.E.2d 287 (1981); *Wright v. State*, 220 Ga. App. 233, 469 S.E.2d 381 (1996).

Intoxication. — See *Pierce v. State*, 53 Ga. 365 (1874); *Suggs v. State*, 9 Ga. App. 830, 72 S.E. 287 (1911); *Grier v. State*, 72 Ga. App. 633, 34 S.E.2d 642 (1945); *Fountain v. Smith*, 103 Ga. App. 192, 118 S.E.2d 852 (1961).

Mental condition. — See *Dennis v. Weekes*, 51 Ga. 24 (1874); *Strickland v. State*, 137 Ga. 115, 72 S.E. 922 (1911); *Goss v. State*, 14 Ga. App. 402, 81 S.E. 247 (1914); *Dyar v. Dyar*, 161 Ga. 615, 131 S.E. 535 (1926); *Taylor v. Warren*, 175 Ga. 800, 166 S.E. 225 (1932); *Morgan v. Bell*, 189 Ga. 432, 5 S.E.2d 897 (1939); *Espy v. Preston*, 199 Ga. 608, 34 S.E.2d 705 (1945); *Jarrard v. State*, 206 Ga. 112, 55 S.E.2d 706 (1949); *English v. Shivers*, 220 Ga. 737, 141 S.E.2d 443 (1965); *Lingo v. State*, 224 Ga. 333, 162 S.E.2d 1, *cert. denied*, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455 (1968); *Dix v. State*, 238 Ga. 209, 232 S.E.2d 47 (1977); *Currelley v. State*, 145 Ga. App. 29, 243 S.E.2d 307 (1978); *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916 (1980), *overruled on other grounds*, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993); *Leonard v. State*, 157 Ga. App. 37, 276 S.E.2d 94 (1981).

In a transfer hearing, a child's mental condition may be established by the testimony of a nonexpert witness, such as a court services worker, provided the witness gives sufficient facts and circumstances to establish the basis for the witness's opinion. *L.K.F. v. State*, 173 Ga. App. 770, 328 S.E.2d 394 (1985).

Odor identification. — See *Green v. State*, 125 Ga. 742, 54 S.E. 724 (1906).

Personal injury damages. — See *Black & White Cab Co. v. Clark*, 67 Ga. App. 170, 19 S.E.2d 570 (1942); *Moore v. Graham*, 221 Ga. App. 616, 472 S.E.2d 152 (1996).

Quality of product. — See *Wilcox v. State*, 8 Ga. App. 536, 69 S.E. 1086 (1911).

Rape. — See *Epps v. State*, 216 Ga. 606, 118 S.E.2d 574, *cert. denied*, 368 U.S. 849, 82 S. Ct. 81, 7 L. Ed. 2d 47 (1961).

Sanity. — See *Henderson v. State*, 157 Ga. App. 621, 278 S.E.2d 164 (1981).

Size. — See *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947).

Shoe size is matter within the common knowledge, experience, and education of mankind. *Buchanan v. State*, 168 Ga. App. 365, 308 S.E.2d 860 (1983).

Solvency or insolvency. — See *Crawford v. Andress*, 6 Ga. 244 (1849); *Cabaniss v. State*, 8 Ga. App. 129, 68 S.E. 849 (1910); *Spence v. State*, 20 Ga. App. 61, 92 S.E. 555, *cert. denied*, 20 Ga. App. 832 (1917); *Lamb v. Sewell*, 20 Ga. App. 250, 92 S.E. 1011 (1917); *Gay v. Smith*, 51 Ga. App. 615, 181 S.E. 129

(1935); *Bell v. State*, 52 Ga. App. 249, 183 S.E. 93 (1935); *Hill v. Kirk*, 78 Ga. App. 310, 50 S.E.2d 785 (1948); *Western & Atl. R.R. v. Hart*, 95 Ga. App. 810, 99 S.E.2d 302 (1957); *Hatcher v. State*, 175 Ga. App. 768, 334 S.E.2d 709 (1985).

Speed. — Layman's opinion of speed is admissible when the layman has testified to the facts upon which the opinion is based. *Wright v. State*, 205 Ga. App. 149, 421 S.E.2d 331 (1992).

Stopping distance of vehicle. — See *Fouts v. Builders Transp., Inc.*, 222 Ga. App. 568, 474 S.E.2d 746 (1996).

Trial court did not err in admitting the testimony of the retired police officer as to the police officer's opinion about the most reliable means of suspect identification as that testimony, which was lay opinion testimony, was based on the police officer's own experience and observations, and referred to a matter within the scope of the average juror's knowledge. *Dillingham v. State*, 275 Ga. 665, 571 S.E.2d 777 (2002).

Time. — See *Allison v. Wall*, 121 Ga. 822, 49 S.E. 831 (1905); *Georgia Ry. & Power Co. v. Belote*, 20 Ga. App. 454, 93 S.E. 62 (1917).

Ultimate issue. — See *Morgan v. Bell*, 189 Ga. 432, 5 S.E.2d 897 (1939); *Weather Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945); *Galloway v. Banks County*, 139 Ga. App. 649, 229 S.E.2d 127 (1976); *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

Trial court did not err in allowing the witnesses in defendant's trial for possession of illegal gambling machines to testify that the machines were "gambling devices," as the jury had to determine whether defendant sold a machine that detectives testified was set up for gambling to a witness, who then sold it to the detectives, and whether that machine was illegal under O.C.G.A. § 16-12-20(2); describing the machines the detectives seized as "gambling machines" did not answer those questions. *Jones v. State*, 276 Ga. App. 810, 625 S.E.2d 4 (2005).

Undue influence. — See *Howell v. Howell*, 59 Ga. 145 (1877).

Unusual or special situation. — See *Allison v. Wall*, 121 Ga. 822, 49 S.E. 831 (1905).

Value. — See *Ferguson v. Bank of Dawson*, 50 Ga. App. 604, 179 S.E. 236 (1935); *Simmons v. Simmons*, 194 Ga. 649, 22 S.E.2d

399 (1942); *Firemen's Ins. Co. v. Allmond*, 105 Ga. App. 763, 125 S.E.2d 545 (1962); *State Hwy. Dep't v. Parker*, 114 Ga. App. 270, 150 S.E.2d 875 (1966); *Edwards v. State*, 116 Ga. App. 80, 156 S.E.2d 518 (1967); *Johnson v. Rooks*, 116 Ga. App. 394, 157 S.E.2d 527 (1967); *Sisk v. Carney*, 121 Ga. App. 560, 174 S.E.2d 456 (1970); *Nelson v. Cheek*, 127 Ga. App. 31, 192 S.E.2d 504 (1972); *Hasty v. Meaders*, 130 Ga. App. 62, 202 S.E.2d 263 (1973); *Hiatt v. State*, 133 Ga. App. 111, 210 S.E.2d 22 (1974); *Clark v. Peck*, 134 Ga. App. 868, 216 S.E.2d 687 (1975); *Gaines v. DOT*, 140 Ga. App. 741, 231 S.E.2d 829 (1976); *Ricker v. Hopkins Chevrolet, Inc.*, 147 Ga. App. 358, 248 S.E.2d 720 (1978); *Citizens & S. Nat'l Bank v. Williams*, 147 Ga. App. 205, 249 S.E.2d 289 (1978); *DOT v. Brown*, 155 Ga. App. 622, 271 S.E.2d 876 (1980); *Four Oaks Properties, Inc. v. Carusi*, 156 Ga. App. 422, 274 S.E.2d 783 (1980); *Maddox v. State*, 157 Ga. App. 696, 278 S.E.2d 480 (1981).

In a condemnation proceeding, in which the land owner maintained that the land's highest and best use was as a wetlands mitigation bank, while the land owner's president had no specific expertise in wetlands mitigation, the owner's 30 years experience in real estate development and the owner's familiarity with the land's topography and hydrology qualified the owner to give an opinion as to its value as a mitigation bank. *DOT v. Southeast Timberlands, Inc.*, 263 Ga. App. 805, 589 S.E.2d 575 (2003).

Visibility. — See *Carnes v. Woodall*, 233 Ga. App. 797, 505 S.E.2d 537 (1998).

Opinion Testimony Not Admissible

1. In General

Intent or purpose contrary to statute. — Witness may not state a purpose or an intended result of a levy, seizure, and notice which purpose or intended result is contrary to the provisions of a plain statute, or constructions thereof which have been made by the courts. *Summer v. Allison*, 127 Ga. App. 217, 193 S.E.2d 177 (1972).

Existence of a fact. — When the issue shall be to the existence of a fact, opinions generally are inadmissible. *Jones v. State*, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

Conclusion cannot be based on hearsay statements. — Police officer who investigates an accident cannot base the officer's opin-

Opinion Testimony Not**Admissible (Cont'd)****1. In General (Cont'd)**

ion as to the manner in which the accident occurred upon hearsay statements which the officer receives during an investigation unless the statements are a part of the res gestae. *Avant Trucking Co. v. Stallion*, 159 Ga. App. 198, 283 S.E.2d 7 (1981).

Conclusions. — It is error to permit a witness over timely objection to testify to a conclusion. *Hammock v. McBride*, 6 Ga. 178 (1849); *Franklin v. Mayor of Macon*, 12 Ga. 257 (1852); *Parker v. Chambers*, 24 Ga. 518 (1858); *Howell v. Howell*, 59 Ga. 145 (1877); *Atlanta Masonic Temple Co. v. City of Atlanta*, 162 Ga. 244, 133 S.E. 864 (1926); *Central of Ga. Ry. v. Evans*, 35 Ga. App. 438, 134 S.E. 122 (1926); *Granger v. National Convoy & Trucking Co.*, 62 Ga. 294, 7 S.E.2d 915 (1940); *Cooper v. State*, 197 Ga. 611, 30 S.E.2d 177 (1944); *Sanders v. Chandler*, 71 Ga. App. 337, 30 S.E.2d 813 (1944); *Jones v. State*, 75 Ga. App. 610, 44 S.E.2d 174 (1947); *Brown-Rogers-Dixon Co. v. Southern Ry.*, 79 Ga. App. 449, 53 S.E.2d 702 (1949); *Central of Ga. Ry. v. Brower*, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962); *State Hwy. Dep't v. Raines*, 129 Ga. App. 123, 199 S.E.2d 96 (1973); *Marshall v. State*, 154 Ga. App. 327, 268 S.E.2d 383 (1980).

Witness cannot state witness's mere conclusion that others than the witness know a fact. *Summer v. Allison*, 127 Ga. App. 217, 193 S.E.2d 177 (1972).

Witness cannot state a mere conclusion that others than the witness knew a particular fact since it is not established that the witness was qualified to testify as to the knowledge of others. *Marshall v. State*, 154 Ga. App. 327, 268 S.E.2d 383 (1980).

Witness invading province of jury. — Witness cannot state an opinion or conclusion where the data or facts are such that a jury can make the jury's own calculation or conclusions. *Blackman v. State*, 80 Ga. 785, 7 S.E. 626 (1888); *Robinson v. State*, 128 Ga. 254, 57 S.E. 315 (1907); *Caswell v. State*, 5 Ga. App. 483, 63 S.E. 566 (1909); *Glover v. State*, 15 Ga. App. 44, 82 S.E. 602 (1914); *Hayes v. State*, 16 Ga. App. 20, 84 S.E. 497 (1915); *Bugg v. State*, 17 Ga. App. 211, 86 S.E. 405 (1915); *Hansberger Motor Transp.*

Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796 (1935); *Harris v. State*, 188 Ga. 245, 4 S.E.2d 651 (1939); *Whatley v. Henry*, 65 Ga. App. 668, 16 S.E.2d 214 (1941); *Simmons v. Simmons*, 194 Ga. 649, 22 S.E.2d 399 (1942); *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944); *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945); *Barnes v. Thomas*, 72 Ga. App. 827, 35 S.E.2d 364 (1945); *McGahee v. Phillips*, 211 Ga. 118, 84 S.E.2d 19 (1954); *Klein v. State*, 104 Ga. App. 126, 121 S.E.2d 253 (1961); *Gazaway v. Secured Ins. Co.*, 109 Ga. App. 428, 136 S.E.2d 531 (1964); *Ford Motor Co. v. Hanley*, 128 Ga. App. 311, 196 S.E.2d 454 (1973); *Galloway v. Banks County*, 139 Ga. App. 649, 229 S.E.2d 127 (1976); *Tam v. Newsome*, 141 Ga. App. 76, 232 S.E.2d 613 (1977).

2. Specific Examples

Accident victims. — In an action against the Georgia Department of Transportation alleging negligent placement of safety devices at an intersection, the trial court properly excluded the testimony of a judge who was injured in an accident at an intersection located in the same road construction project where the plaintiffs' family members died, because the judge's accident occurred at a different intersection and the judge was not familiar with the intersection where the plaintiffs' family members died. *McCorkle v. DOT*, 257 Ga. App. 397, 571 S.E.2d 160 (2002).

Conclusion of law. — See *Morgan v. Bell*, 189 Ga. 432, 5 S.E.2d 897 (1939); *Wells v. State*, 151 Ga. App. 416, 260 S.E.2d 374 (1979); *Gage v. Tiffin Motor Homes, Inc.*, 153 Ga. App. 704, 266 S.E.2d 345 (1980).

While a sheriff deputy's opinion that the defendant's string of harassing phone messages amounted to aggravated stalking in violation of a protective order was inadmissible testimony on an ultimate issue, the error was harmless given the defendant's own testimony establishing the elements of the offense without dispute. *Shafer v. State*, 285 Ga. App. 748, 647 S.E.2d 274 (2007), cert. denied, 2007 Ga. LEXIS 642 (Ga. 2007).

Conspiracy. — See *Mercer v. Woodard*, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Contents of bottles. — See *Gales v. State*, 14 Ga. App. 450, 81 S.E. 364 (1914).

Damages. — See *Central R.R. & Banking Co. v. Kelly*, 58 Ga. 107 (1877); *Carter v. Carter Elec. Co.*, 156 Ga. 297, 119 S.E. 737 (1923).

Experts. — Opinion of an expert accident reconstructionist was not admissible as lay testimony since the expert testified that it was based upon the expert's study of photographs of damaged cars; since the same photographs were before the jury, it was not necessary for the witness to relate the witness's personal opinion in order to adequately relate that information. *Johnson v. Knebel*, 267 Ga. 853, 485 S.E.2d 451 (1997).

Expert opinion inadmissible as supporting facts not yet in record. — Trial court correctly ruled that a psychologist could not testify that at the time the defendant committed several crimes the defendant did not know right from wrong because the defendant was under the influence of the drug GHB because at the time the defendant sought to present that testimony, there was no evidence that the defendant had actually ingested the drug or was under the drug's influence. *Kirkland v. State*, 292 Ga. App. 73, 663 S.E.2d 408 (2008).

Hair analysis results cannot be used to make positive identification of an individual. *Hudson v. State*, 166 Ga. App. 660, 305 S.E.2d 409 (1983).

In rape prosecution, defendant cannot ask victim's mother whether she believed daughter's statements about the offense or could tell her daughter was lying from her body language. *Nichols v. State*, 221 Ga. App. 600, 473 S.E.2d 491 (1996).

Inference from facts in testimony of others. — See *Hook v. Stovall, Dunn & Co.*, 30 Ga. 418 (1860); *Southern Mut. Ins. Co. v. Hudson*, 113 Ga. 434, 38 S.E. 964 (1901); *Taylor v. Warren*, 175 Ga. 800, 166 S.E. 225 (1932); *Murray v. State*, 201 Ga. 201, 39 S.E.2d 842 (1946); *Jones v. State*, 75 Ga. App. 610, 44 S.E.2d 174 (1947).

Inference requiring mixture of law and fact. *Gage v. Tiffin Motor Homes, Inc.*, 153 Ga. App. 704, 266 S.E.2d 345 (1980); *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

Intent of deceased. — See *Hudgins v. State*, 2 Ga. 173 (1847); *Hawkins v. State*, 25 Ga. 207, 71 Am. Dec. 166 (1858).

Intent or purpose of another. — See *Summer v. Allison*, 127 Ga. App. 217, 193 S.E.2d 177 (1972).

Lay opinions. — Trial court did not err when the court did not permit a defense witness to give opinion testimony regarding an experiment the witness conducted at the scene of the crime because the issue of the visibility of the bulge produced by an object placed under carpeting since the defendant allegedly hid a murder weapon at the scene of the crime was not one of opinion. *Jones v. State*, 277 Ga. 36, 586 S.E.2d 224 (2003).

Because the personal opinions of three potential witnesses were based on the defendant's work, and the limited interactions attendant thereto, and the witnesses could not offer any opinion and had no personal knowledge of the defendant's general reputation in the community, the failure to call the witnesses at trial for that purpose did not prejudice defendant's case. *Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

Measurement of missing article. — See *Williams v. State*, 145 Ga. 177, 88 S.E. 958 (1916).

Mental condition. — See *Morgan v. Bell*, 189 Ga. 432, 5 S.E.2d 897 (1939); *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942); *McGahee v. Phillips*, 211 Ga. 118, 84 S.E.2d 19 (1954).

Paranoia. — Since paranoia is a medical term relating to a mental disorder, only a qualified expert such as a psychiatrist, psychologist, or medical doctor would be competent to diagnose and define such a mental disorder. *Ellis v. State*, 168 Ga. App. 757, 309 S.E.2d 924 (1983).

Proving opinions of others. — See *Wynes v. State*, 182 Ga. 434, 185 S.E. 711 (1936).

Self-defense. — On a trial for murder, as to the defendant's theory of self-defense, apprehensions or opinions of third parties, that the accused is in imminent danger, are not relevant. But facts from which apprehension might reasonably be inferred, as distinct from opinions, are relevant when stated or shown by third parties. *Lancaster v. State*, 250 Ga. 871, 301 S.E.2d 882 (1983).

Suicide. — See *Trammell v. State*, 18 Ga. App. 487, 89 S.E. 606 (1916).

"Understanding" of ownership. — See *Brooks v. State*, 19 Ga. App. 3, 90 S.E. 989 (1916).

Ultimate issue. — See *Morgan v. Bell*, 189 Ga. 432, 5 S.E.2d 897 (1939); *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

Opinion Testimony Not**Admissible (Cont'd)****2. Specific Examples (Cont'd)**

Witness's medical condition. — Any statement of "opinion" made by or attributed to a nonexpert workers' compensation claimant which was to the effect that the claim-

ant's CT scan of October 1983 (which was not in evidence) may have showed a second herniated disc at L4 was nonprobative hearsay as to that purported fact. Under O.C.G.A. § 24-9-65, lay opinions must be based upon facts, not hearsay. *Fidelity & Cas. Ins. Co. v. Cigna/Pacific Employers Ins. Co.*, 180 Ga. App. 159, 348 S.E.2d 702 (1986).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Identification of Bite Marks, 75 POF3d 317.

C.J.S. — 32 C.J.S., Evidence, §§ 586 et seq., 608 et seq., 751 et seq., 768.

ALR. — Effect of witness qualifying his testimony with "I think," "I believe," or the like, when expressing thereby indistinct observation or recollection, 4 ALR 979.

Admissibility of witness's conclusion as to care exercised in driving automobile, 66 ALR 1117.

Right of witness to give summary based on inspection of number of documents, 66 ALR 1206.

Testimony by witness as to emotions of fear or other mental state manifested by another, 69 ALR 1168.

Opinion evidence as to speed of automobile or motorcycle, 70 ALR 540; 94 ALR 1190.

Competency of testimony of nonexperts on question of sanity or insanity in criminal cases, 72 ALR 579.

Right of witness to state conclusion as to immoral purpose or intent of another, 73 ALR 868.

Opinion evidence as to condition of automobile or other motor vehicle, 77 ALR 559.

Right of witness to state his opinions or conclusion, based on examination of books and accounts, as to solvency or insolvency, 81 ALR 1431.

Opinion evidence directly as to the ultimate question of the amount of damage to property, 86 ALR 1449.

Opinion of court or counsel or other person learned in law as a factor in determining marketability of title, 90 ALR 609.

Right of witness to testify as a conclusion or as an ultimate fact to existence or nonexistence of agency or relationship of master and servant, 90 ALR 749.

Admissibility and effect of testimony of lay witness as to existence of a particular disease,

or as to apparent physical condition of a person, on the issue of existence of particular disease, 93 ALR 482.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 ALR 974.

Opinion evidence as to distance within which automobile can be stopped, 135 ALR 1404.

Admissibility of opinion evidence as to cause of death, disease, or injury, 136 ALR 965; 66 ALR2d 1082.

Proper form of question to witness or of testimony of witness, as regards mental condition of person whose capacity to execute a will is in issue, 155 ALR 281.

Admissibility on question of damages in action for libel or slander of testimony as to the impression or effect of the matter upon the minds of individuals, 12 ALR2d 1005.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Admissibility of opinion evidence as to whether vehicle involved in collision was standing still or moving, 33 ALR2d 1250.

Admissibility of opinion evidence as to the cause of an accident or occurrence, 38 ALR2d 13.

Requisite foundation or predicate to permit nonexpert witness to give opinion, in a civil action, as to sanity, mental competency, or mental condition, 40 ALR2d 15.

Admissibility of opinion evidence of lay witnesses as to diseases and physical condition of animals, 49 ALR2d 932.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted, 56 ALR2d 1447.

Statement of belief or opinion as perjury, 66 ALR2d 791.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, 66 ALR2d 1048.

Admissibility and probative effect of testimony that motor vehicle was going "fast" or the like, 92 ALR2d 1391.

Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness, 10 ALR3d 258.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator or testatrix, 17 ALR3d 503.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts, 29 ALR3d 248.

Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident, 33 ALR3d 1405.

Admissibility of nonexpert opinion testimony as to weather conditions, 56 ALR3d 575.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 ALR3d 783.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 ALR5th 749.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case, 87 ALR5th 693.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused, 1 ALR6th 657.

Admissibility of expert or opinion evidence — Supreme court cases, 177 ALR Fed. 77.

24-9-66. Market value as opinion evidence; who may testify as to value.

Direct testimony as to market value is in the nature of opinion evidence. One need not be an expert or dealer in the article in question but may testify as to its value if he has had an opportunity for forming a correct opinion. (Civil Code 1895, § 5286; Civil Code 1910, § 5875; Code 1933, § 38-1709.)

History of Code section. — This Code section is derived from the decision in *Central R.R. & Banking Co. v. Skellie*, 86 Ga. 686, 12 S.E. 1017 (1891).

Law reviews. — For comment on *Hoard v. Wiley*, 113 Ga. App. 328, 147 S.E.2d 782 (1966), see 3 Ga. St. B.J. 476 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DETERMINATION OF MARKET VALUE

APPLICATION IN SPECIFIC CASES

General Consideration

"Market value" defined. — What is meant by market value of property is what it will bring when sold for cash by a person ready and willing to sell, but under no obligation to sell, and when bought by a person ready and willing to buy, but under no obligation to buy. *Housing Auth. v. Spink*, 91 Ga. App. 72, 85 S.E.2d 80 (1954).

Duty of trial court. — Determination as to whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis for expressing an opinion is for the trial court. *DOT v.*

McLaughlin, 163 Ga. App. 1, 292 S.E.2d 435, cert. denied, 250 Ga. 10, 297 S.E.2d 217 (1982), overruled on other grounds, 264 Ga. 393, 444 S.E.2d 734 (1994).

Cited in *Central Mfrs. Mut. Ins. Co. v. Graham*, 24 Ga. App. 199, 99 S.E. 434 (1919); *Blaylock v. Walker County Bank*, 36 Ga. App. 377, 136 S.E. 924 (1927); *Edwards v. Smith*, 42 Ga. App. 730, 157 S.E. 348 (1931); *Griffeth v. Wilmore*, 46 Ga. App. 481, 167 S.E. 914 (1933); *Carr v. State*, 60 Ga. App. 590, 4 S.E.2d 500 (1939); *Harris v. State*, 191 Ga. 243, 12 S.E.2d 64 (1940); *Hadden v. Fuqua*, 194 Ga. 621, 22 S.E.2d 377 (1942); *Albany Fed. Sav. & Loan Ass'n v.*

General Consideration (Cont'd)

Henderson, 200 Ga. 79, 36 S.E.2d 330 (1945); Heughan v. State, 82 Ga. App. 640, 61 S.E.2d 685 (1950); Ward v. Nance, 102 Ga. App. 201, 115 S.E.2d 781 (1960); Spielberg v. McEntire, 105 Ga. App. 545, 125 S.E.2d 134 (1962); Clemones v. Alabama Power Co., 107 Ga. App. 489, 130 S.E.2d 600 (1963); Central Chevrolet Co. v. Ballentine Motors of Augusta, Inc., 112 Ga. App. 618, 145 S.E.2d 750 (1965); Harper v. Green, 115 Ga. App. 525, 154 S.E.2d 762 (1967); Taber Pontiac, Inc. v. Osborne, 116 Ga. App. 274, 157 S.E.2d 33 (1967); Noble v. State Hwy. Dep't, 117 Ga. App. 33, 159 S.E.2d 715 (1967); Gainesville Stone Co. v. Parker, 224 Ga. 819, 165 S.E.2d 296 (1968); Wilkins v. Hester, 119 Ga. App. 389, 167 S.E.2d 167 (1969); Cordell Ford Co. v. Mullis, 121 Ga. App. 123, 173 S.E.2d 120 (1970); Hwy. Dep't v. Peters, 121 Ga. App. 167, 173 S.E.2d 253 (1970); Georgia Power Co. v. Slappey, 121 Ga. App. 534, 174 S.E.2d 361 (1970); Crowe v. Harrell, 122 Ga. App. 7, 176 S.E.2d 190 (1970); Tri-County Gas Co. v. Brooker, 122 Ga. App. 522, 177 S.E.2d 806 (1970); State Hwy. Dep't v. Chance, 122 Ga. App. 600, 178 S.E.2d 212 (1970); City of Atlanta v. Layton, 123 Ga. App. 432, 181 S.E.2d 313 (1971); Ocilla Truck & Implement Co. v. Nolan, 124 Ga. App. 417, 184 S.E.2d 48 (1971); Rutledge v. Glass, 125 Ga. App. 549, 188 S.E.2d 261 (1972); State Hwy. Dep't v. Raines, 129 Ga. App. 123, 199 S.E.2d 96 (1973); Martin v. Newton, 129 Ga. App. 735, 201 S.E.2d 31 (1973); DeKalb County v. McFarland, 231 Ga. 649, 203 S.E.2d 495 (1974); Millcreek Properties, Inc. v. Gregory, 136 Ga. App. 511, 221 S.E.2d 685 (1975); Carroll-Leslie Bldrs., Inc. v. Serwitz, 136 Ga. App. 721, 222 S.E.2d 178 (1975); Housing Auth. v. Millwood, 138 Ga. App. 610, 226 S.E.2d 766 (1976); King v. Sinyard, 139 Ga. App. 14, 227 S.E.2d 834 (1976); Gordon County Bd. of Tax Assessors v. Aldon Indus., 237 Ga. 527, 228 S.E.2d 905 (1976); Butts v. State, 141 Ga. App. 119, 232 S.E.2d 634 (1977); Hudson v. Miller, 142 Ga. App. 331, 235 S.E.2d 773 (1977); Lee v. Huie & Powell, Inc., 142 Ga. App. 528, 236 S.E.2d 506 (1977); Smith v. General Fin. Corp., 143 Ga. App. 390, 238 S.E.2d 694 (1977); Hood v. Hallman, 143 Ga. App. 507, 239 S.E.2d 194 (1977); American Reliable Ins. Co. v.

Woodward, 143 Ga. App. 652, 239 S.E.2d 543 (1977); DOT v. Turner, 148 Ga. App. 354, 251 S.E.2d 182 (1978); Mallett v. Fulford, 149 Ga. App. 773, 256 S.E.2d 49 (1979); Shipman v. Horizon Corp., 151 Ga. App. 242, 259 S.E.2d 221 (1979); Lakeview Estates Homeowners Corp. v. Hilltop Enters. of Ga., Inc., 153 Ga. App. 323, 265 S.E.2d 120 (1980); State Farm Mut. Auto. Ins. Co. v. Chadwick, 154 Ga. App. 394, 268 S.E.2d 436 (1980); Ford Motor Credit Co. v. Spicer, 156 Ga. App. 541, 275 S.E.2d 116 (1980); Francis v. Cook, 248 Ga. 225, 281 S.E.2d 548 (1981); Georgia Power Co. v. Bishop, 162 Ga. App. 122, 290 S.E.2d 328 (1982); Zohbe v. First Nat'l Bank, 162 Ga. App. 604, 292 S.E.2d 444 (1982); In re J.C., 163 Ga. App. 822, 296 S.E.2d 117 (1982); Standard Guar. Ins. Co. v. Advance Well Servs., Inc., 167 Ga. App. 314, 306 S.E.2d 388 (1983); Croft v. Kamens, 171 Ga. App. 105, 318 S.E.2d 809 (1984); Oglethorpe Realty Co. v. Hazzard, 172 Ga. App. 98, 321 S.E.2d 820 (1984); Getz Servs., Inc. v. Perloe, 173 Ga. App. 532, 327 S.E.2d 761 (1985); DOT v. Gunnels, 175 Ga. App. 632, 334 S.E.2d 197 (1985); Hankinson v. Rackley, 177 Ga. App. 734, 341 S.E.2d 231 (1986); Smith v. Millen Properties, Inc., 179 Ga. App. 165, 345 S.E.2d 625 (1986); Canal Ins. Co. v. Savannah Bank & Trust Co., 181 Ga. App. 520, 352 S.E.2d 835 (1987); Lamb v. R.L. Mathis Certified Dairy Co., 183 Ga. App. 455, 359 S.E.2d 214 (1987); California Fed. Sav. & Loan Ass'n v. Hudson, 185 Ga. App. 384, 364 S.E.2d 582 (1987); Clayton County Water Auth. v. Harbin, 192 Ga. App. 257, 384 S.E.2d 453 (1989); Commercial Exch. Bank v. Johnson, 197 Ga. App. 529, 398 S.E.2d 817 (1990); DOT v. Bales, 197 Ga. App. 862, 400 S.E.2d 21 (1990); Jim Ellis Atl., Inc. v. McAlister, 198 Ga. App. 94, 400 S.E.2d 389 (1990); Southeast Consultants, Inc. v. O'Pry, 199 Ga. App. 125, 404 S.E.2d 299 (1991); Southern Cellular Telecom, Inc. v. Banks, 208 Ga. App. 286, 431 S.E.2d 115 (1993); Topeka Mach. Exch., Inc. v. Stoler Indus., Inc., 220 Ga. App. 799, 470 S.E.2d 250 (1996); Klingshirm v. McNeal, 239 Ga. App. 112, 520 S.E.2d 761 (1999); Blue Marlin Dev., LLC v. Branch Banking & Trust Co., 302 Ga. App. 120, 690 S.E.2d 252 (2010).

Determination of Market Value

In general. — Opinion evidence is admissible when it is necessary for the jury to

determine the reasonable value of services or property. *Allison v. Wall*, 121 Ga. 822, 49 S.E. 831 (1905).

Market value may be established by either direct or circumstantial evidence. *Grant v. Dannals*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Citizens & S. Nat'l Bank v. Williams*, 147 Ga. App. 205, 249 S.E.2d 289 (1978).

Question of value is a matter of opinion under O.C.G.A. § 24-9-66, and as to questions of opinion, the witness may swear to the witness's opinion or belief, giving the witness's reasons therefor. *Maddox v. State*, 157 Ga. App. 696, 278 S.E.2d 480 (1981).

Hearsay evidence. — See *Garner v. Gwinnett County*, 105 Ga. App. 714, 125 S.E.2d 563 (1962); *Hiatt v. State*, 133 Ga. App. 111, 210 S.E.2d 22 (1974); *Gibbs v. Clay*, 137 Ga. App. 381, 224 S.E.2d 46 (1976); *Dickens v. Adams*, 137 Ga. App. 564, 224 S.E.2d 468 (1976); *Burch v. Lawrence*, 150 Ga. App. 351, 258 S.E.2d 35 (1979); *Toney v. Johns*, 153 Ga. App. 880, 267 S.E.2d 298 (1980); *Apostle v. Prince*, 158 Ga. App. 56, 279 S.E.2d 304 (1981).

Market value may rest wholly or in part upon hearsay, provided the witness has had an opportunity of forming a correct opinion. *B & L Serv. Co. v. Gerson*, 167 Ga. App. 679, 307 S.E.2d 262 (1983).

It is peculiarly within the province of the jury to determine market value. *National Ben Franklin Fire Ins. Co. v. Purvis*, 61 Ga. App. 674, 7 S.E.2d 296 (1940); *Simmons v. Simmons*, 194 Ga. 649, 22 S.E.2d 399 (1942); *Grant v. Dannals*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Hayes v. O'Shield Buick Co.*, 94 Ga. App. 177, 94 S.E.2d 44 (1956); *Youngblood v. Ruis*, 96 Ga. App. 290, 99 S.E.2d 714 (1957); *Dalon Contracting Co. v. Artman*, 101 Ga. App. 828, 115 S.E.2d 377 (1960); *Smith v. Fidelity Fed. Sav. & Loan Ass'n*, 149 Ga. App. 730, 256 S.E.2d 43 (1979); *Varnedoe v. Singleton*, 154 Ga. App. 332, 268 S.E.2d 387 (1980); *Murdock v. Godwin*, 154 Ga. App. 824, 269 S.E.2d 905 (1980); *DOT v. Brown*, 155 Ga. App. 622, 271 S.E.2d 876 (1980).

Jury question as to weight of value evidence. — When defendants contended that plaintiff's testimony as to the value of plaintiff's motor vehicle was without the proper foundation and had no probative value, but plaintiff had related plaintiff's knowledge and familiarity with classic type vehicles,

described the condition of the vehicle, and introduced photographs of the damage to the vehicle, it was held that after the plaintiff gave the basis for plaintiff's opinion, the weight and credibility of the testimony was for the jury, and since the witness had an opportunity for forming a correct opinion, the evidence was sufficient for the jury's consideration. *Long v. Marion*, 182 Ga. App. 361, 355 S.E.2d 711, aff'd, 257 Ga. 431, 360 S.E.2d 255 (1987).

Qualification of witnesses. — Competency of a witness to testify an opinion of market value is a matter for the discretion of the trial court. *Central Ga. Power Co. v. Cornwell*, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912); *Haas & Howell v. Godby*, 33 Ga. App. 218, 125 S.E. 897 (1924), cert. denied, 33 Ga. App. 829 (1925); *McDuffie County v. Gunn*, 50 Ga. App. 198, 177 S.E. 363 (1934); *United States ex rel. TVA v. Phillips*, 50 F. Supp. 454 (N.D. Ga. 1943); *Dickens v. Adams*, 137 Ga. App. 564, 224 S.E.2d 468 (1976); *DOT v. Great S. Enters., Inc.*, 137 Ga. App. 710, 225 S.E.2d 80 (1976).

It is not a ground for objection to testimony that a witness, after testifying to a fact, testifies on cross-examination to facts that tend to show that the witness knows little or nothing about the facts as to which the witness previously testified on direct examination. *Toney v. Johns*, 153 Ga. App. 880, 267 S.E.2d 298 (1980).

Some evidence of market value mandatory. — There must be in evidence sufficient facts on which the jury may exercise the jury's own knowledge and ideas and draw a legitimate conclusion of market value. *Grant v. Dannals*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Mills v. Mangum*, 111 Ga. App. 396, 141 S.E.2d 773 (1965); *Nail v. Hiers*, 116 Ga. App. 522, 157 S.E.2d 771 (1967); *Citizens & S. Nat'l Bank v. Williams*, 147 Ga. App. 205, 249 S.E.2d 289 (1978).

As to items of a common nature, such as automobiles, a plaintiff need not offer any opinion evidence as to value, and so long as the evidence contains facts upon which the jury may legitimately exercise their own knowledge and ideas, the question of value is properly left to the jury. *White v. Miller*, 194 Ga. App. 816, 392 S.E.2d 30 (1990).

Jurors are not absolutely bound by opinion testimony as to market value, even though it is not contradicted, as jurors may

Determination of Market Value (Cont'd)

exercise their own judgment based on their own experience and knowledge and the evidence as a whole. *Widincamp v. McCall*, 25 Ga. App. 733, 104 S.E. 642 (1920); *Black v. Automatic Sprinkler Co.*, 35 Ga. App. 8, 131 S.E. 543 (1926); *Bitting v. State*, 165 Ga. 55, 139 S.E. 877 (1927); *Central of Ga. Ry. v. Cowart & Son*, 38 Ga. App. 426, 144 S.E. 213 (1928); *Watson v. Tompkins Chevrolet Co.*, 83 Ga. App. 440, 63 S.E.2d 681 (1951); *Grant v. Dannals*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Hayes v. Carter*, 91 Ga. App. 540, 86 S.E.2d 532 (1955); *Hayes v. O'Shield Buick Co.*, 94 Ga. App. 177, 94 S.E.2d 44 (1956); *Youngblood v. Ruis*, 96 Ga. App. 290, 99 S.E.2d 714 (1957); *Dalon Contracting Co. v. Artman*, 101 Ga. App. 828, 115 S.E.2d 377 (1960); *J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972); *DOT v. Driggers*, 150 Ga. App. 270, 257 S.E.2d 294 (1979); *Smith v. Fidelity Fed. Sav. & Loan Ass'n*, 149 Ga. App. 730, 256 S.E.2d 43 (1979); *Murdock v. Godwin*, 154 Ga. App. 824, 269 S.E.2d 905 (1980).

Credibility of a witness is a matter to be weighed by the jury. *Central Ga. Power Co. v. Cornwell*, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912); *Haas & Howell v. Godby*, 33 Ga. App. 218, 125 S.E. 897 (1924), *cert. denied*, 33 Ga. App. 829 (1925); *McDuffie County v. Gunn*, 50 Ga. App. 198, 177 S.E. 363 (1934); *Dickens v. Adams*, 137 Ga. App. 564, 224 S.E.2d 468 (1976).

Weight to be given opinion evidence of market value is a matter for the jury. *Central Ga. Power Co. v. Cornwell*, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912); *Anderson v. Anderson*, 27 Ga. App. 513, 108 S.E. 907, *cert. denied*, 27 Ga. App. 835 (1921); *Bitting v. State*, 165 Ga. 55, 139 S.E. 877 (1927); *Central of Ga. Ry. v. Cowart & Son*, 38 Ga. App. 426, 144 S.E. 213 (1928); *Sutton v. State Hwy. Dep't*, 103 Ga. App. 29, 118 S.E.2d 285 (1961); *Seaboard Coast Line R.R. v. Toole*, 128 Ga. App. 24, 195 S.E.2d 282 (1973); *Hiatt v. State*, 133 Ga. App. 111, 210 S.E.2d 22 (1974); *Clark v. Peck*, 134 Ga. App. 868, 216 S.E.2d 687 (1975); *Gibbs v. Clay*, 137 Ga. App. 381, 224 S.E.2d 46 (1976); *Williams v. State*, 246 Ga. App. 347, 540 S.E.2d 305 (2000).

Expert witnesses. — Witness must be an expert, or must state a sufficient basis for

testifying as to market value. *Southern Cotton Oil Co. v. Overby*, 136 Ga. 69, 70 S.E. 664 (1911); *Crump v. Knox*, 18 Ga. App. 437, 89 S.E. 586 (1916); *Fowler v. National City Bank*, 49 Ga. App. 435, 176 S.E. 113 (1934).

Expert's opinion as to what expert would pay for condemned land was probative of the land's fair market value and improperly excluded by the trial court. *Jotin Realty Co. v. Department of Transp.*, 174 Ga. App. 809, 331 S.E.2d 605 (1985).

Nonexpert witnesses. — There was no requirement that officer be an expert in order to express the officer's opinion as to amount of damages inflicted to the officer's vehicle by defendant, provided the officer had had an opportunity for forming a correct opinion. *Mallory v. State*, 164 Ga. App. 569, 298 S.E.2d 290 (1982).

To give an opinion on value, the nonexpert witness must supply reasons by showing knowledge, experience, or familiarity as to value. *City of Alma v. Morris*, 180 Ga. App. 420, 349 S.E.2d 277 (1986).

Because an opinion rendered by a debtor's guarantor lacked probative value as to the valuation of the debtor-dry cleaner's equipment, as the guarantor was not in the business of owning and operating a dry cleaning business, such opinion was inadmissible as it amounted to nothing more than an unsupported conclusion or guess; thus, the debtor and its guarantors failed to rebut the bank's *prima facie* showing that the sale was commercially reasonable, and the trial court properly granted summary judgment on this ground. *AKA Mgmt. v. Branch Banking & Trust Co.*, 275 Ga. App. 615, 621 S.E.2d 576 (2005).

Given that both parties to a property dispute involving a house testified as to the home's value, including the appraisals, probative and non-hearsay evidence as to the value existed to support the jury's damages award such that the trial court erred in concluding otherwise and awarding a new trial on this basis. *Perry v. Perry*, 285 Ga. App. 892, 648 S.E.2d 193 (2007).

Owner of property is considered to be qualified to state owner's opinion as to value. *Maddox v. State*, 157 Ga. App. 696, 278 S.E.2d 480 (1981); *Dixon v. Williams*, 177 Ga. App. 702, 340 S.E.2d 286 (1986).

Property owner need not be an expert to state an opinion as to the value of the

owner's property, provided the owner can establish that the owner has had an opportunity for forming a correct opinion. *Iffland v. Lancaster*, 176 Ga. App. 449, 336 S.E.2d 350 (1985).

There was no error by the trial court in admitting property owner's opinion testimony as to the fair market value of the damaged property before the fire where the owner had adequate opportunity to form a correct opinion as to the value of the items lost and the values to which the owner testified were those prior to the fire. *Georgia Power Co. v. Hinson*, 179 Ga. App. 263, 346 S.E.2d 73 (1986).

Trial court did not err in allowing the sellers to testify as to the fair market value of their property in a promissory estoppel action because the owner was competent to form a correct opinion of the property's fair market value based on the financial records put into evidence. *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

Foundation for opinion evidence required. — Opinion evidence as to market value must be based upon a foundation that the witness has some experience or familiarity with, or knowledge other than mere general knowledge of, the value of the property or similar property, must have had an opportunity to form a correct opinion, and must give reasons for the value assessed. *Southern Cotton Oil Co. v. Overby*, 136 Ga. 69, 70 S.E. 664 (1911); *Central Ga. Power Co. v. Cornwell*, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912); *Crump v. Knox*, 18 Ga. App. 437, 89 S.E. 586 (1916); *Anderson v. Anderson*, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921); *Bitting v. State*, 165 Ga. 55, 139 S.E. 877 (1927); *Central of Ga. Ry. v. Cowart & Son*, 38 Ga. App. 426, 144 S.E. 213 (1928); *Speir v. Westmoreland*, 40 Ga. App. 302, 149 S.E. 422 (1929); *Georgia Power Co. v. Carson*, 96 Ga. App. 612, 167 S.E. 902 (1933); *Herrmann & Henican v. De La Perrier*, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937); *Fowler v. National City Bank*, 49 Ga. App. 435, 176 S.E. 113 (1934); *Southern Ry. v. Thacker*, 50 Ga. App. 706, 179 S.E. 225 (1935); *Ferguson v. Bank of Dawson*, 50 Ga. App. 604, 179 S.E. 236 (1935); *United States ex rel. TVA v. Phillips*, 50 F. Supp. 454 (N.D.

Ga. 1943); *Grant v. Dannels*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Housing Auth. v. Spink*, 91 Ga. App. 72, 85 S.E.2d 80 (1954); *Georgia R.R. & Banking Co. v. Flynt*, 93 Ga. App. 514, 92 S.E.2d 330 (1956); *Hayes v. O'Shield Buick Co.*, 94 Ga. App. 177, 94 S.E.2d 44 (1956); *Sutton v. State Hwy. Dep't*, 103 Ga. App. 29, 118 S.E.2d 285 (1961); *Mills v. Mangum*, 111 Ga. App. 396, 141 S.E.2d 773 (1965); *Hoard v. Wiley*, 113 Ga. App. 328, 147 S.E.2d 782 (1966); *Johnson v. Rooks*, 116 Ga. App. 394, 157 S.E.2d 527 (1967); *Nail v. Hiers*, 116 Ga. App. 522, 157 S.E.2d 771 (1967); *Sisk v. Carney*, 121 Ga. App. 560, 174 S.E.2d 456 (1970); *Lary v. Gilmer*, 125 Ga. App. 604, 188 S.E.2d 432 (1972); *Schoolcraft v. DeKalb County*, 126 Ga. App. 101, 189 S.E.2d 915 (1972); *Nelson v. Cheek*, 127 Ga. App. 31, 192 S.E.2d 504 (1972); *Seaboard Coast Line R.R. v. Toole*, 128 Ga. App. 24, 195 S.E.2d 282 (1973); *Abbott v. State*, 130 Ga. App. 891, 205 S.E.2d 14 (1974); *Hiatt v. State*, 133 Ga. App. 111, 210 S.E.2d 22 (1974); *Clark v. Peck*, 134 Ga. App. 868, 216 S.E.2d 687 (1975); *DeKalb County v. Queen*, 135 Ga. App. 307, 217 S.E.2d 624 (1975); *Hagin v. Powers*, 140 Ga. App. 300, 231 S.E.2d 780 (1976); *Canal Ins. Co. v. P & J Truck Lines*, 145 Ga. App. 545, 244 S.E.2d 81, overruled on other grounds sub nom., *United Family Life Ins. Co. v. Shirley*, 242 Ga. 235, 248 S.E.2d 635 (1978); *Ricker v. Hopkins Chevrolet, Inc.*, 147 Ga. App. 358, 248 S.E.2d 720 (1978); *Citizens & S. Nat'l Bank v. Williams*, 147 Ga. App. 205, 249 S.E.2d 289 (1978); *DOT v. Brand*, 149 Ga. App. 547, 254 S.E.2d 873 (1979); *Burch v. Lawrence*, 150 Ga. App. 351, 258 S.E.2d 35 (1979); *Cunningham v. Hodges*, 150 Ga. App. 827, 258 S.E.2d 631 (1979); *Toney v. Johns*, 153 Ga. App. 880, 267 S.E.2d 298 (1980); *Varnedoe v. Singleton*, 154 Ga. App. 332, 268 S.E.2d 387 (1980); *Orkin Exterminating Co. v. Thrift*, 154 Ga. App. 545, 269 S.E.2d 53 (1980); *Gunter v. State*, 155 Ga. App. 176, 270 S.E.2d 224 (1980); *Maddox v. State*, 157 Ga. App. 696, 278 S.E.2d 480 (1981); *Apostle v. Prince*, 158 Ga. App. 56, 279 S.E.2d 304 (1981); *Loethen v. State*, 158 Ga. App. 469, 280 S.E.2d 878 (1981).

Trial court did not err in refusing to allow the plaintiff to testify as to plaintiff's opinion of the value of an automobile destroyed in a collision since the plaintiff did not demonstrate any foundation of knowledge, experi-

Determination of Market Value (Cont'd)

ence, or familiarity on which an opinion of value could properly be based. *White v. Miller*, 194 Ga. App. 816, 392 S.E.2d 30 (1990); *GMAC v. Newton*, 207 Ga. App. 700, 429 S.E.2d 120 (1993).

Testimony that the witness is familiar with the value of the item in question is sufficient foundation. — It is no ground for objection if thereafter on cross-examination the witness testifies as to facts which tend to show a lack of knowledge about the facts to which the witness previously testified on direct. *City of Alma v. Morris*, 180 Ga. App. 420, 349 S.E.2d 277 (1986).

In an action by homeowners for negligent construction of their house, since the homeowners demonstrated no basis for the homeowners opinion as to value except that the homeowners doubted the house could be sold and to them they had not received what they bargained for and thus the house had no value to them, and later homeowners admitted they were not familiar with building costs or procedures, there was no rational basis for their value opinions, and the opinions could furnish no basis for the jury's consideration of value. *Hutto v. Shedd*, 181 Ga. App. 654, 353 S.E.2d 596 (1987).

Pursuant to O.C.G.A. § 24-9-66, direct testimony as to market value is in the nature of opinion evidence, and one need not be an expert or dealer but may testify as to the value of property if one has had an opportunity for forming a correct opinion; a creditor's testimony at a confirmation proceeding about the creditor's experience with the property at issue in a foreclosure sale, how much the creditor had invested in the property, how much the creditor borrowed against the property, the property's condition at the time of the foreclosure sale, and the creditor's opinion that the creditor bid the fair market value for the property, along with the testimony of one of the buyers and the tax appraisal, was sufficient to show the fair market value of the property at the time of the sale. *McCain v. Galloway*, 267 Ga. App. 505, 600 S.E.2d 449 (2004).

Testimony of shareholder. — Trial court did not err in refusing to allow a witness to testify as to the value of a riverboat after counsel argued that the witness was a shareholder in the company selling the vessel but

no foundation was laid by counsel to elicit the witness's knowledge, experience, or familiarity with the value of the riverboat. *North Ala. Enters., Inc. v. Cap'n Sam's Cruises, Inc.*, 181 Ga. App. 718, 353 S.E.2d 578 (1987).

Prior jury verdict not admissible. — Trial court abused the court's discretion in ruling that the prior jury verdict is admissible evidence since to give an opinion on value the witness must supply reasons by showing knowledge, experience, or familiarity as to value and there was no procedure by which the parties could question the jury in the prior case about the reasons for its opinion of the property's earlier value and the prior jury could not relate its opinion to the later value of the property. *Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc.*, 207 Ga. App. 693, 428 S.E.2d 687 (1993).

Application in Specific Cases

Automobile franchise. — Although franchisee was not an expert or dealer, as a person experienced in this field with the opportunity to form a correct opinion, the franchisee was authorized to state the franchisee's opinion of the value of the various equipment and inventory as well as the profit or loss incurred on the sales of certain automobiles. *Moore v. American Suzuki Motor Corp.*, 203 Ga. App. 189, 416 S.E.2d 807 (1992).

Confiscated drugs. — When a crime laboratory chemist testified as to the basis for the chemist's estimate involving confiscated drugs, it was not necessary that the chemist be qualified as an expert. *Robinson v. State*, 203 Ga. App. 759, 417 S.E.2d 404, cert. denied, 203 Ga. App. 907, 417 S.E.2d 404 (1992).

Assessment of property. — See *Hirsch v. Joint City County Bd. of Tax Assessors*, 218 Ga. App. 881, 463 S.E.2d 703 (1995); *Hall County v. Merritt*, 233 Ga. App. 526, 504 S.E.2d 754 (1998).

In rendering expert opinions as to the market value of property subject to a condemnation proceeding, experts could properly consider hearsay statements made by a prior planning director for the local government to the effect that the government would work with the property's owner regarding rezoning the property. *Unified Gov't v. Watson*, 255 Ga. App. 1, 564 S.E.2d

453 (2002), *aff'd*, 276 Ga. 276, 577 S.E.2d 769 (2003).

Defendant was properly sentenced for felony theft of aluminum tire rims based on lay testimony of the victim regarding their value because the victim had experience in buying and selling such rims, which gave the victim an opportunity to form a correct opinion as to the fair cash market value at the time and place of the theft. *Perdue v. State*, 300 Ga. App. 588, 685 S.E.2d 489 (2009).

Houses. — See *Clark v. Peck*, 134 Ga. App. 868, 216 S.E.2d 687 (1975); *DeKalb County v. Queen*, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Land. — See *Central Ga. Power Co. v. Cornwell*, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912); *Birmingham Paper Co. v. Holder*, 24 Ga. App. 630, 101 S.E. 692 (1919); *Georgia Power Co. v. Carson*, 46 Ga. App. 612, 167 S.E. 902 (1933); *McDuffie County v. Gunn*, 50 Ga. App. 198, 177 S.E. 363 (1934); *Housing Auth. v. Spink*, 91 Ga. App. 72, 85 S.E.2d 80 (1954); *Georgia R.R. & Banking Co. v. Flynt*, 93 Ga. App. 514, 92 S.E.2d 330 (1956); *Schoolcraft v. DeKalb County*, 126 Ga. App. 101, 189 S.E.2d 915 (1972); *DOT v. Brown*, 155 Ga. App. 622, 271 S.E.2d 876 (1980).

Mobile homes. — See *First Fed. Sav. & Loan Ass'n v. Jones*, 173 Ga. App. 356, 326 S.E.2d 554 (1985).

Motor vehicles. — See *Grant v. Dannals*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Nail v. Hiers*, 116 Ga. App. 522, 157 S.E.2d 771 (1967); *Ricker v. Hopkins Chevrolet, Inc.*, 147 Ga. App. 358, 248 S.E.2d 720 (1978); *Burch v. Lawrence*, 150 Ga. App. 351, 258 S.E.2d 35 (1979); *Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc.*, 167 Ga. App. 532, 307 S.E.2d 13 (1983).

While the purchase price of a motor vehicle is relevant and admissible to establish the vehicle's value at the time of purchase, it is obviously not, standing alone, sufficient to establish the value of the vehicle at some later point in time. Similarly, the value of a motor vehicle cannot be established merely by adding to the vehicle's purchase price the cost of maintaining and repairing the vehicle. *Builders Transp., Inc. v. Hall*, 183 Ga. App. 812, 360 S.E.2d 60, *cert. denied*, 183 Ga. App. 905, 360 S.E.2d 60 (1987).

When an affidavit as to the value of a truck contained no information regarding the

affiant's knowledge, experience, or familiarity with the value of the vehicle, the affidavit lacked probative value as a nonexpert opinion. *Dowdell v. Volvo Commer. Fin., LLC*, 286 Ga. App. 659, 649 S.E.2d 750 (2007).

Owner of property. — See *Speir v. Westmoreland*, 40 Ga. App. 302, 149 S.E. 422 (1929); *Georgia Power Co. v. Carson*, 46 Ga. App. 612, 167 S.E. 902 (1933); *Grant v. Dannals*, 87 Ga. App. 389, 74 S.E.2d 119 (1953); *Housing Auth. v. Spink*, 91 Ga. App. 72, 85 S.E.2d 80 (1954); *Georgia R.R. & Banking Co. v. Flynt*, 93 Ga. App. 514, 92 S.E.2d 330 (1956); *Isen & Co. v. Wise*, 94 Ga. App. 220, 94 S.E.2d 98 (1956); *Hoard v. Wiley*, 113 Ga. App. 328, 147 S.E.2d 782 (1966); *Edwards v. State*, 116 Ga. App. 80, 156 S.E.2d 518 (1967); *Johnson v. Rooks*, 116 Ga. App. 394, 157 S.E.2d 527 (1967); *Nelson v. Check*, 127 Ga. App. 31, 192 S.E.2d 504 (1972); *Clark v. Peck*, 134 Ga. App. 868, 216 S.E.2d 687 (1975); *Hagin v. Powers*, 140 Ga. App. 300, 231 S.E.2d 780 (1976); *Cunningham v. Hodges*, 150 Ga. App. 827, 258 S.E.2d 631 (1979); *Gunter v. State*, 155 Ga. App. 176, 270 S.E.2d 224 (1980); *DOT v. Brown*, 155 Ga. App. 622, 271 S.E.2d 876 (1980).

Trial court did not err in concluding that the victim's testimony was sufficient to allow a felony theft charge to go to the jury because the victim testified as to the market value for each of the items stolen from him, and the total value exceeded \$500; the victim established that the victim had an opportunity to form a correct opinion because the victim based the opinion as to the market value of the stolen tools on the age of the tools and his experience using and purchasing them. *Sheppard v. State*, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

Testimony from child of property owner. — Property owner's son's testimony in a condemnation proceeding as to the value of residential property was admissible, when the son testified to the son's comparable sales analysis and to the son's familiarity with the neighborhood. Appraiser could testify as to the possible rezoned value of the property, because the rezoning was sufficiently likely as to have an appreciable influence on the property's present market value, approximately \$600. *DOT v. Jordan*, 300 Ga. App. 104, 684 S.E.2d 141 (2009), *cert. denied*, No. S10C0207, 2010 Ga. LEXIS 311 (Ga. 2010).

Application in Specific Cases (Cont'd)

Personal property. — See *Hagin v. Powers*, 140 Ga. App. 300, 231 S.E.2d 780 (1976).

Purchase price. — See *Speir v. Westmoreland*, 40 Ga. App. 302, 149 S.E. 422 (1929); *Herrmann & Henican v. De La Perrier*, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937); *Mills v. Mangum*, 111 Ga. App. 396, 141 S.E.2d 773 (1965); *Hoard v. Wiley*, 113 Ga. App. 328, 147 S.E.2d 782 (1966); *Nail v. Hiers*, 116 Ga. App. 522, 157 S.E.2d 771 (1967); *Sisk v. Carney*, 121 Ga. App. 560, 174 S.E.2d 456 (1970); *Seaboard Coast Line R.R. v. Toole*, 128 Ga. App. 24, 195 S.E.2d 282 (1973); *Smith v. Fidelity Fed. Sav. & Loan Ass'n*, 149 Ga. App. 730, 256 S.E.2d 43 (1979); *Cunningham v. Hodges*, 150 Ga. App. 827, 258 S.E.2d 631 (1979); *General Fin. Corp. v. Henderson*, 160 Ga. App. 242, 286 S.E.2d 454 (1981).

Purchaser may testify as to termite damage. — In a suit arising out of hidden termite damage, the court erred by refusing to allow the plaintiff-purchaser to provide evidence of damage by giving plaintiff's own non-expert opinion testimony as to the diminished value of the property, based on

plaintiff's familiarity with similar property in the area and plaintiff's close personal inspection of the damage in question. *Vitello v. Stott*, 222 Ga. App. 134, 473 S.E.2d 504 (1996).

Rental value. — See *Mayor of Gainesville v. Robertson*, 25 Ga. App. 632, 103 S.E. 853 (1920).

Salvage price. — See *Isen & Co. v. Wise*, 94 Ga. App. 220, 94 S.E.2d 98 (1956); *Nail v. Hiers*, 116 Ga. App. 522, 157 S.E.2d 771 (1967); *Burch v. Lawrence*, 150 Ga. App. 351, 258 S.E.2d 35 (1979).

Services. — See *Western & Atl. R.R. v. Townsend*, 36 Ga. App. 70, 135 S.E. 439 (1926), cert. denied, 36 Ga. App. 826 (1927).

Similar sale. — See *Herrmann & Henican v. De La Perrier*, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937); *Housing Auth. v. Spink*, 91 Ga. App. 72, 85 S.E.2d 80 (1954).

Stock. — See *Speir v. Westmoreland*, 40 Ga. App. 302, 149 S.E. 422 (1929); *Herrmann & Henican v. De La Perrier*, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937); *Ferguson v. Bank of Dawson*, 50 Ga. App. 604, 179 S.E. 236 (1935).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 387 et seq.

C.J.S. — 32 C.J.S., Evidence, § 792.

ALR. — Public or corporate officer as within rule that owner of property may testify to value thereof, 5 ALR 1171; 45 ALR 1494.

Newspapers and trade journals as evidence of market prices or quotations, 43 ALR 1192.

Lack of market value as a necessary condition of admissibility of evidence of actual or intrinsic value, 110 ALR 1375.

Competency of witness to give expert or opinion testimony as to value of real property, 159 ALR 7.

Unaccepted offer for purchase or sale of real property as evidence of value, 7 ALR2d 781.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if

devoted to particular agricultural purposes, 16 ALR2d 1113.

Admissibility of opinion of nonexpert owner as to value of chattel, 37 ALR2d 967.

Person performing services as competent to testify as to their value, 5 ALR3d 947.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 ALR3d 780.

Sale price of real property as evidence in determining value for tax assessment purposes, 89 ALR3d 1126.

Unaccepted offer for purchase of real property as evidence of its value, 25 ALR4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 ALR4th 615.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983.
Admissibility of testimony of expert, as to

basis of his opinion, to matters otherwise excludible as hearsay—state cases, 89 ALR4th 456.

24-9-67. Opinions of experts admissible in criminal cases.

In criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses. (Orig. Code 1863, § 3792; Code 1868, § 3812; Code 1873, § 3868; Code 1882, § 3868; Civil Code 1895, § 5287; Penal Code 1895, § 1022; Civil Code 1910, § 5876; Penal Code 1910, § 1048; Code 1933, § 38-1710; Ga. L. 2005, p. 1, § 7/SB 3.)

Cross references. — Discovery of facts known and opinions held by expert witnesses, § 9-11-26(b)(4). Admissibility of medical tests and blood tests in proceedings to determine paternity, § 19-7-46.
Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly fur-

ther finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."
Law reviews. — For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For article, "The Skelton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony," see 39 Mercer L. Rev. 545 (1988). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005). For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005).
For note on the chiropractor as an expert witness, see 15 Mercer L. Rev. 431 (1964). For note on admissibility of expert psychological testimony in Georgia, see 4 Ga. St. U.L. Rev. 117 (1988). For note, "Exiting Twilight Zone: Changes in the Standard for Admissibility of Scientific Evidence in Georgia," see 10 Ga. St. U. L. Rev. 401 (1994). For note, "Kumho Tire Co. v. Carmichael: Daubert's Gatekeeping Method Expanded To Apply To All Expert Testimony," see 51 Mercer L. Rev. 1325 (2000).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- PROCEDURAL CONSIDERATIONS
- QUALIFICATION AS EXPERT
- APPOINTMENT OF EXPERT BY COURT
- BASIS FOR OPINION
 - 1. IN GENERAL

2. NEED TO STATE BASIS
HYPOTHETICAL QUESTIONS
WEIGHT OF OPINION EVIDENCE
CROSS-EXAMINATION
ILLUSTRATIONS

1. OPINIONS ADMISSIBLE
2. OPINIONS INADMISSIBLE
3. WITNESS QUALIFIED AS EXPERT

General Consideration

Status of witness as lay or expert goes not to admissibility, but credibility. *McLelland v. State*, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992).

Expert witness defined. — An expert witness is one who through education, training, or experience has peculiar knowledge concerning some matter of science or skill to which the expert's testimony relates. *Tifton Brick & Block Co. v. Meadow*, 92 Ga. App. 328, 88 S.E.2d 569 (1955).

Construction with § 24-9-67.1. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. Further, O.C.G.A. § 24-9-67, and neither *Daubert* nor O.C.G.A. § 24-9-67.1 controlled the admission of evidence in criminal proceedings. *Vaughn v. State*, 282 Ga. 99, 646 S.E.2d 212 (2007).

Qualifications of expert witness are addressed to sound discretion of court. *Atlantic Coast Line R.R. v. Sweat*, 183 F.2d 27 (5th Cir. 1950).

Expert opinion must be helpful or necessary. — Expert opinion, like lay opinion, is received only in instances when the opinion is helpful or necessary. *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974).

Expert opinion is admissible on any matter of scientific or technical knowledge. *Southern Ry. v. Wessinger*, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924).

When based on facts supported by other witnesses and weight thereof is jury question. — Expert witnesses' opinions, on questions of science, skill, trade, or like questions, shall always be admissible provided the opinions are based on facts supported by other witnesses and the weight thereof is a question for the jury, to deal with as the jury sees fit, giving credence to the opinion or not. *Atlantic Coast Line R.R. v. Sweat*, 183 F.2d 27 (5th Cir. 1950).

When an expert testified that the expert's opinion was based upon the plaintiff's deposition testimony, the investigating officer's report, diagrams of the accident scene drafted by the plaintiff, photographs of the plaintiff's vehicle, and information regarding the speed of the plaintiff's truck from its governor, it was a jury question as to the weight which should be assigned the opinion, and not a question of admissibility. *J.B. Hunt Transp., Inc. v. Brown*, 236 Ga. App. 634, 512 S.E.2d 34 (1999).

Expert's credibility is a jury question. — Defendant's argument that the evidence was insufficient to support the defendant's conviction for possession by ingestion of methamphetamine because the testimony of the defendant's expert witness, a forensic toxicologist with a private clinical reference laboratory, called into question the validity of the state crime lab report, was rejected because the determination of the credibility of defendant's expert and the effect of the expert's testimony on the validity of the state crime lab report were for the jury. *Poston v. State*, 274 Ga. App. 117, 617 S.E.2d 150 (2005).

Opinion proper when on matter within scope of expertise. — Expert can express an opinion on a matter when the matter inquired about lies within the domain of the profession or calling which the expert pursues. *Southern Ry. v. Cabe*, 109 Ga. App. 432, 136 S.E.2d 438 (1964).

Opinions on matters outside scope of expertise. — Opinion of any witness, not on

any question of science, skill, trade, or like questions is inadmissible when all the facts are capable of being clearly detailed so that the jury may form correct conclusions therefrom. *Whatley v. Henry*, 65 Ga. App. 668, 16 S.E.2d 214 (1941).

While expert witnesses may give their opinions as to facts, principles, and rules involved in the science in which the witnesses are learned, the witnesses are not, as to questions lying out of the domain of the science, art, or trade in which the witnesses are experts, exempt from the restriction of the statute, which requires witnesses to state facts and not opinions. *Southern Ry. v. Cabe*, 109 Ga. App. 432, 136 S.E.2d 438 (1964).

Establishing variance from standard of care in legal malpractice cases. — Plaintiff may not establish variance from standard of care in medical or legal malpractice cases without expert opinion testimony from which the jury could determine malpractice. This latter requirement is properly a prerequisite for the submission of a case to the jury. *Savannah Valley Prod. Credit Ass'n v. Cheek*, 248 Ga. 745, 285 S.E.2d 689 (1982).

Matter within scope of lay knowledge or experience. — Expert testimony is usually excluded when the question is whether the subject matter is within the scope of the ordinary layman's knowledge and experience. *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974).

Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible when the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; that is, the conclusion is beyond the ken of the average layman. *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981).

Expert may not testify as to the expert's opinion as to the existence vel non of a fact (in this case, whether a child had been abused sexually) unless the inference to be drawn from facts in evidence is beyond the ken of the jurors—that is, unless the jurors, for want of specialized knowledge, skill, or experience, are incapable of drawing—from facts in evidence—such an inference for themselves. *Allison v. State*, 256 Ga. 851, 353 S.E.2d 805 (1987).

Advocate for the victims of sexual assault at a rape crisis center did not testify as to a rape trauma syndrome; rather, the advocate

properly testified that there was no typical or common behavior among rape victims and that alleged victims of sexual assault might delay reporting such crimes. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Whether a seat belt engaged properly or an air bag deployed are not matters of science and issues requiring the expert testimony of an engineer or a metallurgist, but are matters of skill and experience. *Owens v. GMC*, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Whether someone suffers greater injuries in a car wreck when a seat belt does not work to restrain the person and the air bag does not inflate between the person and the steering wheel, windshield, and mirror are not matters of science and issues requiring the expert testimony of trauma physician or engineer, but are matters of skill and experience. *Owens v. GMC*, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Mixture of law and fact. — It is only when the drawing of the inference requires a mixture of law and fact that the question is not a proper one for opinion evidence. *Gage v. Tiffin Motor Homes, Inc.*, 153 Ga. App. 704, 266 S.E.2d 345 (1980); *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

Opinion of ultimate fact. — Expert opinions are advisory and are not binding upon a fact-finding tribunal when such opinions are as broad in scope as the question of fact at issue, such as the cause of death or disability. *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S.E.2d 81 (1953).

As a general rule, an expert witness is not allowed to express on the stand an opinion of ultimate fact or the very fact to be decided by the jury because to do so would invade the province of the jury. *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974); *Mitchell v. State*, 154 Ga. App. 399, 268 S.E.2d 360 (1980).

An expert witness may testify as to the witness's opinion on the ultimate issue in the case without invading the province of the jury so long as the subject is an appropriate one for opinion evidence. *King v. Browning*, 246 Ga. 46, 268 S.E.2d 653 (1980); *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

If witness is asked witness's opinion as to a

General Consideration (Cont'd)

fact and not as to a mixed question of law and fact, the witness should be allowed to testify even though the witness's opinion is as to the ultimate issue for the jury. *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

If the cause and manner of an injury is the ultimate issue of fact to be determined by the jury, an expert may nevertheless give the expert's factual opinion but not the expert's legal conclusion on this issue for the benefit of the jury in their fact finding. *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980).

An expert may state the expert's opinion upon an ultimate fact, provided that all other requirements for admission of expert opinion are met. *Baker v. State*, 161 Ga. App. 670, 288 S.E.2d 280 (1982).

Legal conclusions. — Expert cannot act as a member of the jury; nor, while on the stand, can the expert transcend the functions of a witness and, under the guise of giving testimony, state a legal conclusion. *Travelers Ins. Co. v. Thornton*, 119 Ga. 455, 46 S.E. 678 (1904); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935); *Gage v. Tiffin Motor Homes, Inc.*, 153 Ga. App. 704, 266 S.E.2d 345 (1980); *Mitchell v. State*, 154 Ga. App. 399, 268 S.E.2d 360, cert. denied, 449 U.S. 1011, 101 S. Ct. 567, 66 L. Ed. 2d 469 (1980).

Whether a question calls for a legal conclusion or principally a fact which incidentally involves a legal word or phrase is within the sound discretion of the trial court. *Gage v. Tiffin Motor Homes, Inc.*, 153 Ga. App. 704, 266 S.E.2d 345 (1980).

Although it is permissible for the expert to give the expert's opinion to facts in issue or even the ultimate issue where such question is a proper one for opinion evidence, the expert is not permitted to state a legal conclusion as to the ultimate matter in issue. *Nichols v. State*, 177 Ga. App. 689, 340 S.E.2d 654 (1986).

Testimony on calculation of damages. — When plaintiffs presented expert testimony on the calculation of damages, even though the trier of fact found that the defendant was not responsible for all the damages, the plaintiff showed with reasonable certainty

the total amount of damages and the degree to which those damages were attributable to defendant, and the award was affirmed. *Metropolitan Atlanta Rapid Transit Authority v. Green Int'l, Inc.*, 235 Ga. App. 419, 509 S.E.2d 674 (1998).

Opinions of an expert alone are insufficient grounds on which to grant summary judgment. *Lake v. Hamilton Bank*, 137 Ga. App. 600, 224 S.E.2d 522 (1976).

Experiments. — Expert testimony can be based on experiments if the expert gives details of the experiment. *Frank v. State*, 141 Ga. 243, 80 S.E. 1016 (1914).

Construction with § 24-9-65. — Former Code 1933, § 38-1710 (see O.C.G.A. § 24-9-67) dealt with expert testimony concerning science, skill, trade, or like questions, in which matters experts may give their opinion based on facts as proved by other witnesses, but former Code 1933, § 38-1708 (see O.C.G.A. § 24-9-65) dealt with opinions of lay witnesses. *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944).

Appellate standard for admission. — When testimony of an expert accident reconstructionist was admitted by the trial court as expert opinion, the Court of Appeals erred by judging its admissibility pursuant to the standard appropriate for lay witnesses. *Johnson v. Knebel*, 267 Ga. 853, 485 S.E.2d 451 (1997).

Appellate court is not bound by Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 LE2d 469 (1993) and has consistently refused to apply the Daubert standard; further, as Daubert involves the application of Fed. R. Evid. 702, which has not been adopted in Georgia, Daubert has not been adopted in Georgia either. *Dailey v. State*, 271 Ga. App. 492, 610 S.E.2d 126 (2005).

Past use of expert by other party. — Plaintiff's questions regarding the prior employment of plaintiff's expert by defense counsel, asked in an attempt to rehabilitate or bolster the expert's credibility, were not admissible. *Vaughn v. Protective Ins. Co.*, 243 Ga. App. 79, 532 S.E.2d 159 (2000).

Exclusion of expert witness testimony on cross-racial eyewitness identification not reversible error. — Trial court did not abuse court's discretion or violate the defendant's 14th and 6th amendment rights by excluding expert testimony about cross-racial eye-

witness identification; based on eyewitness testimony and the defendant's confession, the jury could have resolved the issue of whether the victims recognized the defendant without the assistance of an expert witness. *Crawford v. State*, 283 Ga. App. 645, 642 S.E.2d 335 (2007).

Cited in *Southern Ry. v. Cowan*, 52 Ga. App. 360, 183 S.E. 331 (1936); *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939); *Keene v. Lumbermen's Mut. Ins. Co.*, 60 Ga. App. 864, 5 S.E.2d 379 (1939); *Cone v. Davis*, 66 Ga. App. 229, 17 S.E.2d 849 (1941); *Weathers Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945); *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945); *Lively v. Lively*, 206 Ga. 606, 58 S.E.2d 168 (1950); *Liberty Mut. Ins. Co. v. Meeks*, 81 Ga. App. 800, 60 S.E.2d 258 (1950); *Royal Crown Bottling Co. v. Stiles*, 82 Ga. App. 254, 60 S.E.2d 815 (1950); *Fulton Bag & Cotton Mills v. Speaks*, 90 Ga. App. 685, 83 S.E.2d 872 (1954); *Swift & Co. v. Morgan & Sturdivant*, 214 F.2d 115 (5th Cir. 1954); *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957); *Pass v. Firestone Tire & Rubber Co.*, 242 F.2d 914 (5th Cir. 1957); *Clemones v. Alabama Power Co.*, 107 Ga. App. 489, 130 S.E.2d 600 (1963); *Word v. Henderson*, 220 Ga. 846, 142 S.E.2d 244 (1965); *Graham v. Clark*, 114 Ga. App. 825, 152 S.E.2d 789 (1966); *Harrison v. Tuggle*, 225 Ga. 211, 167 S.E.2d 395 (1969); *State Hwy. Dep't v. Peters*, 121 Ga. App. 167, 173 S.E.2d 253 (1970); *American Home Assurance Co. v. Stephens*, 121 Ga. App. 306, 174 S.E.2d 186 (1970); *Georgia Power Co. v. Slappey*, 121 Ga. App. 534, 174 S.E.2d 361 (1970); *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970); *Fules, Inc. v. Rutland*, 123 Ga. App. 23, 179 S.E.2d 290 (1970); *Tompkins v. West*, 123 Ga. App. 459, 181 S.E.2d 549 (1971); *Fountain v. State*, 228 Ga. 306, 185 S.E.2d 62 (1971); *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972); *Central of Ga. Ry. v. Luther*, 128 Ga. App. 178, 196 S.E.2d 149 (1973); *State Hwy. Dep't v. Stevens*, 128 Ga. App. 418, 196 S.E.2d 890 (1973); *Braswell v. Owen of Ga., Inc.*, 128 Ga. App. 528, 197 S.E.2d 463 (1973); *Insurance Co. of N. Am. v. City of Dalton*, 128 Ga. App. 853, 198 S.E.2d 401 (1973); *Drake v. Shurbutt*, 129 Ga. App. 754, 201 S.E.2d 184 (1973); *DeKalb County v. McFarland*, 231 Ga. 649, 203

S.E.2d 495 (1974); *Breland v. State*, 134 Ga. App. 259, 214 S.E.2d 186 (1975); *Parker v. State*, 137 Ga. App. 6, 223 S.E.2d 6 (1975); *Hogan v. City-County Hosp.*, 138 Ga. App. 906, 227 S.E.2d 796 (1976); *Appling Motors, Inc. v. Todd*, 143 Ga. App. 644, 239 S.E.2d 537 (1977); *Short v. Riles*, 144 Ga. App. 463, 241 S.E.2d 580 (1978); *Wright v. American Mut. Liab. Ins. Co.*, 145 Ga. App. 155, 243 S.E.2d 261 (1978); *Stone v. Citizens & S. Nat'l Bank*, 145 Ga. App. 601, 244 S.E.2d 135 (1978); *Hicks v. State*, 145 Ga. App. 669, 244 S.E.2d 597 (1978); *Thomas v. State*, 242 Ga. 712, 251 S.E.2d 294 (1978); *Barge v. City of College Park*, 148 Ga. App. 480, 251 S.E.2d 580 (1978); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Bell v. State*, 244 Ga. 411, 259 S.E.2d 465 (1979); *Huskins v. State*, 245 Ga. 541, 266 S.E.2d 163 (1980); *State Farm Mut. Auto. Ins. Co. v. Chadwick*, 154 Ga. App. 394, 268 S.E.2d 436 (1980); *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980); *Baker v. State*, 156 Ga. App. 283, 274 S.E.2d 678 (1980); *Waters v. State*, 248 Ga. 355, 283 S.E.2d 238 (1981); *Camelot Club Condominium Ass'n v. Metro Lawns, Inc.*, 161 Ga. App. 574, 288 S.E.2d 325 (1982); *Jester v. State*, 250 Ga. 119, 296 S.E.2d 555 (1982); *Hyles v. Cockrill*, 169 Ga. App. 132, 312 S.E.2d 124 (1983); *Epps v. State*, 169 Ga. App. 157, 312 S.E.2d 146 (1983); *Griffin v. State*, 170 Ga. App. 287, 316 S.E.2d 797 (1984); *Southeastern Ambulance Corp. v. Freeman*, 185 Ga. App. 119, 363 S.E.2d 571 (1987); *Bass v. State*, 185 Ga. App. 666, 365 S.E.2d 509 (1988); *Thaxton v. State*, 260 Ga. 141, 390 S.E.2d 841 (1990); *Doctors Hosp. v. Bonner*, 195 Ga. App. 152, 392 S.E.2d 897 (1990); *Eason v. State*, 260 Ga. 445, 396 S.E.2d 492 (1990); *Wood v. Turner*, 196 Ga. App. 815, 397 S.E.2d 161 (1990); *Gilbert v. CSX Transp., Inc.*, 197 Ga. App. 29, 397 S.E.2d 447 (1990); *Goodman v. Lipman*, 197 Ga. App. 631, 399 S.E.2d 255 (1990); *Reynolds v. State*, 200 Ga. App. 43, 406 S.E.2d 553 (1991); *Morrison v. Koornick*, 201 Ga. App. 367, 411 S.E.2d 105 (1991); *Benton v. Chatham County*, 206 Ga. App. 285, 425 S.E.2d 317 (1992); *Bailey v. State*, 229 Ga. App. 869, 494 S.E.2d 672 (1998); *Zampatti v. Tradebank Int'l Franchising Corp.*, 235 Ga. App. 333, 508 S.E.2d 750 (1998); *Manesh v. Baker Equip. Eng'g Co.*, 247 Ga. App. 407, 543 S.E.2d 61 (2000); *Robles v. State*, 277 Ga. 415, 589 S.E.2d 566

General Consideration (Cont'd)

(2003); *Woodland Partners Ltd. P'ship v. DOT*, 286 Ga. App. 546, 650 S.E.2d 277 (2007); *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008); *Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

Procedural Considerations

Giving testimony based on lab report not yet admitted into evidence. — Expert medical witness could not give an opinion on the cause of death based on lab report which had not yet been admitted into evidence, but error in allowing such opinion was cured when the lab report was later introduced into evidence. *Vaughn v. State*, 249 Ga. 803, 294 S.E.2d 504 (1982).

Trial court did not err in refusing to permit the testimony of two of the manufacturer's expert witnesses in an asbestos exposure case as to the asbestos fiber counts on its packing material that had been determined by an outside laboratory, even though such opinions may be given on the facts as proved by other witnesses, because the experts were not entitled to give an opinion based upon the outside laboratory's report which was prepared by other people and which was not in evidence. *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 586 S.E.2d 26 (2003).

Introduction of fingerprint magnifications not necessary when expert testified as to expert's comparisons. — Expert in field of fingerprint identification was qualified to state opinion based on expert's analysis and comparison that fingerprints found at scene of the crime were those of appellant; and in presenting this expert testimony, it was not necessary for state to introduce magnification of prints to demonstrate at trial the points of similarity. *W.B.S. v. State*, 163 Ga. App. 471, 294 S.E.2d 705 (1982).

When witness is tendered as an expert. — Witness who was not tendered as an expert until near the end of the witness's testimony and after cross-examination qualified as an expert at the inception of the witness's testimony and could properly render an expert opinion. *In re C.W.D.*, 232 Ga. App. 200, 501 S.E.2d 232 (1998).

Qualification as Expert

Court determines expert's qualifications. — Qualification of a witness as an expert is

addressed to the sound discretion of the court. *Clary v. State*, 8 Ga. App. 92, 68 S.E. 615 (1910); *Hines v. Hendricks*, 25 Ga. App. 682, 104 S.E. 520 (1920); *Western & Atl. R.R. v. Fowler*, 77 Ga. App. 206, 47 S.E.2d 874 (1948); *McDowell v. State*, 78 Ga. App. 116, 50 S.E.2d 633 (1948); *Carroll v. Hayes*, 98 Ga. App. 450, 105 S.E.2d 755 (1958); *Pinkerton & Laws Co. v. Robert & Co. Assocs.*, 129 Ga. App. 881, 201 S.E.2d 654 (1973); *Johnson v. State*, 130 Ga. App. 704, 204 S.E.2d 302 (1974); *Barrow v. State*, 235 Ga. 635, 221 S.E.2d 416 (1975); *McCoy v. State*, 237 Ga. 118, 227 S.E.2d 18 (1976); *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978); *Kelly v. Floor Bazaar, Inc.*, 153 Ga. App. 163, 264 S.E.2d 697 (1980); *Wilkie v. State*, 153 Ga. App. 609, 266 S.E.2d 289 (1980); *Haygood v. State*, 154 Ga. App. 633, 269 S.E.2d 480 (1980); *Rose Mill Homes, Inc. v. Michel*, 155 Ga. App. 808, 273 S.E.2d 211 (1980); *Hicks v. State*, 157 Ga. App. 69, 276 S.E.2d 129 (1981); *Hicks v. State*, 196 Ga. App. 311, 396 S.E.2d 60 (1990).

For definitions of expert, see *Macon Ry. & Light Co. v. Mason*, 123 Ga. 773, 51 S.E. 569 (1905). See also *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153 (1858); *White v. Clements*, 39 Ga. 232 (1869); *Hines v. Hendricks*, 25 Ga. App. 682, 104 S.E. 520 (1920).

An expert is one who practices a business or profession requiring the person to have technical knowledge in that field. *Smith v. State*, 127 Ga. 56, 56 S.E. 116 (1906); *Glover v. State*, 129 Ga. 717, 59 S.E. 816 (1907).

Expert testimony must relate to scientific or technical knowledge. *McLain v. State*, 71 Ga. 279 (1883); *McClendon v. State*, 7 Ga. App. 784, 68 S.E. 331 (1910); *Spence v. State*, 20 Ga. App. 61, 92 S.E. 555, cert. denied, 20 Ga. App. 832 (1917).

Basic requirements for expert. — Generally, nothing more is required to qualify an expert than that one has been educated in a particular trade or profession. *Southern Ry. v. Cabe*, 109 Ga. App. 432, 136 S.E.2d 438 (1964); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977), cert. denied, 435 U.S. 937, 98 S. Ct. 1513, 55 L. Ed. 2d 533 (1978); *Brown v. State*, 245 Ga. 588, 266 S.E.2d 198 (1980); *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981); *Morris v. State*, 159 Ga. App. 600, 284 S.E.2d 103 (1981); *Inta-Roto, Inc. v. Guest*, 160 Ga. App. 75, 286 S.E.2d 61 (1981).

An expert witness need only be competent as an expert in the witness's own field, and the witness need not have legal expertise. *Watkins v. State*, 259 Ga. 648, 386 S.E.2d 132 (1989).

Formal training is not a prerequisite for expert status. *Brown v. State*, 245 Ga. 588, 266 S.E.2d 198 (1980).

Special knowledge necessary to be an expert may be derived from experience as well as study. *Southern Ry. v. Cabe*, 109 Ga. App. 432, 136 S.E.2d 438 (1964); *Martin v. Newton*, 129 Ga. App. 735, 201 S.E.2d 31 (1973); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977), cert. denied, 435 U.S. 937, 98 S. Ct. 1513, 55 L. Ed. 2d 533 (1978); *Brown v. State*, 245 Ga. 588, 266 S.E.2d 198 (1980); *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981); *Morris v. State*, 159 Ga. App. 600, 284 S.E.2d 103 (1981); *Inta-Roto, Inc. v. Guest*, 160 Ga. App. 75, 286 S.E.2d 61 (1981).

Failure to object constitutes waiver. — In rate increase request hearings, when the power company failed to object to an expert witness's qualifications either before or during the witness's testimony, any objection it might have had was waived. *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 196 Ga. App. 572, 396 S.E.2d 562 (1990).

Expert can express an opinion on a matter which lies within the domain of the profession or calling which the witness pursues. *Martin v. Newton*, 129 Ga. App. 735, 201 S.E.2d 31 (1973).

Application of knowledge to specific problem not necessary. — When one has been formally educated in a particular trade or profession, additional experience by application of that knowledge to a specific problem is not necessary in order to sustain one as an expert. *Inta-Roto, Inc. v. Guest*, 160 Ga. App. 75, 286 S.E.2d 61 (1981).

Qualification as expert satisfied. — Toxicologist and pharmacologist, who was not a medical doctor, was competent to give an opinion in a medical malpractice action that a drug prescribed by defendants caused plaintiff's miscarriage since the testimony was not offered to address the applicable standard of care but to show causation. *Sinkfield v. Shi-Han Oh*, 229 Ga. App. 883, 495 S.E.2d 94 (1998).

Medical examiner's testimony was not without proper foundation as the examiner

was qualified, tendered, and admitted as an expert and, therefore, the examiner was permitted to give opinion testimony based on observations during the autopsy, as well as on facts provided by other witnesses; the examiner testified that the opinion as to the manner of death was based on the appearance of the wound, the path and course of the bullet, the presence of a laceration to the head of the victim, and the absence of a gun at the scene. *Smith v. State*, 276 Ga. 97, 575 S.E.2d 450 (2003).

Defendant alleged that the witness was not qualified as a handwriting expert because the witness failed the test to become a member of the American Board of Forensic Document Examiners and was only a trainee member of the American Society of Forensic Document Examiners; although this is true, the witness testified to becoming a member of the Southeastern Association of Forensic Document Examiners after completing two years of training, that the witness had been performing handwriting analysis on a daily basis for the Georgia Crime Lab for the last eight years, that the witness had examined thousands of documents, and that the witness had been qualified as an expert witness in criminal cases tried in a Georgia superior court approximately eighteen times; thus, there was no abuse of discretion by the trial court in qualifying the witness as an expert in forensic document examination. *Poole v. State*, 270 Ga. App. 432, 606 S.E.2d 878 (2004).

Advocate for the victims of sexual assault at a rape crisis center was properly qualified as an expert as the advocate had been through 50 hours of sexual assault training and had two years of experience, in which the advocate had counseled over 100 purported victims of sexual assault; further, the advocate had published one article that was presented at a seminar. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Certification of an expert was not an abuse of discretion as the witness had over 20 years of experience in the field of domestic violence and an educational background in psychology. *Miller v. State*, 273 Ga. App. 761, 615 S.E.2d 843 (2005).

Employee of the Department of Family and Children Services was properly allowed to testify that a victim's condition and behavior was consistent with Shaken Baby Syn-

Qualification as Expert (Cont'd)

drome based on the employee's extensive experience and training with respect to fatal child abuse and Shaken Baby Syndrome; the fact that the employee did not hold a medical degree went only to the weight of the employee's testimony, and the employee's evidence was cumulative of that given by physicians. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

Trial court did not abuse the court's discretion by qualifying a licensed professional counselor and qualified psychometrist as an expert in the administration of intelligence tests after hearing testimony regarding the counselor's relevant education and experience based on the fact that the counselor did not independently perform the Wechsler Adult Intelligence Scales-Third Edition test (WAIS-III) on the defendant and merely assisted in the test's administration, nor did the trial court err in admitting the sufficiently relevant and reliable evidence regarding the WAIS-III test administered since the counselor's supervisor did not have to be physically present in the room with the defendant during the counselor's testing session in order to supervise the counselor. Further, the defendant failed to show that the tests results were unreliable after the counselor's rebutted testimony regarding the manner in which the testing was conducted. *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, U.S. , 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008).

An investigator testified that the investigator had been employed in law enforcement since 1988; that the investigator had received 240 hours of narcotics training; that the investigator had attended a regional drug training academy specializing in the recognition of clandestine methamphetamine labs; that the investigator had attended informant management classes, undercover drug classes, and drug identification classes; that the investigator had previously investigated cases involving possession of narcotics with the intent to distribute and manufacturing of the same, including methamphetamine; and, among other things, that the investigator used confidential informants to assess new trends in the world of

illegal narcotics. Based on this training and experience, there was no abuse of discretion by the trial court in qualifying the investigator as an expert in the street level narcotics trade, the characteristics of a methamphetamine lab, and the identification of a substance as possible methamphetamine. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

In a prosecution for driving under the influence, testimony of the forensic toxicologist who tested the defendant's blood was properly admitted as expert testimony as the witness had a permit from the Georgia Bureau of Investigation to perform chemical analyses of blood specimens received from the police, and the defendant subsequently had the opportunity to cross-examine the witness about the witness's credentials and testimony. *Fowler v. State*, 294 Ga. App. 864, 670 S.E.2d 448 (2008), cert. denied, No. S09C0529, 2009 Ga. LEXIS 204 (Ga. 2009).

Appointment of Expert by Court

Appointment discretionary with court. — Granting or denial of a motion for appointment of expert witnesses lies within the sound discretion of the trial court. *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980).

Appointment of expert witnesses lies within the sound discretion of the trial court and, absent a showing of an abuse of that discretion, the Court of Appeals will not interfere. *Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982); *Dennis v. State*, 158 Ga. App. 142, 279 S.E.2d 275 (1981); *Morris v. State*, 159 Ga. App. 600, 284 S.E.2d 103 (1981).

Trial court's comments on witness's status held prejudicial. — Trial court's comments, adding the influence of the court's personal opinion on the expert status of a witness and identifying the witness in common with the court as a state-paid employee, were prejudicial comments on the evidence during a competency trial. *Jones v. State*, 189 Ga. App. 232, 375 S.E.2d 648 (1988).

Basis for Opinion

1. In General

Facts that can form basis for opinion. — Expert opinions can be based upon facts

which the expert has testified to, or heard others testify to, or which have been hypothetically stated to the expert. *Choice v. State*, 31 Ga. 424 (1860); *Taylor v. State*, 83 Ga. 647, 10 S.E. 442 (1889).

An expert witness may give an opinion based upon the witness's own examination of a person, upon the witness's observation of that person, or upon any state of facts, supported by some evidence in the case, which the witness assumes as true. *Mutual Benefit Health & Accident Ass'n v. Hickman*, 100 Ga. App. 348, 111 S.E.2d 380 (1959).

Opinion of an expert on any question relating to the expert's profession, trade, or business is always admissible, when given in response to a hypothetical question based upon the testimony of witnesses other than the expert, or if the expert has personally observed the facts, and gives the expert's opinion based upon the expert's own observation. *Bullington v. Chandler*, 110 Ga. App. 803, 140 S.E.2d 59 (1964).

An expert may give an opinion based on facts which the expert personally observes, and when an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, on the other's findings. *Millar Elevator Serv. Co. v. O'Shields*, 222 Ga. App. 456, 475 S.E.2d 188 (1996).

Expert witness's opinion predicated on facts raised by others. — An expert witness's opinion may be predicated upon facts placed in evidence by the testimony of other witnesses or by any other legal means. *Mutual Benefit Health & Accident Ass'n v. Hickman*, 100 Ga. App. 348, 111 S.E.2d 380 (1959); *National Trailer Convoy, Inc. v. Sutton*, 136 Ga. App. 760, 222 S.E.2d 98 (1975).

Opinions must be based on established facts. — Expert opinions are admissible if based upon a state of facts which the evidence on behalf of either party tends to establish; but the jury should know upon what facts the opinion is founded, for its pertinence depends upon whether the jury finds the facts on which the opinion rests. *Moore v. State*, 221 Ga. 636, 146 S.E.2d 895 (1966).

Matter not in evidence. — An expert witness was properly precluded from expressing an opinion based on a letter containing an inadmissible summary of matter

not in evidence and not within the expert's own knowledge. *Loper v. Drury*, 211 Ga. App. 478, 440 S.E.2d 32 (1994).

Witness's opinion must be witness's own; the witness cannot act as a mere conduit for the opinion of others. Thus, the opinion is incompetent if the witness has no general knowledge of the witness's own. *Central of Ga. Ry. v. Brower*, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962); *Stephen W. Brown Radiology Assocs. v. Gowers*, 157 Ga. App. 770, 278 S.E.2d 653 (1981).

Personal observation of fact by expert. — Opinion of experts, on matters within their area of expertise, is admissible especially when the expert has personally observed the facts and gives the expert's opinion based upon the expert's own observations. *Erwin v. Gold Kist, Inc.*, 146 Ga. App. 372, 246 S.E.2d 404 (1978).

Expert testimony as to illegal drug distribution trade is admissible. — Trial court did not err by allowing a district attorney's investigator to give the investigator's "guess" that a document found in appellant's possession and introduced in evidence "was 'the way people who are involved in the distribution of drugs keep records of who owes them money,'" because the testimony of the investigator involved a question of "trade," particularly concerning the procedure used in the illegal drug distribution trade in keeping records of accounts due and owing. *O'Donnell v. State*, 200 Ga. App. 829, 409 S.E.2d 579, cert. denied, 200 Ga. App. 896, 409 S.E.2d 579 (1991).

Expert testimony by an undercover officer about how street drug dealers operated in three person units consisting of a seller, drug handler, and money handler, and why they did so, was admissible as not "beyond the ken" of the average juror and applicable to the facts of the case. *Vaughan v. State*, 251 Ga. App. 221, 553 S.E.2d 335 (2001).

With respect to a particular scientific procedure or technique, the trial court makes a determination whether the procedure or technique in question has reached a scientific stage of verifiable certainty, based upon evidence, expert testimony, treatises, or the rationale of cases in other jurisdictions. *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

Expert need not have gone to scene. — When an expert bases the expert's opinion

Basis for Opinion (Cont'd)**1. In General (Cont'd)**

on facts within the bounds of evidence, the testimony is admissible notwithstanding the fact that the expert never went to the scene at all and based the expert's opinion on an examination of photographs. *Jones v. Ray*, 159 Ga. App. 734, 285 S.E.2d 42 (1981).

Opinion based on findings of another. — When an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, upon the other's findings. *Cochran v. State*, 151 Ga. App. 478, 260 S.E.2d 391 (1979).

Condemnor's expert properly testified as to the necessity of a transmission line even though the condemnor's opinion was based, in part, on another's findings; further, the expert conducted the condemnor's own study after the case was initially remanded and testified on remand that the transmission line was needed by 2007 to provide safe and reliable electric service to customers in North Georgia. *Mosteller Mill, Ltd. v. Ga. Power Co.*, 271 Ga. App. 287, 609 S.E.2d 211 (2005).

Expert opinion may not be given on another's opinion. — Expert may give an opinion upon the facts testified to by other witnesses, but not upon their opinions. *Walker v. Fields*, 28 Ga. 237 (1859); *Taylor v. Warren*, 175 Ga. 800, 166 S.E. 225 (1932); *McCauley v. Boston Old Colony Ins. Co.*, 149 Ga. App. 706, 256 S.E.2d 19 (1979).

Expert opinion cannot be based on out-of-court representations by another. *Flanagan v. State*, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898).

Opinion based on hearsay. — When an expert witness's opinion is based on hearsay it is not error for the court to allow an expert to relate facts of which the expert has no direct personal knowledge, especially if the court gives the proper limiting instruction. *White v. Georgia Power Co.*, 237 Ga. 341, 227 S.E.2d 385 (1976).

It is axiomatic that an expert, in utilizing the expert's expertise, may base the expert's opinion as to value upon hearsay. *Hoover & Morris Dev. Co. v. FDIC*, 149 Ga. App. 855, 256 S.E.2d 140 (1979).

When an expert's testimony is based on hearsay, the lack of personal knowledge on

the part of the expert does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. *King v. Browning*, 246 Ga. 46, 268 S.E.2d 653 (1980); *Cheek v. Wainwright*, 246 Ga. 171, 269 S.E.2d 443 (1980); *Jones v. Ray*, 159 Ga. App. 734, 285 S.E.2d 42 (1981).

An expert's opinion may be based in part upon hearsay, and when it is based thereon it goes to the weight and credibility of the testimony, not its admissibility. *Avant Trucking Co. v. Stallion*, 159 Ga. App. 198, 283 S.E.2d 7 (1981).

Provided an expert witness is properly qualified in the field in which the expert offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion or whether it is based upon hearsay goes to the weight and credibility of the testimony, not its admissibility. *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

In an action against a utility and power company for damages arising from electromagnetic radiation, the trial court committed reversible error in admitting testimony of experts regarding a perceived consensus of opinion in the scientific community that magnetic fields from power lines are not a cause of cancer. *Jordan v. Georgia Power Co.*, 219 Ga. App. 690, 466 S.E.2d 601 (1995).

Forensic pediatrician who examined a battered infant was properly allowed to testify about seizures noted in the baby's medical records, and about a radiologist's report that confirmed suspicions about the extent of an injury, because the pediatrician's opinion was not based solely on those records, but also on an examination of the baby. *Nichols v. State*, 278 Ga. App. 46, 628 S.E.2d 131 (2006).

Investigating police officer basing opinion on hearsay statements. — Police officer who investigates an accident cannot base the officer's opinion as to manner in which accident occurred upon hearsay statements which the officer receives during the officer's investigation unless they are a part of the *res gestae*. *Avant Trucking Co. v. Stallion*, 159 Ga. App. 198, 283 S.E.2d 7 (1981).

Book learning. — Expert testimony is admissible even though based on book learn-

ing rather than knowledge gained from actual experience. *Boswell v. State*, 114 Ga. 40, 39 S.E. 897 (1901); *Miller v. Travelers Ins. Co.*, 111 Ga. App. 245, 141 S.E.2d 223 (1965).

Opinion based on education and experience was not speculative. — Testimony of a firearms expert, that the expert would not expect to find gunshot residue from the murder weapon, a semiautomatic pistol, was not speculative, was grounded on the expert's education and experience, and was admissible under O.C.G.A. § 24-9-67. *Tavera v. State*, 279 Ga. 803, 621 S.E.2d 422 (2005).

Restatement of textbook opinion inadmissible. — While an expert witness may support the expert's opinion by reference to books, statistical sources, and other learned sources, the witness's testimony is inadmissible when it is merely a restatement of a textbook opinion rather than an independent expression of the witness's own expert opinion. *DOT v. Brand*, 149 Ga. App. 547, 254 S.E.2d 873 (1979), overruled on other grounds, *Metropolitan Atlanta Rapid Transit Auth.*, 250 Ga. 538, 299 S.E.2d 876 (1983).

Medical records. — Opinion testimony based merely upon records and case history furnished the witness by other doctors and not a part of the evidence in the case was objectionable, but the error in the admission of the doctor's opinion was harmless, since during the four-day trial of the case, an enormous amount of testimony was adduced concerning the recent medical history of the decedent, the testimony included findings of diagnostic tests made during the decedent's final days, a pathologic opinion as to the cause of death could not have been made without reference to the decedent's records, and other opinion evidence based upon the records was admitted in evidence without objection. *Andrews v. Major*, 180 Ga. App. 393, 349 S.E.2d 225 (1986).

Specific article in medical journal. — It was not necessary for a doctor to have qualified as authoritative the specific article referred to in a medical journal in defense of a medical malpractice case, since the doctor did not limit the doctor's assessment of the journal's authority to the selective scope of the article. *Pound v. Medney*, 176 Ga. App. 756, 337 S.E.2d 772 (1985).

Jury instructions. — Charge to the jury, that opinions of experts to be of any value,

must be based upon facts believed, or proven to be true, was not an improper charge, nor did it have the effect of expressing an opinion on the evidence or tending to discredit the testimony of the expert witnesses in the case. *Allen v. Allen*, 71 Ga. App. 272, 30 S.E.2d 665 (1944).

2. Need to State Basis

Expert and nonexpert compared. — An expert may give the expert's opinion without stating the reasons therefor, but one who is not an expert may give an opinion only when accompanied with the reasons. *Wallace v. State*, 204 Ga. 676, 51 S.E.2d 395 (1949).

Explanation unnecessary. — Opinion testimony by witnesses who qualified as expert real estate appraisers, as to the value of the condemnees' land and as to the damages which the witnesses had suffered on account of the taking, is admissible without the necessity for the witnesses to state the facts upon which the witnesses based their opinions. *Housing Auth. v. Millwood*, 138 Ga. App. 610, 226 S.E.2d 766 (1976).

An expert may give the expert's opinion without stating the foundation therefor and without a hypothetical question based upon other evidence if the expert's opinion is based upon facts which the expert knows and has observed, or based upon facts in the record at the time the expert states the expert's opinion, or based partly on first-hand knowledge and partly on the facts or record. *Thrift-Mart, Inc. v. Commercial Union Assurance Cos.*, 154 Ga. App. 344, 268 S.E.2d 397 (1980).

Explanation permitted. — While it is not necessary that an expert witness state the facts upon which the expert bases the expert's opinion, it is error to refuse to permit the expert to do so for the purpose of showing the basis of the opinion. It matters not whether the facts are sought from the witness while on direct or on cross-examination. *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 177 (1969); *Martin v. State*, 151 Ga. App. 9, 258 S.E.2d 711 (1979).

Explanation necessary. — When an expert testifies to a conclusion based on information furnished by others, then all the information utilized by that expert in forming an opinion should be presented to the jury to

Basis for Opinion (Cont'd)**2. Need to State Basis (Cont'd)**

enable the jury to evaluate the expert's testimony. *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

Error to refuse to permit witness to state basis. — While it is not necessary that an expert witness state the facts upon which the expert bases the expert's opinion, it is error to refuse to permit the expert to do so for the purpose of showing the basis of the opinion. *Jordan v. Department of Transp.*, 178 Ga. App. 133, 342 S.E.2d 482 (1986).

Basis for opinion outside scope of expertise. — An opinion of a witness is inadmissible when the information upon which the opinion is based is not given. This is true, even though the witness is an expert on some subject, when the opinion testimony related to a subject on which the witness is not qualified as an expert. *Central of Ga. Ry. v. Brower*, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962).

Explanation enhances weight of opinion. — When the facts upon which an expert bases the expert's opinion are stated the opinion is entitled to greater weight. *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 177 (1969).

Hypothetical Questions

Admissibility of opinion. — Opinion of an expert on any question relating to the expert's profession, trade, or business is always admissible, when given in response to a hypothetical question based upon the testimony of witnesses other than the expert, or where the expert has personally observed the facts and given the expert's opinion based on the expert's own opinion. *Yates v. State*, 127 Ga. 813, 56 S.E. 1017, 9 Ann. Cas. 620 (1907); *Cranshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S.E. 222 (1907); *Fincher v. Davis*, 27 Ga. App. 494, 108 S.E. 905 (1921); *Taylor v. Warren*, 175 Ga. 800, 166 S.E. 225 (1932); *Wallace v. State*, 204 Ga. 676, 51 S.E.2d 395 (1949).

It is not necessary that question be propounded hypothetically when an expert testifies to the expert's opinion based upon facts which the expert has observed. *Jones v. Ray*, 159 Ga. App. 734, 285 S.E.2d 42 (1981).

When hypothetical question is appropriate. — Proper mode of examining a physician or expert, when the physician or expert is not testifying from one's own knowledge, is to ask the physician or expert hypothetical questions. *Kimball v. State*, 63 Ga. App. 183, 10 S.E.2d 240 (1940).

When an expert is asked to give an opinion on facts not coming within the expert's own knowledge, the question should be hypothetical. *Evans v. DeKalb County Hosp. Auth.*, 154 Ga. App. 17, 267 S.E.2d 319 (1980).

Factual basis for hypothetical question. — When the testimony is based upon a hypothetical question, the facts assumed to be true should be such as the evidence on behalf of either party tends to establish. *Flanagan v. State*, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898); *Yarbrough v. Yarbrough*, 202 Ga. 391, 43 S.E.2d 329 (1947); *Ellis v. Southern Ry.*, 89 Ga. App. 407, 79 S.E.2d 541 (1953); *Garrett v. State*, 153 Ga. App. 366, 265 S.E.2d 304 (1980).

Opinion of an expert witness may be given in response to a hypothetical question based upon facts placed in evidence by the testimony of other witnesses or by competent evidence of any nature. *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976); *DuBois v. Ray*, 177 Ga. App. 349, 339 S.E.2d 605 (1985); *Horton v. Eaton*, 215 Ga. App. 803, 452 S.E.2d 541 (1994), overruled on other grounds, *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009); *Rowe v. State*, 266 Ga. 136, 464 S.E.2d 811 (1996).

When reliance is made upon circumstantial evidence alone for proof of one of the essential facts assumed in the framing of a hypothetical question, the trier of fact may consider the answer to the question only if it has first determined that the assumed fact has been satisfactorily established. *Bowers v. State*, 153 Ga. App. 894, 267 S.E.2d 309 (1980).

Reliance can be made upon circumstantial evidence to establish a basis for framing a hypothetical question; the question of whether the circumstances were sufficiently proven to establish the fact contained in the hypothetical question is an issue for the trier of fact. *Stoneridge Properties, Inc. v. Kuper*, 178 Ga. App. 409, 343 S.E.2d 424 (1986).

That the testimony was circumstantial

would not affect the viability of a hypothetical. Whether there was insufficient knowledge upon which the expert could render the expert's opinion goes not to the admissibility of that opinion, but to the credibility of the witness. *Apac-Georgia, Inc. v. Padgett*, 193 Ga. App. 706, 388 S.E.2d 900 (1989).

Method of asking question. — Attorney would be limited in framing the hypothetical question to the expert witness by the same parameters which would limit own testimony. *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976).

Weight of testimony in response to hypothetical question. — Opinion testimony of an expert can be based upon hypothetical questions and though the jury is allowed to receive the testimony of experts the jury is not bound by such testimony; such testimony is not conclusive or controlling and is submitted for whatever the jury considers it to be worth. *Woods v. Andersen*, 145 Ga. App. 492, 243 S.E.2d 748 (1978).

Weight of Opinion Evidence

Expert testimony is weighed and judged like any other; its weight and value is determined by the jury considering its nature and the layman's knowledge thereof. *Buckhanon v. State*, 151 Ga. 827, 108 S.E. 209 (1921). See also *Mitchell v. State*, 6 Ga. App. 554, 65 S.E. 326 (1909).

Trier of fact not bound by expert testimony. — While competent expert testimony is entitled to great weight, the testimony is not so authoritative that either court, jury, or commission is bound to be governed by that testimony, since the testimony is advisory merely and intended to assist the court, jury, or commission in coming to a correct conclusion. *B.F. Goodrich Co. v. Arnold*, 88 Ga. App. 64, 76 S.E.2d 20 (1953). See also *Thomas v. United States Cas. Co.*, 218 Ga. 493, 128 S.E.2d 749 (1962); *Miller v. Travelers Ins. Co.*, 111 Ga. App. 245, 141 S.E.2d 223 (1965); *Hughes v. Newell*, 152 Ga. App. 618, 263 S.E.2d 505 (1979); *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916 (1980), cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993).

While direct and positive testimony cannot arbitrarily be rejected by a jury or other trier of facts, this rule does not apply to the

opinion evidence of physicians or other experts. Accordingly, it was a question for the board's determination as to whether the board would accept the testimony of one physician, which authorized the award for the claimant, or the testimony of two other doctors, which would have authorized an award denying compensation. *United States Fid. & Guar. Co. v. Doyle*, 96 Ga. App. 745, 101 S.E.2d 600 (1957).

Expert testimony is not absolutely obligatory on the jury, even if uncontradicted. *Smith v. Godfrey*, 155 Ga. App. 113, 270 S.E.2d 322 (1980).

Probative value of opinion evidence is for the jury. *Western Union Tel. Co. v. Ford*, 8 Ga. App. 514, 70 S.E. 65 (1911); *McDowell v. State*, 78 Ga. App. 116, 50 S.E.2d 633 (1948); *Ford Motor Co. v. Hanley*, 128 Ga. App. 311, 196 S.E.2d 454 (1973); *Arnold v. State*, 155 Ga. App. 569, 271 S.E.2d 702 (1980).

Weight given to discredited tests in expert community. — Trial court did not err in admitting the expert testimony of the psychologist who interviewed the children even though defendant presented expert testimony that one of the tests used by the psychologist had been discredited in the psychological community; the conflicting expert opinions on test results went to the weight, rather than the admissibility, of the testimony. *Hanson v. State*, 263 Ga. App. 45, 587 S.E.2d 200 (2003).

Quality of expert opinion must be considered. — An expert opinion while very valuable in many situations, nevertheless has a limited weight-carrying capacity. The "quality" of such testimony must be considered. *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973).

Jury can consider expert's credentials in assessing weight. — Whether an examining physician is or is not a psychiatrist is a matter which may affect the extent of the physician's expertise in evaluating a mental condition, and therefore may affect the weight of any opinion or evaluation, a matter to be determined by a jury, but it does not affect admissibility, nor is admissibility precluded by the fact that the physician's opinions and evaluations are based on conversations with the patient. *Petty v. Folsom*, 229 Ga. 477, 192 S.E.2d 246 (1972).

Weight of Opinion Evidence (Cont'd)

Jury can consider the expert's credentials and then give such weight and credit to the expert's testimony as jury sees fit. *McCoy v. State*, 237 Ga. 118, 227 S.E.2d 18 (1976).

Positive factual testimony outweighs negative opinion. — Affirmative and positive testimony of witnesses as to the actual facts of a particular occurrence is not overcome by testimony which is negative in its character or consists of mere opinions. *West v. State*, 84 Ga. 527, 10 S.E. 731 (1890).

An expert's opinion based on insufficient factual foundation or hearsay affects the weight, but not the admissibility, of the expert's testimony. *Woods v. Andersen*, 145 Ga. App. 492, 243 S.E.2d 748 (1978).

When it is developed by examination that the opinion is based on inadequate knowledge, this goes to the credibility of the witness rather than to the admissibility of the evidence. *Jones v. Ray*, 159 Ga. App. 734, 285 S.E.2d 42 (1981).

Jury instructions. — Even if the testimony of the civil engineer as to the distance between named points, introduced by the defendant in support of an alibi sought to be established by the defendant, could be considered as expert evidence, the omission to charge the law in regard to expert testimony as set forth in statute, declaring that "the opinions of experts, on any question of science, skill, trade, or like questions, shall always be admissible; and such opinions may be given on the facts as proved by other witnesses," was not, as contended, an expression of opinion as to credibility of the witness and weight of the testimony; nor was it erroneous to omit to charge on that subject without request. *Stone v. State*, 180 Ga. 223, 178 S.E. 435 (1935).

Charge that opinion evidence could be accepted by the jury and considered along with all the other evidence in the case, but that the jury was not bound by the opinions of experts or nonexperts was not error. *Allen v. Allen*, 71 Ga. App. 272, 30 S.E.2d 665 (1944).

Jury charge upheld. — There was no reversible error, despite the defendant's argument on appeal that the trial court's charge to the jury on DNA evidence was incomplete and prejudicial as a matter of law because: (1) a review of the record showed

that the charge given by the court tracked the language set forth in the pattern charge and was otherwise a correct statement of law with respect to the collection and testing of DNA; and (2) the defendant's proposed jury charge was argumentative and composed primarily of evidentiary matters that were not proper for a jury instruction. Moreover, there was no request for the additional charge the defendant asserted was erroneously omitted present in the record. *Stanley v. State*, 289 Ga. App. 373, 657 S.E.2d 305 (2008).

Cross-Examination

Matters admissible on cross examination. — Matters the expert may have omitted from consideration in the expert's appraisal of property were appropriate matters for cross-examination and rebuttal, and ultimately for the weight to be given the opinion by the jury. *Brookhaven Supply Co. v. DeKalb County*, 134 Ga. App. 878, 216 S.E.2d 694 (1975).

Reasoning the expert used in reaching expert's opinion may be explored on cross-examination and need not be presented in toto as a condition precedent to admissibility. *Woods v. Andersen*, 145 Ga. App. 492, 243 S.E.2d 748 (1978).

Introducing inadmissible evidence by cross-examination. — Party should not be allowed to introduce in evidence an opinion of an expert witness based on hearsay by the method of cross-examining such witness when such evidence would have been entirely inadmissible on direct examination. *Moore v. State*, 221 Ga. 636, 146 S.E.2d 895 (1966).

Volunteered testimony. — Testimony of an expert witness is not reversible error if the expert volunteered testimony during cross-examination which was substantially the same or similar to that later objected to. *DOT v. Coley*, 184 Ga. App. 206, 360 S.E.2d 924 (1987).

Illustrations

1. Opinions Admissible

Experts were permitted to testify in the following cases. — See *Hook v. Stovall, Dunn & Co.*, 26 Ga. 704 (1859) (physician on disease); *Walker v. Fields*, 28 Ga. 237

(1859) (willwright); *May v. Dorsett*, 30 Ga. 116 (1860) (banking expert); *White v. Clements*, 39 Ga. 232 (1869) (physician on disease; ethnologist on question of race); *Everett v. State*, 62 Ga. 65 (1878) (physician); *Taylor v. State*, 83 Ga. 647, 10 S.E. 442 (1889) (physician on sanity); *Von Pollnitz v. State*, 92 Ga. 16, 18 S.E. 301, 44 Am. St. R. 72 (1893) (physician); *Perry v. State*, 110 Ga. 234, 36 S.E. 781 (1900) (physician); *Wheeler v. State*, 112 Ga. 43, 37 S.E. 126 (1900) (acoustics expert on whether conversation could be overheard); *Travelers Ins. Co. v. Thornton*, 119 Ga. 455, 46 S.E. 678 (1904) (physician on death but not on contributing cause); *Macon Ry. & Light Co. v. Mason*, 123 Ga. 773, 51 S.E. 569 (1905) (osteopath notwithstanding lack of physician's license); *Bullard v. State*, 127 Ga. 289, 56 S.E. 429 (1907) (physician); *Goodwyn v. Central of Ga. Ry.*, 2 Ga. App. 470, 58 S.E. 688 (1907) (railroad engineer); *Glover v. State*, 129 Ga. 717, 59 S.E. 816 (1907) (physician on sanity); *Harper v. State*, 129 Ga. 770, 59 S.E. 792 (1907) (physician); *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 62 S.E. 52 (1908) (expert on location of railroad and factory); *Cochrell v. Langley Mfg. Co.*, 5 Ga. App. 317, 63 S.E. 244 (1908) (experts on machinery); *Garner v. State*, 6 Ga. App. 788, 65 S.E. 842 (1909) (gun expert on caliber of bullet); *Western Union Tel. Co. v. Ford*, 8 Ga. App. 514, 70 S.E. 65 (1911) (whether sight could have been saved by timely arrival of oculist); *Lanier v. State*, 141 Ga. 17, 80 S.E. 5 (1913) (expert testimony on manner and cause of death); *Wilensky v. State*, 15 Ga. App. 360, 83 S.E. 276 (1914) (jeweler as to symbol on watch); *Byrd v. State*, 142 Ga. 633, 83 S.E. 513, 1915B L.R.A. 1143 (1914) (gun expert on wound); *Bates v. State*, 18 Ga. App. 718, 90 S.E. 481 (1916) (handwriting expert on authorship of papers); *Spence v. State*, 20 Ga. App. 61, 92 S.E. 555, cert. denied, 20 Ga. App. 832 (1917) (accountant as to what books show); *Holtzendorf v. McNeil*, 25 Ga. App. 792, 104 S.E. 919 (1920) (dentist on value of extracted tooth); *Bullard v. Metropolitan Life Ins. Co.*, 31 Ga. App. 641, 122 S.E. 75 (1924) (physician on death but not on contributing cause); *Southern Ry. v. Wessinger*, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924) (railroad engineer); *Taber Mill v. Southern Brighton Mills*, 49 Ga. App. 390, 175 S.E. 665

(1934) (expert on customs and usages of trade); *Pollard v. Page*, 56 Ga. App. 503, 193 S.E. 117 (1937) (physician on plaintiffs' condition, after giving basic facts); *Southern Ry. v. Blanton*, 59 Ga. App. 252, 200 S.E. 471 (1938), later appeal, 63 Ga. App. 93, 10 S.E.2d 430 (1940) (railroad engineer on safety practices); *Sockwell v. Lucas & Jenkins, Inc.*, 71 Ga. App. 765, 32 S.E.2d 201 (1944) (building inspector on conformance to building code); *McDowell v. State*, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (undertaker on cause of corpse's mutilation); *Central Truckaway Sys. v. Harrigan*, 79 Ga. App. 117, 53 S.E.2d 186 (1949) (physician on permanency of patient's injuries); *Eller v. Matthews*, 216 Ga. 315, 116 S.E.2d 235 (1960) (teacher on emotional state of pupil); *State Hwy. Dep't v. Sinclair Ref. Co.*, 103 Ga. App. 18, 118 S.E.2d 293 (1961) (expert on damages to property); *McGuire v. Davis*, 437 F.2d 570 (5th Cir. 1971) (physician on pain suffered by patient); *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976) (plaintiff's attorney on reasonableness of attorney's fee); *Hall v. State*, 138 Ga. App. 20, 225 S.E.2d 705 (1976) (fingerprints); *Harris v. Atlantic Cresosote Co.*, 142 Ga. App. 695, 236 S.E.2d 909 (1977) (expert on vehicle's stopping distance); *Security Life Ins. Co. v. Blitch*, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (expert on whether wound was self-inflicted); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981) (expert on battered woman's syndrome); *Paxton v. State*, 159 Ga. App. 175, 282 S.E.2d 912, cert. denied, 248 Ga. 231, 283 S.E.2d 235 (1981) (common origin of pubic hairs); *Inta-Roto, Inc. v. Guest*, 160 Ga. App. 75, 286 S.E.2d 61 (1981) (expert on mechanical engineering); *Davis v. Williams*, 165 Ga. App. 45, 299 S.E.2d 102 (1983) (surveyor as to boundary line); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984) (experts in automobile engineering and systems safety analysis); *Concrete Constr. Co. v. City of Atlanta*, 176 Ga. App. 873, 339 S.E.2d 266 (1985) (expert in electric engineering familiar with the installation of gas lines); *Ingram v. State*, 178 Ga. App. 292, 342 S.E.2d 765 (1986) (Georgia Bureau of Investigation (GBI) agent qualified to testify as an expert in drug business methods and language interpretation); *Height v. State*, 221 Ga. App. 647, 472 S.E.2d 485

Illustrations (Cont'd)**1. Opinions Admissible (Cont'd)**

(1996) (drug investigator on amount and manner of packaging of cocaine).

Battered women's syndrome expert was properly permitted to testify as to why a victim would not have reported instances of abuse and why the victim dismissed a complaint for divorce and reconciled with defendant; further, the expert was properly permitted to testify as to the expert's qualifications in the presence of the jury. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Fingerprint comparison expert. — State's fingerprint expert was properly permitted to testify as fingerprint comparison evidence was not novel and was widely accepted in Georgia courts. *Dailey v. State*, 271 Ga. App. 492, 610 S.E.2d 126 (2005).

Rheumatologist testifying on the cause of an injured party's scleroderma. — Trial court properly allowed a customer who fell while shopping at a home products store to offer the testimony of experts who opined that scleroderma the customer developed shortly after the customer underwent surgical fusion of two vertebrae was caused by trauma the customer suffered when the customer fell, and the court did not err when the court declined to apply the test established by the Supreme Court of Georgia in its *Harper* decision when it decided if the customer's experts could testify. *Home Depot U.S.A., Inc. v. Tvrdeich*, 268 Ga. App. 579, 602 S.E.2d 297 (2004).

Contract terms. — If there was no applicable custom to determine, in a timber lease, the size of trees meant by the phrase "suitable for turpentine purposes," opinion evidence would be admissible. It should be admitted, however, not to explain the meaning of descriptive terms in the contract, but simply for the purpose of determining what class of trees or timber as to size would come within such description. Nor would the quoted phrase be varied in the phrase's legal meaning because of the different methods of proof, for that would be the same whether a custom be shown or not, since any such custom, if existing, would presumably represent the standard of ordinarily prudent men. *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947).

Expert testimony on credibility of witness.

— Generally, expert testimony as to the credibility of a witness is admissible if the subject matter involves organic or mental disorders, such as insanity, hallucinations, nymphomania, retrograde amnesia, and testimony concerning physical maladies which tend to impair mental or physical faculties. *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974).

Expert's testimony as to whether victims' videotaped statements were coached. — Expert's testimony as to whether victims' videotaped statements were coached was inadmissible in a prosecution for child molestation since the jury saw the interviews for themselves and heard the victims' direct and cross-examination as witnesses. *Wright v. State*, 233 Ga. App. 358, 504 S.E.2d 261 (1998).

An expert on insanity may give an opinion based upon the expert's own examination of a person, upon the expert's observation of that person, or upon any state of facts, supported by some evidence in the case, which the expert assumes as true. *Moore v. State*, 221 Ga. 636, 146 S.E.2d 895 (1966).

Testimony by examining physician. — Physician who has examined an injured party may describe what the physician has seen and give the physician's expert inferences therefrom. *McGuire v. Davis*, 437 F.2d 570 (5th Cir. 1971).

Opinion on ultimate fact. — Defendant's claim that a doctor improperly gave an opinion as to an ultimate fact was rejected as the doctor did not testify concerning child neglect syndrome when the doctor testified that the doctor's overall impression was a possible child-neglect scenario, the syndrome had been recognized and expert testimony concerning the syndrome was admissible, and a treating physician could testify that the examination of a child raised a strong suspicion of child abuse. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

Testimony by examining psychologist. — Juvenile court properly allowed expert to testify about mother's mental health status and its effects on the mother's parenting abilities even though the testing occurred two years prior to the hearing. *In the Interest of A.K.*, 272 Ga. App. 429, 612 S.E.2d 581 (2005).

In a child molestation case, there was no error in allowing certain expert testimony by a psychologist. The psychologist was properly allowed to explain conclusions based on tests developed either in the scientific community or from the psychologist's own clinical experience; the psychologist could testify that the victim's symptoms and accounts were highly consistent with sexual abuse; and because the trial court was authorized to conclude that one's ability to manufacture stories of abuse based upon his or her intelligence quotient (IQ) level fell beyond the ken of the average juror, the psychologist was properly allowed to testify that a person with the victim's IQ of 74 would have difficulty fabricating a detailed fictional account of abuse. *Mullis v. State*, 292 Ga. App. 218, 664 S.E.2d 271 (2008).

Testimony by examining nurse. — In a prosecution on charges of both child molestation and aggravated child molestation, the trial court did not abuse the court's discretion in allowing an examining registered nurse to give an opinion that a child sex abuse victim's injuries were consistent with ones caused by penetration by a finger when, prior to testifying, the nurse outlined the nurse's relevant background including completion of a sexual assault nurse examiner's program, advanced pediatric training under the supervision of a doctor involved in child abuse cases, and training and experience in performing numerous pelvic examinations on child abuse victims. *Rodriguez v. State*, 281 Ga. App. 129, 635 S.E.2d 402 (2006).

Trial court did not err in denying the defendant's motion in limine to exclude a nurse's testimony, stating that the victim's normal physical examination was consistent with claims of molestation, as the nurse simply testified that the victim's physical examination results were consistent with the allegations, and as such was a permissible expression of the expert's opinion. *Noe v. State*, 287 Ga. App. 728, 652 S.E.2d 620 (2007).

Experts on toxicology. — As an expert witness was not a mere conduit for a toxicologist's findings, because the expert reviewed the data and testing procedures to determine the accuracy of the toxicologist's report, the expert's testimony was properly admitted. Therefore, defense counsel was not ineffective for failing to object to the

testimony. *Watkins v. State*, 285 Ga. 355, 676 S.E.2d 196 (2009).

Psychologist's hypothetical based on evidence adduced at trial. — When appellant was charged with sexually molesting his daughter, and appellant acknowledged that he had sexually molested his first daughter by a previous marriage over a ten year period, the trial court did not err by admitting a psychologist's testimony about the mathematical probabilities regarding the self-rehabilitation of pedophiles or persons with incestuous behavior, since the likelihood of a person with compulsive behavior rehabilitating himself without treatment is a subject matter not within the scope of the ordinary laymen's knowledge and experience, and thus evidence regarding these matters was properly admissible under O.C.G.A. § 24-9-67. *Harwood v. State*, 195 Ga. App. 465, 394 S.E.2d 109 (1990).

Testimony on psychiatric disorders. — Testimony of experts that plaintiff suffered from recognized psychiatric disorders that caused the plaintiff to have or complain of physical symptoms out of proportion to any injuries the plaintiff may have experienced did not go solely to the credibility of the plaintiff and was admissible. *Rose v. Figgie Int'l, Inc.*, 229 Ga. App. 848, 495 S.E.2d 77 (1998).

Medical social worker. — Witness's testimony that a baby's injuries were inconsistent with the history of events the defendant had described was well within the witness's purview as a medical social worker because the witness's daily duties required consideration of medical evidence along with personal observations to determine whether factors were present which could indicate child abuse. *Nichols v. State*, 278 Ga. App. 46, 628 S.E.2d 131 (2006).

Testimony of a mechanic was sufficient to prove the value of the damage to the victim's car in a case charging second degree criminal damage to property. *Wyche-Hinkle v. State*, 268 Ga. App. 898, 602 S.E.2d 902 (2004).

Expert on property value. — In an action to acquire land, a duly qualified expert may state the expert's opinion as to value without the necessity of stating the facts on which the expert's opinion is based. *DeKalb County v. Cowan*, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Illustrations (Cont'd)**1. Opinions Admissible (Cont'd)**

In an action to acquire land, if the expert testifies that the expert's opinion is based in part on a personal inspection of the property, it is no ground for objection that the expert's inspection was made subsequent to the taking. *DeKalb County v. Cowan*, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

In an action to acquire land, it was not error to allow expert testimony as to the rental value of the property over the county's objection that the figure was based on the rental value of other property which was not shown to be comparable as the comparability of the other property was a matter going to the weight to be given the testimony, not its admissibility, and further, the testimony was relevant on the issue of consequential damages for the temporary loss of use of the property. *DeKalb County v. Cowan*, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Expert's reliance on hearsay. — Trial court did not err in overruling a landowner's objection to the admission of evidence of a survey conducted by another surveyor employed by the landowner's neighbors in that the survey was prepared in partial reliance on data outside of the surveyor's personal knowledge; an expert may base the expert's opinion on hearsay and may be allowed to testify as to the basis for the expert's findings, and the lack of the expert's personal knowledge goes to the weight assigned to the opinion. *Ellis v. Holder*, 267 Ga. App. 503, 600 S.E.2d 425 (2004).

Value of condemned land. — Expert's opinion as to what expert would pay for condemned land was probative of the land's fair market value and improperly excluded by the trial court. *Jotin Realty Co. v. Department of Transp.*, 174 Ga. App. 809, 331 S.E.2d 605 (1985).

Expert on safety and causation. — Propriety of expert opinion as to whether a particular condition is safe or unsafe certainly is within the scope and purview of an expert's opinion; moreover, testimony as to causation is a proper matter for expert testimony. *Pembroke Mgt., Inc. v. Cossaboon*, 157 Ga. App. 675, 278 S.E.2d 100 (1981).

Testimony of pathologist in murder was not inadmissible because it might possibly give rise to inferences adverse to defendant.

Bethea v. State, 251 Ga. 328, 304 S.E.2d 713 (1983).

Medical expert on murder victim's fatal condition. — It was within the medical examiner's expertise to testify, based upon the examiner's observation of the blood stains at victim's condo and the significance of the blood loss indicated by those stains, that in the absence of immediate medical care victim was probably dead. *White v. State*, 263 Ga. 94, 428 S.E.2d 789 (1993).

Medical examiner properly allowed to state opinion on cause of death. — County medical examiner was properly permitted to state examiner's opinion, based on the facts contained in a 1979 autopsy report, that the victim died of a gunshot wound to the abdomen, and such opinion was not the restatement of the diagnostic opinion of another expert. *Turner v. State*, 273 Ga. 340, 541 S.E.2d 641 (2001), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Forensic pathologist on single fatal blow. — Expert's testimony regarding the possibility of death by a single blow, and the possibility of subsequent head movement following death in that manner, was admissible because it was based on facts in evidence and because this testimony pertained to conclusions jurors would not ordinarily be able to draw for themselves. *Maxwell v. State*, 263 Ga. 57, 428 S.E.2d 76 (1993).

Testimony by pathologist instead of physician on injury was proper. — In a prosecution for kidnapping and aggravated assault, the trial court properly allowed a pathologist instead of a physician to testify as to whether the holes in the victim's shoe and an injury to the victim's toe were caused by a bullet; the pathologist had experience in inspecting gunshot wounds on people and in clothing and footwear. *Winfrey v. State*, 286 Ga. App. 450, 649 S.E.2d 561 (2007).

Expert trained in behavioral science. — Expert in the areas of homicide investigation and crime scene reconstruction was allowed to testify regarding the reasons why a perpetrator might reposition and cover a victim since the challenged testimony was well within the expert's range of training and experience and the average juror does not possess the experience necessary to discern the most common complex behavioral reasons for a perpetrator's acting in such a manner. *Foster v. State*, 273 Ga. 34, 537 S.E.2d 659 (2000).

Expert testimony on DNA profile. — Expert's testimony regarding the frequency in the population of the DNA profile obtained from three rape victims was admissible given the expert's credentials and expertise and the expert's testimony as to the computer program which generated the statistical frequencies to which the expert testified. *Collins v. State*, 267 Ga. App. 784, 600 S.E.2d 802 (2004).

No error resulted by admitting expert testimony on the issue of DNA testing, and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. *Carruth v. State*, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Pediatrician's opinion that a child had been molested was one of fact and one which the jurors would not ordinarily be able to draw for themselves, and was admissible even though the testimony indirectly involved the child's credibility. *State v. Butler*, 256 Ga. 448, 349 S.E.2d 684 (1986), *aff'd*, 181 Ga. App. 589, 353 S.E.2d 855 (1987).

Expert's opinion that child molested. — Expert's testimony that in expert's opinion the child had been molested without comment as to whether the defendant was the molester was not testimony as to the ultimate issue in the case and was not objectionable. *Karonen v. State*, 205 Ga. App. 852, 424 S.E.2d 47, *cert. denied*, 205 Ga. App. 900, 424 S.E.2d 47 (1992).

Child abuse syndrome. — Trial court properly allowed a psychologist, who had examined a child molestation victim, to testify as to the psychologist's conclusion that the victim suffered from child abuse syndrome, since the testimony was not a conclusion that the victim was in fact abused and that issue was left to the jury to determine. *Cooper v. State*, 200 Ga. App. 560, 408 S.E.2d 797 (1991).

Trial court properly admitted an expert's testimony as to child sexual abuse syndrome as: (1) it was helpful to the jury; and (2) laymen could not understand this syndrome without expert testimony, nor would laymen be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted; further, the expert offered no opinion as to whether the victims were being truthful, but

left that determination for the jury. *McCoy v. State*, 278 Ga. App. 492, 629 S.E.2d 493 (2006).

Testimony of burglary investigator. — Testimony of a sheriff's department's burglary investigator as to whether, based on his training and experience, items are sometimes sold when items are stolen and whether the crime lab would process fingerprints taken from a burglary crime scene was admissible. *Hestley v. State*, 216 Ga. App. 573, 455 S.E.2d 333 (1995).

Testimony on blood samples based on electrophoresis procedure. — Expert witness may testify concerning identification of blood samples based on procedure known as electrophoresis, the statistical or mathematical probability of certain enzymes being found in the blood of the general population. *Graham v. State*, 168 Ga. App. 23, 308 S.E.2d 413 (1983).

Evidence of source of DNA. — Trial counsel was not ineffective in failing to make a meritless objection based on the state's expert's testimony as to the source of the DNA on a sock as the possible mechanisms by which epithelial cells ended up on a sock were beyond the ken of the average layman; since the evidence at issue was admissible, defendant's trial counsel was not required to object. *Eley v. State*, 266 Ga. App. 45, 596 S.E.2d 660 (2004).

Expert testimony as to the practices of an industry is admissible. *Dan Gurney Indus., Inc. v. Southeastern Wheels, Inc.*, 168 Ga. App. 504, 308 S.E.2d 637 (1983).

Expert could rely on the Safety Code for Elevators and Escalators in forming the expert's opinion. *Millar Elevator Serv. Co. v. O'Shields*, 222 Ga. App. 456, 475 S.E.2d 188 (1996).

Product liability action. — Trial court did not abuse court's discretion in allowing an expert witness to testify, pursuant to O.C.G.A. § 24-9-67, in a truck owner's products liability action against a truck modifying company regarding an allegedly defective switch that was installed on the floorboard of the truck, as the expert testified that the expert had some knowledge of electrical systems, vehicle wiring, and in investigating electrical fires; accordingly, the expert's opinion that the origin of the fire was electrical and the expert's explanation as to the meaning of a flammability rating and the

Illustrations (Cont'd)**1. Opinions Admissible (Cont'd)**

expert's testimony thereon was properly admitted. *Cottrell, Inc. v. Williams*, 266 Ga. App. 357, 596 S.E.2d 789 (2004).

In an action for libel, there was no error in the admission of the testimony of a journalism professor who testified as to certain generally recognized minimum standards in journalism and then stated the professor's opinion that the conduct described in a hypothetical question did not meet these standards. *News Publishing Co. v. DeBerry*, 171 Ga. App. 787, 321 S.E.2d 112 (1984), cert. denied, 471 U.S. 1053, 105 S. Ct. 2112, 85 L. Ed. 2d 477 (1985).

Testimony of police officer on cocaine use admissible. — Knowledge of the amount of crack cocaine one would generally possess for personal use or the amount which might evidence distribution is not necessarily within the scope of the ordinary layman's knowledge and experience. Therefore, the testimony of a veteran police officer on the subject would be properly admissible under O.C.G.A. § 24-9-67. *Davis v. State*, 200 Ga. App. 44, 406 S.E.2d 555 (1991).

Police officer's opinion testimony that the amount of cocaine seized in the execution of a search warrant upon defendant's residence would typically be intended for distribution by the defendant rather than for the defendant's personal use was properly admissible. *Wise v. State*, 257 Ga. App. 211, 570 S.E.2d 656 (2002).

Unqualified testimony of a police officer offered to show intent to distribute cocaine, based on the amount of cocaine and the officer's knowledge of defendant, was not competent evidence of an intent to distribute. *Stephens v. State*, 219 Ga. App. 881, 467 S.E.2d 201 (1996).

Crime lab chemist qualified regarding street value of drugs. — It was not error for the trial court to permit the state expert, a crime laboratory chemist, to testify concerning the "street value" of confiscated drugs, where the chemist testified that the chemist had accumulated knowledge of the street value of cocaine as a result of the chemist's experience over years of comparing the prices paid by undercover officers during their undercover purchases with that which was supplied to the chemist for analysis.

Robinson v. State, 203 Ga. App. 759, 417 S.E.2d 404, cert. denied, 203 Ga. App. 907, 417 S.E.2d 404 (1992).

Although a print card was not admitted as a business record, it was relevant as the basis for an expert's conclusion that defendant's print matched that taken from the victim's vehicle; despite defendant's hearsay objection, the expert's testimony connected defendant to the crime, and the admissibility of the expert's inculpatory testimony did not depend upon the admission of the print. *Roebuck v. State*, 277 Ga. 200, 586 S.E.2d 651 (2003).

Opinion of police officer on auto accident. — Investigating officer's opinion testimony regarding the sequence of events involved in a vehicle collision is admissible evidence as a police officer with investigative experience on automobile collisions is an expert who may testify as to the cause of an accident the officer investigated. *Bennett v. Mullally*, 263 Ga. App. 215, 587 S.E.2d 385 (2003).

Officer is an expert on narcotics investigations. — Arresting officer should have been qualified as an expert in "narcotics investigation"; although the trial court allowed the officer's testimony over objection. *Davis v. State*, 209 Ga. App. 572, 434 S.E.2d 132 (1993).

Officer's testimony on effects of alcohol on body. — At the time of a defendant's driving under the influence (DUI) trial, the arresting officer had over four years of law enforcement experience, had been trained in DUI detection and field sobriety testing, and had been involved in over 100 DUI arrests. Based on the officer's training and experience, the officer was qualified to testify about the effects of alcohol consumption on the body. *Lanwehr v. State*, 265 Ga. App. 359, 593 S.E.2d 897 (2004).

Dock signals expert. — Trial court did not err in permitting witness to testify as an expert for procedures where hand signals or sight alone is insufficient in a personal injury action brought by longshoreman against state port authority. *Georgia Ports Auth. v. Hutchinson*, 209 Ga. App. 726, 434 S.E.2d 791 (1993).

Highway signal engineer. — Trial court did not abuse court's discretion in permitting a Department of Transportation engineer, qualified as a signal engineer, to testify

whether the state was negligent in designing an intersection and signal timing at the intersection. *Fouts v. Builders Transp., Inc.*, 222 Ga. App. 568, 474 S.E.2d 746 (1996).

Failure to identify expert before hearing not grounds to exclude testimony. — In a child deprivation hearing, a parent's claim that the trial court erred by allowing the state to call an expert witness without identifying the expert or producing the medical records in advance of the hearing was meritless because: (1) the parent's discovery request did not ask the state to identify each person whom the state expected to call as an expert witness at trial; and (2) the parent did not show prejudice from the lack of any additional information other than a broad assertion of insufficient time to prepare for the hearing. *In the Interest of A.A.*, 293 Ga. App. 471, 667 S.E.2d 641 (2008).

Expert testimony not objectionable. — Trial court did not err in denying a defendant's motion for a new trial based on the ineffective assistance of counsel in failing to object to an expert's opinion testimony because the record did not support the defendant's argument that the expert's testimony was objectionable; the expert's testimony was limited to describing how the expert and doctors in the medical community generally performed genital examinations of female patients and did not touch on whether either the defendant or the victim was telling the truth on whether the defendant committed aggravated sexual battery, and the expert's testimony regarding the typical medical examination of a preadolescent girl's genitals was relevant to the issues raised by the defendant's defense. *Lee v. State*, 300 Ga. App. 214, 684 S.E.2d 348 (2009).

2. Opinions Inadmissible

Testimony was inadmissible as expert testimony in the following cases. — See *Wylly v. Gazan*, 69 Ga. 506 (1882) (meaning of "more or less" in deed); *Central R.R. v. DeBray*, 71 Ga. 406 (1883) (whether employees were required to get on or off moving train); *Carter v. Carter Elec. Co.*, 156 Ga. 297, 119 S.E. 737 (1923) (damage to business from use of similar name by competitor); *Davies v. Blasingame*, 177 Ga. 450, 170 S.E. 477 (1933) (soundness of property title); *United States v. Roberts*, 192 F.2d 893

(5th Cir. 1951) (continuing total disability a matter of law and fact).

Trial court properly granted summary judgment in favor of a drug store in a suit brought by the parents of a teenager who died while huffing butane for wrongful death and in a suit brought by the parents of two other teens who were injured when: the teens assumed the risk; the expert's affidavit presented by the parents was not based on personal knowledge from interviewing the teens, and was conclusory and speculative; to the extent that the expert's affidavit fit within O.C.G.A. § 24-9-67, the expert's generalizations about the beliefs of adolescents about death or the propensity of adolescents to exercise poor judgment and behave irresponsibly were not appropriate yardsticks for assessing the minors' knowledge of the risk; the parents' claim that the drug store knew that the teens were going to misuse the butane was based on hearsay; and the parents' public policy claims were rejected as O.C.G.A. § 16-13-90 created a list of dangerous substances not to be sold to minors, butane was not on the list, and any change in the law had to be legislatively enacted. *Garner v. Rite Aid of Ga., Inc.*, 265 Ga. App. 737, 595 S.E.2d 582 (2004).

In a negligence and premises liability action, an administrator's expert affidavit regarding the foreseeability of a shooting of the decedent, a licensee, on the premises was inadmissible as there was no need for expert testimony to determine whether ordinary care was exercised in running the premises' business; moreover, because the evidence showed that there had never been an accidental shooting of one hunter by another on the premises, no basis existed for holding that the owners or operator should have foreseen that a third party would come onto the property and illegally shoot at a target which the third party could not identify. *Hadden v. ARE Props., LLC*, 280 Ga. App. 314, 633 S.E.2d 667 (2006).

Trial court did not abuse the court's discretion in refusing to admit the testimony of a defendant's expert because the mistake charged to an arresting officer in administering an alco-sensor test too soon after the officer first stopped the defendant would not have affected the test result to which the arresting officer testified since the defendant admitted that defendant had been

Illustrations (Cont'd)**2. Opinions Inadmissible (Cont'd)**

drinking, and the trial court admitted only the officer's testimony that the alco-sensor produced a positive result. *Oliver v. State*, 294 Ga. App. 299, 669 S.E.2d 162 (2008).

Opinion going to matter of ultimate fact.

— Medical expert witness may give the expert's opinion as to the cause of an injury, but if the cause of the injury constitutes the ultimate issue of fact to be determined by the fact finding tribunal, this opinion is not absolutely binding on such tribunal. *Lockheed Aircraft Corp. v. Marks*, 88 Ga. App. 167, 76 S.E.2d 507 (1953), overruled on other grounds, *Fowler v. City of Atlanta*, 116 Ga. App. 352, 157 S.E.2d 306 (1967).

Whether or not an attorney at law may qualify and testify as an expert witness as to what the law is and who has title and owns property as found by the attorney from examination of title records was a part of the ultimate fact to be decided by the jury. *Bishop v. Lamkin*, 221 Ga. 687, 146 S.E.2d 772 (1966).

Expert testimony on credibility of witness.

— If the characteristic of a witness attacked does not involve some organic or mental disorder or some impairment of the mental or physical faculties by injury, disease, or otherwise, or if there has been insufficient observation by the expert, expert testimony is usually excluded. *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974).

Trial court erred by allowing a state's expert to testify, over the defendant's objection, that the expert did not believe the victim made up the allegations against the defendant, as such was an ultimate issue of fact, and nothing suggested that the determination of the victim's credibility was beyond the ken of the jurors; thus, to the extent that *Smith v. State*, 257 Ga. App. 88, 570 S.E.2d 400 (2002), allowed an expert to give an opinion on a witness's credibility or to express an opinion on the ultimate issue of defendant's guilt to rehabilitate the credibility of a witness whose veracity was attacked, it was overruled. *Patterson v. State*, 278 Ga. App. 168, 628 S.E.2d 618 (2006).

Opinion based on out-of-court evidence.

— Medical expert does not have the right to give in evidence an opinion based on information which the expert has derived from

private conversations with third parties. *Moore v. State*, 221 Ga. 636, 146 S.E.2d 895 (1966).

Trial court erred in admitting a treating physician's opinions which were predicated in part on the opinions of other health care providers which were not admitted into evidence. *Southern Bell Tel. & Tel. Co. v. Franklin*, 196 Ga. App. 474, 396 S.E.2d 514 (1990).

Witness invaded province of jury. — Expert witness's testimony that the childhood maltreatment syndrome or abused child syndrome was the "manner" in which the fatal injuries occurred, and that the fatal injuries occurred "in the process" of the childhood maltreatment syndrome, constituted the expert's opinion that the fatal injuries in fact resulted from child abuse. Accordingly, as the jurors had the ability to reach this conclusion personally, the trial court erred by allowing the expert witness's testimony. *McCartney v. State*, 262 Ga. 156, 414 S.E.2d 227 (1992).

When testimony is not based on an expert opinion and is mere speculation, it is worthless and the trial court does not err in striking the testimony from the record. *Gould v. State*, 168 Ga. App. 605, 309 S.E.2d 888 (1983); *Welborn v. State*, 174 Ga. App. 853, 331 S.E.2d 890 (1985).

When an expert did not present sufficient evidence to show a relevant point, given lack of support for the expert's opinion, the lower court did not abuse the court's discretion in excluding the expert's testimony. *Cromer v. Mulkey Enters., Inc.*, 254 Ga. App. 388, 562 S.E.2d 783 (2002).

When differing ultimate conclusions of physicians as to whether a doctor-patient relationship existed evinced no more than a difference of nonmedical opinion between witnesses who happened to be physicians, those conclusions were neither admissible nor probative as expert medical testimony. *Clanton v. Von Haam*, 177 Ga. App. 694, 340 S.E.2d 627 (1986).

Psychiatrist's reliance on psychologist's test results. — To the extent the state's psychiatric expert relied upon the opinion of another psychologist expert not before the court, the expert's testimony was inadmissible hearsay without probative value even in the absence of an objection. *Brown v. State*, 206 Ga. App. 800, 427 S.E.2d 9 (1992).

Psychologist's opinion irrelevant. — State's motion in limine seeking to exclude the testimony of a defendant's psychologist was properly granted as the defendant claimed that defendant shot the victim in self-defense; the defendant's psychological state was irrelevant. *Lott v. State*, 281 Ga. App. 373, 636 S.E.2d 102 (2006).

School counselor's opinion. — Admission of a school counselor's opinion that a child had been molested based on the child's behavior and demeanor during the counselor's interview of the child was reversible error. *Hilliard v. State*, 226 Ga. App. 478, 487 S.E.2d 81 (1997).

Opinion as to alcohol content drop in dead person. — Question propounded to a forensic chemist concerning whether or not the fact that a person might have died and it had been some days before the person was found would in any way decrease the alcohol content of the victim's body was proper under O.C.G.A. § 24-9-67. *Cameron v. State*, 256 Ga. 225, 345 S.E.2d 575 (1986).

Physician's opinion of "rape." — Allowing any question and answer of a physician who examined the victim of an alleged rape which would involve the physician's opinion stated in the physician's report that "this is rape" constituted reversible error. *Nichols v. State*, 177 Ga. App. 689, 340 S.E.2d 654 (1986).

Physician's opinion of doctor-patient relationship. — No professional skill or specialized medical knowledge was necessarily required to resolve the issue whether a doctor-patient relationship existed since the initial creation of such a relationship was well within the comprehension of the average layman, and a physician's affidavit on this issue was neither probative nor admissible as expert medical testimony. *Minster v. Pohl*, 206 Ga. App. 617, 426 S.E.2d 204 (1992).

Ophthalmologist testimony in DUI case inadmissible. — Trial court did not err in not allowing an ophthalmologist to testify as an expert that a DUI defendant had two surgeries in the past, which could have affected the defendant's performance on walk-and-turn and one-leg-stand tests. The witness had no personal knowledge of the surgery in question or of the medical records referring to the surgeries; moreover, the defendant's live-in companion was per-

mitted to testify at length regarding the defendant's medical issues arising from the surgery and its effect on the defendant's ability to walk normally at the time of the arrest. *Aal v. State*, 290 Ga. App. 252, 659 S.E.2d 609 (2008).

Medical causation not within scope of psychological expertise. — It is a matter within the sound discretion of the trial judge as to whether a witness has such learning and experience in a particular art, science or profession as to entitle the witness to be deemed *prima facie* an expert; therefore, when a neuropsychologist testified to the specific chemical which caused organic brain damage, the trial court did not abuse the court's discretion in striking portions of the affidavit of the psychologist, because medical causation is not a subject within the scope of psychological expertise. *Chandler Exterminators, Inc. v. Morris*, 262 Ga. 257, 416 S.E.2d 277 (1992).

Officer's testimony on marijuana test results. — Officer's testimony regarding officer's training and experience with "ontrack system" urine specimen analysis for the presence of tetrahydrocannabinol was insufficient foundation for the admission of the test results. *Hubbard v. State*, 207 Ga. App. 703, 429 S.E.2d 123 (1993).

Hair analysis results cannot be used to make positive identification of an individual. *Hudson v. State*, 166 Ga. App. 660, 305 S.E.2d 409 (1983).

Reconstruction of accident. — Expert accident reconstructionist was not qualified to render an opinion as to which of two impacts caused plaintiff's injury. *Johnson v. Knebel*, 267 Ga. 853, 485 S.E.2d 451 (1997).

False confession theory. — Trial court did not abuse the court's discretion or violate the defendant's 14th and 6th amendment rights by excluding expert testimony about false confessions; the Georgia Supreme Court had found that the false confession theory was not reliable and had not yet reached a verifiable stage of scientific certainty. *Crawford v. State*, 283 Ga. App. 645, 642 S.E.2d 335 (2007).

Trial court did not improperly exclude testimony from the defendant's proffered expert witness on police interrogation tactics resulting in false confessions, as such theory had not reached a verifiable stage of scientific certainty, and because the issue of

Illustrations (Cont'd)**2. Opinions Inadmissible (Cont'd)**

whether the defendant's inculpatory statements were the results of threats or coercion was a matter the jury could discern for itself. *Lyons v. State*, 282 Ga. 588, 652 S.E.2d 525 (2007), overruled on other grounds, *Garza v. State*, 2008 Ga. LEXIS 865 (Ga. 2008).

Airport operations manager failed to demonstrate qualifications as an expert witness to express an opinion regarding the acceptable and safe number of pounds of force of closing pressure for automatic doors on shuttle trains, or to present a factual predicate for a lay opinion. *Saltis v. A.B.B. Daimler-Benz Ad Tranz Atlanta, Inc.*, 243 Ga. App. 603, 533 S.E.2d 772 (2000).

3. Witness Qualified as Expert

Automobile mechanic. — Contention that testimony of witness qualified as an expert was erroneously admitted for the reason that the witness had testified that the witness did not see the car before impact, and therefore could not testify as to the car's value before the car was damaged, was without merit since the witness actually repaired the car, and was not only a mechanic, but had long experience in buying and selling cars of the same type and model. *Hill v. Kirk*, 78 Ga. App. 310, 50 S.E.2d 785 (1948).

Electrical engineer. — When a witness was an electrical engineer of 31 years experience, and the engineer's opinions were based on proven facts, the opinions were admissible. *Little v. Georgia Power Co.*, 205 Ga. 51, 52 S.E.2d 322 (1949).

Building inspector who held a license in the inspector's individual name at the time of conducting an inspection qualified as an expert; the fact that the inspector was unaware that the inspector was also required to get a license in the name under which the inspector conducted business did not prevent the inspector's qualification as an expert. *Williamson v. Harvey Smith, Inc.*, 246 Ga. App. 745, 542 S.E.2d 151 (2000).

A Ph. D. in entomology was not required to have a pest control operator's license before being qualified to testify in an action arising from termite infestation of property. *Dayoub v. Yates-Astro Termite Pest Control Co.*, 239 Ga. App. 578, 521 S.E.2d 600 (1999).

Specialist in obstetrics and gynecology. —

In a prosecution for rape, a physician may offer the physician's opinion as to what caused the tear in the victim's vagina over an objection that the physician's expertise to offer such an opinion has not been established, where the physician is duly qualified as a specialist in obstetrics and gynecology and testifies that one of the physician's duties at the medical center where the physician worked was to examine rape victims. *Holt v. State*, 147 Ga. App. 186, 248 S.E.2d 223 (1978).

Qualified medical expert with a first-hand knowledge of the material facts is well within permissible bounds in stating the expert's opinion and inferences concerning the existence and cause of a medical condition. *McGuire v. Davis*, 437 F.2d 570 (5th Cir. 1971).

Practicing physician is an expert witness on sanity. *Petty v. Folsom*, 229 Ga. 477, 192 S.E.2d 246 (1972).

Specialists in cardiac physiology. — Two doctors who specialized in cardiac physiology were qualified to testify about the effects on a patient of a heart medication a doctor gave to a patient, and the appellate court reversed the trial court's ruling that the doctors could not testify and the court's judgment dismissing the spouse's claims against a pharmaceutical manufacturer that produced the medication, alleging strict products liability and negligent failure to warn. *Bryant v. Hoffmann-La Roche, Inc.*, 262 Ga. App. 401, 585 S.E.2d 723 (2003).

Investigator testifying as an expert. — In an aggravated assault case, it was permissible for an investigator, testifying as an expert, to state that based on the investigator's experience, persons who suffered from cuts or stab wounds often did not remember being stabbed. This was a conclusion that was beyond the ken of the average layperson; even if the investigator's testimony was somewhat based upon hearsay, the opinion was mainly derived from the investigator's many years of professional experience. *Jackson v. State*, 291 Ga. App. 287, 661 S.E.2d 665 (2008).

Forensic interviewer was implicitly accepted as an expert. — A forensic interviewer testified as to credentials and was questioned as an expert by the State in a defendant's child molestation trial, and thus

was either tacitly or impliedly accepted as an expert by the trial court. Because under O.C.G.A. § 24-9-67, all that was required of the expert was that the expert be competent as an expert in one's own field, the trial court did not err in giving the jury the expert witness charge. *Purvis v. State*, 301 Ga. App. 648, 689 S.E.2d 53 (2009).

Officer properly qualified as expert witness in drug possession and distribution. — In a prosecution for possession of cocaine with intent to distribute (O.C.G.A. § 16-13-30(b)), as the arresting officer testified to making 35 to 40 drug-related arrests, about half of which were for possession with

intent to distribute, the trial court did not abuse the court's discretion in qualifying the officer as an expert witness in drug possession and distribution. *Hight v. State*, 293 Ga. App. 254, 666 S.E.2d 678 (2008).

Any error waived by failure to object. — Pro se defendant's claim that the trial court improperly admitted lay testimony on blood splatters was rejected as defendant failed to object to the admission of the lay opinions at trial; further, in light of the overwhelming evidence of defendant's guilt, any error was harmless. *Swain v. State*, 268 Ga. App. 135, 601 S.E.2d 491 (2004).

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ALR. — Opinion or expert evidence as to whether pain is real or feigned, or as to its severity, 28 ALR 362; 97 ALR 1284.

Dental condition as subject of expert testimony; qualification of witness as expert, 49 ALR 666.

Competency of physician or surgeon as an expert witness as affected by the fact that he is not a specialist, 54 ALR 860.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 65 ALR 1217; 51 ALR2d 1051.

Right of witness to give summary based on inspection of number of documents, 66 ALR 1206.

Constitutionality of statutes relating to expert witnesses, 71 ALR 1017.

Expert testimony to interpret or explain or draw conclusion from photograph, 77 ALR 946.

Testimony of expert witness as to ultimate fact, 78 ALR 755.

Right of witness to state his opinions or

conclusion, based on examination of books and accounts, as to solvency or insolvency, 81 ALR 1431.

Hypothetical questions in case of expert witness who has personal knowledge or observation of facts, 82 ALR 1338.

Right of expert to give an opinion based on testimony of other witnesses not incorporated in a hypothetical question, 82 ALR 1460.

Opinion evidence directly as to the ultimate question of the amount of damage to property, 86 ALR 1449.

Opinion evidence as to speed of automobile, 94 ALR 1190.

Testimony of expert predicated in whole or in part upon opinions, inferences, or conclusions of others, 98 ALR 1109.

Right of expert witness to testify as to "total disability" or other physical condition contemplated by specific provision of insurance policy, 111 ALR 603.

Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 ALR 1149.

Opinion or expert testimony as to materiality of misrepresentation in application for insurance or as to increase of risk or as to practice or usage of insurance companies regarding acceptance or rejection of certain class of risk, 135 ALR 411.

Sufficiency of expert evidence to establish causal relation between accident and physical condition or death, 135 ALR 516.

Opinion or expert evidence regarding loss

or time of loss within fidelity bond, 135 ALR 1145.

Opinion evidence as to distance within which automobile can be stopped, 135 ALR 1404.

Admissibility of opinion evidence as to cause of death, disease, or injury, 136 ALR 965; 66 ALR2d 1082.

Expert or opinion evidence regarding lights on automobiles and the distance at which lights will "pick up" an object, 137 ALR 753.

Necessity of expert evidence to support an action for malpractice against a physician or surgeon, 141 ALR 5; 81 ALR2d 597.

Safety of condition, place, or appliance as proper subject of expert or opinion evidence in tort actions, 146 ALR 5; 62 ALR2d 1426.

Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses, 154 ALR 649.

Comments in judge's charge to jury disparaging expert testimony, 156 ALR 530.

Review on appeal of decision of trial court as to qualification or competency of expert witnesses, 166 ALR 1067.

Testimony of physician based on information from third persons regarding physical condition or symptoms of person in question, 175 ALR 274.

Unaccepted offer for purchase or sale of real property as evidence of value, 7 ALR2d 781.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Expert evidence to identify gun from which bullet or cartridge was fired, 26 ALR2d 892.

Necessity of expert testimony to show causal connection between medical treatment necessitated by injury for which defendant is liable and allegedly harmful effects of such treatment, 27 ALR2d 1263.

Cross-examination of expert witness as to fees, compensation, and the like, 33 ALR2d 1170.

Blood grouping tests, 46 ALR2d 1000.

Admissibility of opinion evidence of lay witnesses as to diseases and physical condition of animals, 49 ALR2d 932.

Chiropractor's competency as expert in

personal injury action as to injured person's condition, medical requirements, nature and extent of injury, and the like, 52 ALR2d 1384.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted, 56 ALR2d 1447.

Use of medical or other scientific treatises in cross-examination of expert witnesses, 60 ALR2d 77.

Admissibility of evidence as to manner or ease of firing gun, in civil action involving issue of accidental death or suicide, 63 ALR2d 1150.

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question, 64 ALR2d 1056.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, 66 ALR2d 1048.

Qualifications of chemist or chemical engineer to testify as to effect of poison upon human body, 70 ALR2d 1029.

Propriety of hypothetical question to expert witness on cross-examination, 71 ALR2d 6.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354.

Admissibility of experimental evidence as to explosion, 76 ALR2d 402.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 ALR2d 971.

Compelling expert to testify, 77 ALR2d 1182; 66 ALR4th 213.

Testing qualifications of expert witness, other than handwriting expert, by objective tests or experiments, 78 ALR2d 1281.

Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss, 79 ALR2d 259.

Admissibility of testimony of actuary or mathematician as to present value of loss or impairment of injured person's general earning capacity, 79 ALR2d 275.

Exclusion from courtroom of expert witnesses during taking or testimony in civil case, 85 ALR2d 478.

Propriety and effect of instructions in civil case on the weight or reliability of medical expert testimony, 86 ALR2d 1038.

Right to elicit expert testimony from adverse party called as witness, 88 ALR2d 1186.

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident, 93 ALR2d 287.

Trial court's appointment, in civil case, of expert witness, 95 ALR2d 390.

Expert testimony as to *modus operandi* of criminals with respect to particular types of crimes, 100 ALR2d 1433.

Person performing services as competent to testify as to their value, 5 ALR3d 947.

Admissibility of expert evidence to decipher illegible document, 11 ALR3d 1015.

Admissibility, in civil case, of expert evidence as to existence or nonexistence, or severity, of pain, 11 ALR3d 1249.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness's inability to testify, 11 ALR3d 1360.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Necessity and admissibility of expert testimony as to credibility of witness, 20 ALR3d 684.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts, 29 ALR3d 248.

Competency of general practitioner to testify as expert witness in action against specialist for medical malpractice, 31 ALR3d 1163.

Locality rule as governing hospital's standard of care to patient and expert's competency to testify thereto, 36 ALR3d 440.

Malpractice testimony: competency of physician or surgeon from one location to testify, in malpractice case, as to standard of care required of defendant practicing in another location, 37 ALR3d 420.

Necessity of expert evidence to support action against hospital for injury to or death of patient, 40 ALR3d 515.

Admissibility of physiological or psychological truth and deception test or its results to support physician's testimony, 41 ALR3d 1369.

Medical malpractice: necessity and sufficiency of showing of medical witness's familiarity with particular medical or surgical technique involved in suit, 46 ALR3d 275.

Admissibility of evidence of neutron activation analysis, 50 ALR3d 117.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 ALR3d 1084.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital records, 55 ALR3d 551.

Modern status of rules regarding use of hypothetical questions in eliciting opinion of expert witness, 56 ALR3d 300.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death, 65 ALR3d 283.

Admissibility of testimony of coroner or mortician as to cause of death in homicide prosecution, 71 ALR3d 1265.

Admissibility of expert medical testimony as to future consequences of injury as affected by expression in terms of probability or possibility, 75 ALR3d 9.

Pleading and proof of law of foreign country, 75 ALR3d 177.

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Admissibility and weight of voiceprint evidence, 97 ALR3d 294.

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Necessity of expert testimony to show malpractice of architect, 3 ALR4th 1023.

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Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 ALR4th 1153.

Admissibility of expert or opinion testimony concerning identification of skeletal remains, 18 ALR4th 1294.

Admissibility and weight, in criminal case, of expert or scientific evidence respecting characteristics and identification of human hair, 23 ALR4th 1199.

Unaccepted offer for purchase of real property as evidence of its value, 25 ALR4th 571.

Unaccepted offer to sell or buy compara-

ble real property as evidence of value of property in issue, 25 ALR4th 615.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Admissibility of testimony that bullet could or might have come from particular gun, 31 ALR4th 486.

Admissibility of expert testimony as to modus operandi of crime — modern cases, 31 ALR4th 798.

Propriety of cross-examining expert witness regarding his status as “professional witness”, 39 ALR4th 742.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

Admissibility of bare footprint evidence, 45 ALR4th 1178.

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony, 46 ALR4th 1047.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 ALR4th 1069.

Right of independent expert to refuse to testify as to expert opinion, 50 ALR4th 680.

Necessity of expert testimony to show standard of care in negligence action against insurance agent or broker, 52 ALR4th 1232.

Compelling testimony of opponent's expert in state court, 66 ALR4th 213.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 ALR4th 588.

Admissibility of expert testimony that item of clothing or footwear belonged to, or was worn by, particular individual, 71 ALR4th 1148.

Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 ALR4th 874.

Necessity of expert evidence in proceeding for revocation or suspension of license of physician, surgeon, or dentist, 74 ALR4th 969.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576.

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drugs were possessed with intent to distribute — state cases, 83 ALR4th 629.

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Cautionary instructions to jury as to reliability of, or factors to be considered in evaluating, voice identification testimony, 17 ALR5th 851.

Necessity of expert testimony on issue of permanence of injury and future pain and suffering, 20 ALR5th 1.

Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of Evidence and similar formulations, 57 ALR5th 141.

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Admissibility of expert testimony regarding questions of domestic law, 66 ALR5th 135.

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Admissibility of expert testimony regarding credibility of confession, 73 ALR5th 581.

Admissibility of results of presumptive tests indicating presence of blood on object, 82 ALR5th 67.

Admissibility of expert testimony regarding reliability of accused's confession where accused allegedly suffered from mental disorder or defect at time of confession, 82 ALR5th 591.

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Admissibility and weight of voice spectrographic analysis evidence, 95 ALR5th 471.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage, 104 ALR5th 503.

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Vertical gaze nystagmus test: Use in impaired driving prosecution, 117 ALR5th 491.

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Admissibility and sufficiency of bite mark evidence as basis for identification of accused, 1 ALR6th 657.

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique — modern cases, 105 ALR Fed. 299.

Admissibility of expert or opinion evidence — Supreme court cases, 177 ALR Fed. 77.

24-9-67.1. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.

(a) The provisions of this Code section shall apply in all civil actions. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in

professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However,

a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

(e) An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases. (Code 1981, § 24-9-67.1, enacted by Ga. L. 2005, p. 1, § 7/SB 3; Ga. L. 2009, p. 859, § 3/HB 509.)

The 2009 amendment, effective July 1, 2009, substituted "physician" for "physician's" twice in subparagraph (c)(2)(D).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2005, a period was added following the Code section number.

Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the

resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005). For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007). For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007). For survey article on trial practice and proce-

dure, see 59 Mercer L. Rev. 423 (2007). For survey article on product liability law, see 60 Mercer L. Rev. 303 (2008). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009). For annual survey on

product liability, see 61 Mercer L. Rev. 267 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

For comment, "Georgia's Codification of Daubert: Narrowing the Admissibility of Novel Scientific Evidence in Georgia?," see 23 Ga. St. U.L. Rev. 481 (2006).

JUDICIAL DECISIONS

Constitutionality. — Statement of intent in O.C.G.A. § 24-9-67.1(f) is not a delegation of legislative power; and, the application of the evidentiary rules established by the Tort Reform Act of 2005, O.C.G.A. § 24-9-67.1, do not violate the constitutional prohibition against retroactive laws. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

Trial court erred in declaring O.C.G.A. § 24-9-67.1(f) unconstitutional on the ground that the statute violated the principle of separation of powers as the suggestion in the statute that Georgia "may" consider the decisions of other courts on a subject did not invade the province of the judiciary because it was not couched in mandatory terms and merely stated a principle of law regularly employed by Georgia courts. Further, the permissive suggestion in § 24-9-67.1(f), that the courts could consider federal interpretations of the cases on which federal rules and § 24-9-67.1(f) were based contained no words of command and did not seek to enforce a particular construction of the statute on the courts. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

Trial court properly found that O.C.G.A. § 24-9-67.1(a) and (b)(1) were contradictory in that paragraph (b)(1) limits experts to relying on potentially admissible facts and data, whereas subsection (a) states that facts and data relied upon need not be admissible. Since the two provisions could not be harmonized and, read together, they rendered the statute unconstitutionally vague; however, the trial court was not required to strike the statute in its entirety. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

In a personal injury suit wherein the trial court excluded the testimony of plaintiffs' two expert witnesses upon application of

O.C.G.A. § 24-9-67.1, the trial court did not err in rejecting plaintiffs' equal protection challenge since plaintiffs could not establish the necessary element of an equal protection claim that plaintiffs were situated similarly to those being treated differently. For purposes of evidentiary standards, only those accused of the same offense are similarly situated in the criminal law arena, only those asserting or defending against the same cause of action are similarly situated in the civil law arena, and the parties to civil cases are not similarly situated to those engaged in criminal prosecutions. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

Use of word "or" or "and" in statute. — Legislature's use of the word "or" between O.C.G.A. § 24-9-67.1(c)(2)(A) and (c)(2)(B), followed by legislature's use of the word "and" between § 24-9-67.1(c)(2)(B) and (c)(2)(C), indicates that a medical expert must show either active practice or teaching for at least three of the last five years, but that whichever of these may be the case, the expert must also be a member of the same profession as the person whose performance the expert is evaluating. For the purposes of § 24-9-67.1, a pharmacist is not a member of the same profession as a medical doctor. *Smith v. Harris*, 294 Ga. App. 333, 670 S.E.2d 136 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. 2009).

No error in excluding expert testimony. — Trial court did not err in excluding expert testimony of the value of a vehicle in the vehicle's defective condition on the date of sale because there was no evidence that the expert witness's method was relied upon more widely in the automotive field, nor of the method's known rate of error, nor whether it had been reviewed by qualified experts other than its creators. *Moran v. Kia Motors Am., Inc.*, 276 Ga. App. 96, 622 S.E.2d 439 (2005).

In an action filed pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq., the trial court did not abuse the court's discretion in excluding the testimony of an employee's treating physician as the doctor's conclusions were based on an incomplete medical history of the employee, without considering earlier lung-related illnesses, and while unaware of the employee's prior chemical exposure and treatment by other physicians. *Shiver v. Ga. & Fla. Railnet, Inc.*, 287 Ga. App. 828, 652 S.E.2d 819 (2007), cert. denied, 2008 Ga. LEXIS 330 (Ga. 2008).

In a patient's medical malpractice action, the testimony of an expert witness was properly excluded as the opinion was based on facts stated in a hypothetical question which were not proven by other witnesses or other competent evidence. Moreover, a motion in limine entered against the patient as to another expert witness's testimony was not addressed on appeal as the patient never called the expert to testify, and thus, the issue was abandoned. *Hawkins v. OB-GYN Assocs., P.A.*, 290 Ga. App. 892, 660 S.E.2d 835 (2008), cert. denied, 2008 Ga. LEXIS 713 (Ga. 2008).

In a wrongful interference with business relations and slander suit, a trial court properly excluded testimony of plaintiff's expert economist, which the plaintiff claimed would show plaintiff's financial injury as to plaintiff's tortious interference claim as the expert's reliance on the partial sales history of a single agent, along with a letter referencing annualized premiums from the sale of only certain life insurance policies and unsupported representations by another agent, did not provide an adequate basis for the expert's opinion. *Am. Southern Ins. Group, Inc. v. Goldstein*, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, 2008 Ga. LEXIS 680 (Ga. 2008).

In a will contest, the trial court did not abuse the court's discretion in limiting testimony from the caveatrix's expert toxicologist as to whether a person's functioning level could be determined by that person's responses to general questions as the trial court found that the expert's opinion was based on generalized statistics which would have been of dubious help to the jury. *Caswell v. Caswell*, 285 Ga. 277, 675 S.E.2d 19 (2009).

In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, a motion in limine was properly granted under O.C.G.A. § 24-9-67.1 to exclude the customer's expert in chemistry because the expert's testing of hair products and the product's reaction to heat did not exactly replicate the conditions under which the incident occurred; the expert used a peroxide product that was not applied to the customer's hair and used a different type of heat source. *Giannotti v. Beleza Hair Salon, Inc.*, 296 Ga. App. 636, 675 S.E.2d 544 (2009).

In a customer's slip and fall case against a dry cleaner establishment, the trial court did not err by denying the customer's motion for a new trial and by excluding the testimony of one of the customer's expert witnesses. The expert was not qualified since the expert was retired and not a licensed physician and the testimony of that expert was cumulative of other expert testimony admitted at trial, therefore, any alleged error was harmless. *Muskett v. Sketchley Cleaners, Inc.*, 297 Ga. App. 561, 677 S.E.2d 731 (2009), cert. denied, No. S09C1422, 2009 Ga. LEXIS 412 (Ga. 2009).

Expert must be member of same profession. — Under O.C.G.A. § 24-9-67.1(c), the trial court erred in allowing a pharmacist to testify about a physician's negligence. A medical expert had to show either active practice or teaching for three of the last five years, and also had to be a member of the same profession as the person whose performance the expert was evaluating. *Smith v. Harris*, 294 Ga. App. 333, 670 S.E.2d 136 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. 2009).

Nurse's affidavit insufficient in case alleging physical therapist's negligence. — A trial court erred in ruling that a registered nurse could provide an expert affidavit regarding a physical therapist's care, given that O.C.G.A. § 9-11-9.1(g) categorized nurses and physical therapists as practicing separate professions, and because an expert was required to meet the conditions of O.C.G.A. § 24-9-67.1 in order to provide a § 9-11-9.1 affidavit. *Ball v. Jones*, 301 Ga. App. 340, 687 S.E.2d 625 (2009).

Evidence of expert's personal practices admitted. — In a medical malpractice case, evidence of an expert's personal practices,

unless excludable on other grounds, is admissible both as substantive evidence and to impeach the expert's opinion as to the applicable standard of care. To the extent *Johnson v. Riverdale Anesthesia Assocs.*, 563 S.E.2d 431 (Ga. 2002), held otherwise, it is overruled. *Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667, 681 S.E.2d 152 (2009).

Opinion of a witness qualified as expert may be given on facts proved by other witnesses. *DOT v. Baldwin*, 292 Ga. App. 816, 665 S.E.2d 898 (2008).

No error in excluding experts' affidavits. — Trial court did not err by denying a defendant's request to admit testimony regarding the contents of affidavits used, in part, by the defendant's expert witnesses as the basis for the experts' opinions regarding the defendant's mental status as, in applying O.C.G.A. § 24-9-67.1, the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as the affidavits rested on the veracity and competency of persons not in court and did not come within any statutorily-recognized hearsay exception. The trial court then balanced the probative value of the affidavits against the prejudicial effect, noting that the affidavits were originally submitted in the defendant's habeas proceeding, contained identical language thereby casting suspicion on the affidavits' trustworthiness, contained conclusory statements and irrelevant and prejudicial information related to the defendant's alleged alcohol and drug use and the crime of murder for which the defendant was convicted; and, therefore, the affidavits had little probative information and were cumulative of other evidence. *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, U.S. , 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008).

Striking surveyor's affidavits held proper. — In a suit between two landowners to enforce the terms of an easement, the trial court did not abuse the court's discretion in excluding two affidavits from a surveyor in determining land elevation as no testimony was offered regarding any knowledge, skill, experience, training, or education the witness possessed in that capacity, and no evidence was presented as to the principles and

methods the witness employed including whether the methods were reliable. *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

Applicability. — Because O.C.G.A. § 24-9-67.1(a), which governed expert witness testimony in civil actions, did not apply to probation revocation hearings, the trial court's ruling to permit the expert's testimony regarding the presence of marijuana in a joint seized from the probationer was not erroneous as the state was not required to comply with *Daubert* to prove the expert's qualifications. *Carlson v. State*, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, 2007 Ga. LEXIS 215 (Ga. 2007).

O.C.G.A. § 24-9-67.1(c) is a procedural, not substantive statute because the statute does not change the standard of care to be applied in a medical malpractice action or the measure of a plaintiff's recovery; thus, the requirements of the statute were properly applied retroactively in a medical malpractice action in which a patient suffered injuries prior to the effective date of the statute but filed suit after § 24-9-67.1(c) became effective. *Nathans v. Diamond*, 282 Ga. 804, 654 S.E.2d 121 (2007).

Construction with other law. — Upon a proper appeal from a final order, while neither O.C.G.A. § 24-9-67.1 nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refiling in another court constitutes "improper judge shopping," obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007), cert. denied, 2007 Ga. LEXIS 656 (Ga. 2007).

In a medical malpractice action, when a doctor was the only expert witness submitted by the suing couple, and the couple did not challenge the trial court's exclusion of another doctor's testimony, their argument that said doctor's testimony should have been admitted as a rebuttal witness was unpersuasive. *Thomas v. Peachtree*

Orthopaedic Clinic, P.C., 290 Ga. App. 869, 660 S.E.2d 758 (2008), cert. denied, 2008 Ga. LEXIS 915 (Ga. 2008).

Timeliness of motion in limine — In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, while a motion in limine to exclude the customer's expert in chemistry was not timely under O.C.G.A. § 24-9-67.1(d), the trial court properly considered the motion and granted the motion as the customer did not make the expert available for deposition until just one week prior to trial. *Giannotti v. Beleza Hair Salon, Inc.*, 296 Ga. App. 636, 675 S.E.2d 544 (2009).

Subject matter improper for expert testimony. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. *Vaughn v. State*, 282 Ga. 99, 646 S.E.2d 212 (2007).

In a negligence action, the trial court erred by allowing the investigating police officer to give expert testimony about the color of the traffic light as the color of the light was a question that average jurors could have answered for themselves, and because the color of the traffic light was the determining factor for assessing negligence, the officer's expert opinion on this issue likely influenced the jury's verdict; thus, based on such error, a new trial was ordered. *Purcell v. Kelley*, 286 Ga. App. 117, 648 S.E.2d 454 (2007).

Healthcare expert not qualified. — In a medical malpractice and negligence action by an arrestee against a county, jail medical personnel, a medical lab, and lab personnel, these defendants successfully moved to exclude the testimony of an expert in correctional health on the basis of O.C.G.A. § 24-9-67.1 because the expert was not qualified to testify as to any matter outside correctional health care—specifically, the standard of care in the fields of internal medicine, infectious disease, or laboratory

procedures with regard to the arrestee's state law claims; furthermore, the expert's testimony was neither relevant nor reliable under the Daubert analysis, and therefore, it was excluded pursuant to Fed. R. Evid. 702. *Dukes v. State*, 428 F. Supp. 2d 1298 (N.D. Ga. 2006).

An expert retained by the plaintiffs in a medical malpractice action, which was based on the failure to adequately inform a patient of the potential risks and complications connected with a sleep apnea procedure, was not qualified to testify under O.C.G.A. § 24-9-67.1 because the expert had not performed the procedure in question on other patients nor did the expert aver that the expert had obtained informed consents for similar procedures. *Nathans v. Diamond*, 282 Ga. 804, 654 S.E.2d 121 (2007).

Trial court did not abuse the court's discretion by dismissing the parents' medical malpractice action because the court correctly found that the purported expert offered by the parents failed to make even one diagnosis of a vascular ring within five years of the date at issue, and had not taught others for at least three of the last five years to diagnose a vascular ring. *Spacht v. Troyer*, 288 Ga. App. 898, 655 S.E.2d 656 (2007), cert. denied, 129 S. Ct. 726, 172 L.Ed.2d 726 (2008).

Trial court properly refused to admit the testimony of a patient's expert in a case involving a claim of an unnecessary surgical procedure because the expert, who described the physician's medical practice as a "family practice", had no surgical training or expertise. *Long v. Natarajan*, 291 Ga. App. 814, 662 S.E.2d 876 (2008).

In a malpractice and wrongful death case filed against a surgeon and an anesthesiologist, as the expert retained by the decedent's spouse did not teach or practice in the area of post-surgical airway management with sufficient frequency to establish the appropriate level of knowledge to meet the criteria of O.C.G.A. § 24-9-67.1(c)(2), and lacked training in anesthesiology, the expert's opinion was properly excluded. *Dawson v. Leder*, 294 Ga. App. 717, 669 S.E.2d 720 (2008).

Trial court did not err in determining that an anesthesiologist did not meet the expert-witness qualification requirements set forth in O.C.G.A. § 24-9-67.1 because the anesthesiologist did not meet the licensing

requirement for expert witnesses, § 24-9-67.1(c)(1). Although the anesthesiologist's amended affidavit in support of a medical malpractice complaint indicated that the anesthesiologist held a medical license from Pennsylvania on the date of the alleged negligent act, there was no evidence that the anesthesiologist was practicing in that state, and instead, the anesthesiologist's testimony indicated that the anesthesiologist was practicing medicine in Australia; in order to comply with the licensing requirement of § 24-7-67.1(c)(1), an expert in a professional malpractice action must be licensed and practicing (or teaching) in one of the states of the United States at the time the alleged negligent act occurred. *Craig v. Azizi*, 301 Ga. App. 181, 687 S.E.2d 198 (2009).

Active practice. — Trial court abused the court's discretion to the extent it determined that an anesthesiologist did not meet the "active practice" requirements of O.C.G.A. § 24-9-67.1(c)(2)(A) because once the anesthesiologist received a medical degree and embarked upon a residency in anesthesiology, the anesthesiologist was engaged in the "active practice of such area of specialty" within the meaning of § 24-9-67.1(c)(2)(A); years spent as a resident physician can count as years of "active practice" for purposes of § 24-9-67.1(c)(2)(A). *Craig v. Azizi*, 301 Ga. App. 181, 687 S.E.2d 198 (2009).

Physician's affidavit. — Fact that a medical expert was not licensed as a medical doctor when the expert executed an expert affidavit to accompany a medical malpractice complaint, pursuant to O.C.G.A. § 9-11-9.1, did not affect the validity of the affidavit or require dismissal of the complaint as licensure was not a required element of such an affidavit under that statutory section or under case law; further, O.C.G.A. § 24-9-67.1, assuming it was applicable to the circumstances, only required that the expert was licensed at the time of the medical negligence, which was the case for the instant expert. *Tenet Healthcare Corp. v. Gilbert*, 277 Ga. App. 895, 627 S.E.2d 821 (2006).

In a professional malpractice case brought by a married couple, an expert's original affidavit was insufficient under O.C.G.A. §§ 9-11-9.1 and 24-9-67.1, which applied ret-

roactively. Although the expert avowed therein that the expert had been licensed to practice medicine since 1974, the affidavit contained nothing concerning the expert's recent or continuing experience as an orthopedist. *Cogland v. Hosp. Auth.*, 290 Ga. App. 73, 658 S.E.2d 769 (2008).

Doctor's affidavit complied with O.C.G.A. § 24-9-67.1(c) because the plain language of the statute did not require a license during three of the last five years of practice, but experience in the area of the alleged malpractice and a license at the time of the alleged malpractice. *Emory Adventist, Inc. v. Hunter*, 301 Ga. App. 215, 687 S.E.2d 267 (2009).

Dismissal of medical malpractice suit based on affidavit. — A trial court erred in granting a hospital's motion to dismiss a survivor's wrongful death action based on O.C.G.A. § 9-11-9.1(e) because a nurse's affidavit that allegedly failed to comply with O.C.G.A. § 24-9-67.1(c)(2) and (e), because the trial court did not consider the survivor's other affidavit submitted: an unchallenged affidavit from a medical doctor. *Piscitelli v. Hosp. Auth. of Valdosta & Lowndes County*, 302 Ga. App. 746, 691 S.E.2d 615 (2010).

Treating physician's testimony sufficient. — In a Federal Employers' Liability Act action, testimony of an employee's treating physician was not insufficient under O.C.G.A. § 24-9-67.1 because after diagnosing the employee with hepatitis related to chemical exposure, the physician reviewed reports of, inter alia, a toxicologist that the chemical in a leaking train car was hydrogen sulfide and opined as to causation; the physician's opinion was not merely based on the temporal proximity of the chemical exposure to the onset of the employee's symptoms. *CSX Transp., Inc. v. McDowell*, 294 Ga. App. 871, 670 S.E.2d 543 (2008).

Qualification of nurses as expert witnesses. — Registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease did not lack qualifications to testify as experts about the decedent's capacity to execute a deed because the law did not require that only physicians be allowed to give testimony regarding a medical issue, but permitted others with certain training and experience to testify on issues within the scope of their expertise,

and a licensed practical nurse or registered nurse was qualified to testify as an expert witness within the areas of the nurse's expertise; as to any failure to qualify the witnesses as experts, the question of whether a person possessed the qualifications of an expert witness rested entirely in the sound discretion of the trial court. *Smith v. Smith*, 281 Ga. 380, 637 S.E.2d 662 (2006).

In a medical malpractice action, given the relevant past experience of the patient's expert as a nurse, and the expert's familiarity with the degree and skills required of nurses and other medical staff in giving intermuscular injections, the expert was sufficiently qualified to render an expert opinion in the case. *Allen v. Family Med. Ctr., P.C.*, 287 Ga. App. 522, 652 S.E.2d 173 (2007).

Complaint alleged that a nurse committed malpractice by not accurately triaging a patient. As the patient's expert nurse had ongoing practical experience in patient triage, and years of practical and teaching experience in supervising patient care, the expert's affidavit filed under O.C.G.A. § 9-11-9.1 was legally sufficient even though the expert had not performed emergency room triage. *Houston v. Phoebe Putney Mem. Hosp., Inc.*, 295 Ga. App. 674, 673 S.E.2d 54 (2009).

In a medical malpractice action brought by a patient against a hospital and an employee of the hospital, the patient's expert nurse was held to be indisputably qualified under O.C.G.A. § 24-9-67.1 based on the nurse actively and regularly practicing as a licensed nurse on a full-time basis in supervising and directly performing nursing services and being a faculty member at two educational institutions accredited in the teaching of the nursing profession. *Lee v. Phoebe Putney Mem. Hosp., Inc.*, 297 Ga. App. 692, 678 S.E.2d 340 (2009).

Medical malpractice expert testimony sufficient to avoid directed verdict. — Patient who was allergic to latex alleged a hospital's negligent use of a latex catheter caused her to develop interstitial cystitis (IC). Though the patient's medical expert admitted that the causes of IC were unknown, and that no research linked IC to latex allergies, the expert's testimony that allergic reactions could trigger IC, and did so in the patient's case, was sufficient evidence of medical cau-

sation to justify denying the hospital's motion for judgment notwithstanding the verdict. *EHCA Dunwoody, LLC v. Daniel*, 277 Ga. App. 783, 627 S.E.2d 830 (2006).

In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under O.C.G.A. § 24-9-67.1 was from an orthopedist and not a fellow neurosurgeon, as the statutory area of practice in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. *Abramson v. Williams*, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, 2007 Ga. LEXIS 91 (2007).

In a medical malpractice action involving alleged nerve damage to a child during delivery, a trial court properly directed a verdict in favor of the doctor upon determining that the suing parent failed to provide causation evidence as the parent's expert failed to rule in a certain possibility as to the cause of the injury at issue and, instead, assumed a cause of injury, which was unsupported by the evidence. *Hawkins v. OB-GYN Assocs., P.A.*, 290 Ga. App. 892, 660 S.E.2d 835 (2008).

Police officer as expert. — In a negligence case, assuming that admission of a police officer's affidavit opining as to the cause of an accident was error under O.C.G.A. § 24-9-67.1, the error was harmless in light of other evidence showing that the proximate cause of the accident was the driver's own negligence, including the driver's statements to treating physicians that the driver was reaching for the driver's cell phone when the driver ran off the road and a statement to the insurance adjustor that the driver was distracted. *Keckes v. City of Mt. Zion*, 300 Ga. App. 348, 685 S.E.2d 329 (2009).

Expert's conclusion could not serve as basis for summary judgment. — Expert's testimony as to the cause of an auto accident was speculative and could not support summary judgment as the credibility of the expert and the weight to be given to the opinion were matters to be addressed by the jury; moreover, if the expert's opinion was based upon inadequate knowledge, this fact did not mandate the exclusion of the opin-

ion but, rather, presented a jury question as to the weight which should be assigned to the opinion. *Layfield v. DOT*, 280 Ga. 848, 632 S.E.2d 135 (2006).

Opinion testimony properly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court properly allowed the plaintiffs' expert to give opinion testimony that the elevator maintenance provider did not follow industry standards in maintaining the elevator; the expert based the opinion on the expert's personal knowledge of the elevator industry, the expert's review of the elevator maintenance records, and the deposition testimony of the provider's mechanics, *Brady v. Elevator Specialists, Inc.*, 287 Ga. App. 304, 653 S.E.2d 59 (2007).

In a patient's suit against a doctor, the doctor was qualified to testify as to the doctor's opinion on the standard of care and causation in the case; although the doctor was not board certified in any field of medicine and had not instructed in the area of emergency medicine, the doctor met the competency standard set forth in O.C.G.A. § 24-9-67.1(c)(2)(A) because the doctor was licensed to practice medicine for 26 years, the doctor practiced as an emergency room physician for 19 years, and the doctor was regularly engaged in the practice of emergency medicine during five of the five years preceding the doctor's treatment of the patient. *Cruikshank v. Elbert County*, No. 3:06-CV-101(CDL), 2008 U.S. Dist. LEXIS 40221 (M.D. Ga. May 19, 2008).

Objections to expert opinions not timely filed. — In a tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured by soot emitted from the apartment's heating system, the trial court properly refused to exclude expert opinions on behalf of the tenant on the ground that the opinions were inadmissible under O.C.G.A. § 24-9-67.1; although the agent had notice that the tenant intended to rely on the experts' opinions, it did not assert its claim until the last business day before the trial and therefore failed to seek a timely ruling no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16 and as required by O.C.G.A. § 24-9-67.1(d). *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Expert testimony was properly allowed in a medical negligence action because the suing patient failed to timely challenge the expert evidence via O.C.G.A. § 24-9-67.1(d), by way of a pretrial hearing; moreover, even assuming that the untimeliness of the patient's request for a hearing did not waive the particular grounds asserted in a motion to strike brought at the close of evidence, the patient nevertheless waived all remaining objections to the expert testimony by failing to object contemporaneously. *Airasian v. Shaak*, 289 Ga. App. 540, 657 S.E.2d 600 (2008).

In a negligence suit involving the death of an individual in an automobile collision, a trial court erred by declaring that application of O.C.G.A. § 24-9-67.1, with regard to a hitch manufacturer seeking to exclude plaintiff's expert witness, would have been unconstitutional as the motion to exclude the expert was filed several months after the final pretrial conference had already taken place and, thus, the time period within which the trial court was required to hold a hearing and rule on the motion had already passed. However, application of the statute would not have changed the trial court's ultimate, and correct, conclusion that the hitch manufacturer's motion to exclude the expert was without merit based on the time period for ruling on the motion having already passed. *Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

Speculative opinion testimony by expert improperly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court should have excluded the opinion of an expert that if the elevator maintenance provider had followed a more aggressive maintenance schedule for the elevator, the condition in the elevator that led to its mis-leveling would almost certainly have been discovered or prevented before a passenger was injured; the expert had showed no basis for the opinion. *Brady v. Elevator Specialists, Inc.*, 287 Ga. App. 304, 653 S.E.2d 59 (2007).

Capacity to execute a deed. — Even if registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease lacked qualifications to testify as experts about the decedent's capacity to execute a deed, a trial court did not err in permitting

the nurses to testify because even a lay witness could give evidence on the question of capacity as long as the witness gave sufficient facts to form the basis of the witness's opinion; the witnesses offered detailed testimony about the decedent's inability to recognize the decedent's sibling or sign the decedent's own name, the decedent's chronic disorientation, the decedent's need for constant redirection and reorientation, and other factual observations the nurses made about the decedent's mental state and the decedent's apparent lack of capacity. *Smith v. Smith*, 281 Ga. 380, 637 S.E.2d 662 (2006).

Striking valuation testimony proper. — Trial court did not manifestly abuse the court's discretion by striking certain testimony of the condemnee's expert witness regarding valuation on the ground that the testimony was without sufficient foundation since the testimony was based on an assumption of the value as if the subject property had already been subdivided, which it had not; in making its ruling, the trial court properly discerned that, even though a different use of the property was shown to have been reasonably probable, a jury cannot evaluate the property as though the new use were an accomplished fact. *Woodland Partners Ltd. P'ship v. DOT*, 286 Ga. App. 546, 650 S.E.2d 277 (2007), cert. denied, 2007 Ga. LEXIS 698 (Ga. 2007).

Probative value. — To the extent that an affidavit as to the value of a truck was offered as an expert opinion, the affidavit lacked probative value as there was no evidence that the valuation method the affiant used was reliable. *Dowdell v. Volvo Commer. Fin., LLC*, 286 Ga. App. 659, 649 S.E.2d 750 (2007).

Limited qualification as expert. — In a suit against a permittee by the Environmental Protection Division of the Georgia Department of Natural Resources (EPD), the permittee objected to testimony of an EPD employee on the ground that the employee was not qualified as an engineer under O.C.G.A. § 24-9-67.1. The trial court, however, qualified the witness and permitted the employee to testify as an expert in biologic and anaerobic processes, and did not abuse the court's discretion in doing so. *Agri-Cycle LLC v. Couch*, 284 Ga. 90, 663 S.E.2d 175 (2008).

Expert found not qualified to render opinion. — In a personal injury case when a driver alleged that a loose tie rod caused the driver to lose control of the steering, neither of the driver's experts was qualified to render an opinion as to the cause of the accident; the first expert did not have adequate knowledge or experience with the mechanical aspects of a vehicle to determine if mechanical failure caused the vehicle to lose control and also had no experience in evaluating design defects, and the second expert, an experienced mechanic and a police officer, had no experience in the area of accident reconstruction or in evaluating the circumstances surrounding catastrophic mechanical failure. *Smith v. Liberty Chrysler-Plymouth-Dodge, Inc.*, 285 Ga. App. 606, 647 S.E.2d 315 (2007), cert. denied, 2007 Ga. LEXIS 861 (Ga. 2007); U.S. , 128 S. Ct. 1883, 170 L. Ed. 2d 757 (2008).

Trial court did not abuse the court's discretion in applying O.C.G.A. § 24-9-67.1, and excluding the testimony of two experts in plaintiffs' personal injury suit because neither witness's testimony was shown to be the product of reliable principles and methods. One expert's testimony on the issue of causation lacked scientific support, and the other expert's testimony on the issue of labeling used standards having no specific relevance to consumer use of products, and the opinion was based solely on data obtained from the Internet and from plaintiffs' attorneys. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

When a couple who filed a medical malpractice case did not show that their experts had actual professional knowledge and experience through active practice or by teaching during at least three of the last five years, the trial court properly held under O.C.G.A. §§ 9-11-9.1 and 24-9-67.1 that the experts were not qualified to give an opinion and dismissed the case. *Akers v. Elsey*, 294 Ga. App. 359, 670 S.E.2d 142 (2008).

Expert allowed to testify. — In a personal injury and loss of consortium action, the trial court did not err by allowing a business to call a witness who had not been identified as an expert as: (1) the proper remedy for the erroneous admission of evidence was to request a continuance or a mistrial, neither of which the injured invitee did; (2) the

invitee did not dispute that the invitee received, before trial, the substance of the witness's expected testimony, along with a curriculum vitae, but only argued that the business failed to amend the interrogatory answers; and (3) the invitee failed to object either when the business called the witness to testify, or when the business tendered the witness as an expert. *Magill v. Edd Kirby Chevrolet, Inc.*, 277 Ga. App. 619, 627 S.E.2d 207 (2006).

A lender's appraiser's opinion as to foreclosed property's true market value at the time of foreclosure was properly admitted under O.C.G.A. § 24-9-67.1(b). The lender's expert's appraisal was based upon extensive facts and careful analysis taking into account the potential for future recovery of a down real estate market by the discounted flow method, which the borrower conceded was reliable. *Blue Marlin Dev., LLC v. Branch Banking & Trust Co.*, 302 Ga. App. 120, 690 S.E.2d 252 (2010).

Surgeon allowed to testify. — Under O.C.G.A. § 24-9-67.1, a vascular surgeon was qualified to give an opinion in a medical malpractice case against an orthopedic surgeon because the vascular surgeon did not allege that the doctor was negligent in the performance of a patient's knee replacement surgery, only in the failure to assess the vascular issues involved, particularly in light of the patient's medical history. *Cotten v. Phillips*, 280 Ga. App. 280, 633 S.E.2d 655 (2006), cert. denied, 2007 Ga. LEXIS 112 (Ga. 2007).

Caseworker allowed to testify. — In a termination of parental rights proceeding, pretermittting whether a case worker was qualified to give an expert opinion about the adverse effects of long-term foster care on the mother's twin children, because the mother failed to show prejudice in light of the other evidence supporting the termination of parental rights, the juvenile court did not err in allowing the case worker's testimony. *In the Interest of T.J.*, 281 Ga. App. 673, 637 S.E.2d 75 (2006).

In a medical malpractice case, because the trial court was authorized to conclude that the patient's expert witnesses applied reliable principles and methods to the facts of the case, and that they were offering opinions in the area of practice or specialty of pediatric medicine, it did not abuse the

court's discretion in qualifying those experts under O.C.G.A. § 24-9-67.1. *Canas v. Al-Jabi*, 282 Ga. App. 764, 639 S.E.2d 494 (2006), cert. denied, 2007 Ga. LEXIS 197 (Ga. 2007); reversed on other grounds, *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691 (2007).

Trial court properly denied a doctor's motion to exclude testimony from the patient's expert witness, despite the fact that the expert had a different specialty than the doctor, as such was allowed under the plain language of O.C.G.A. § 24-9-67.1(c), and the expert's testimony addressed the doctor's alleged misdiagnosis of the patient's condition, which was the ultimate issue in the case. *Mays v. Ellis*, 283 Ga. App. 195, 641 S.E.2d 201 (2007).

Trial court did not abuse the court's discretion in denying a hospital board's motion to exclude the testimony of the plaintiff's medical expert in a medical malpractice suit because under the plaintiff's complaint the ultimate issues to be decided were whether the hospital staff and the board's urologists committed malpractice by failing to timely evaluate the plaintiff's injury, not whether the board's urologists negligently performed the exploratory surgery or that the urologists negligently removed the plaintiff's testicle contrary to urological standards of care; the area of practice or specialty in which the opinion was to have been given in the case was an area of practice in which the plaintiff's medical expert possessed the requisite knowledge and experience under O.C.G.A. § 24-9-67.1(c)(2). *MCG Health, Inc. v. Barton*, 285 Ga. App. 577, 647 S.E.2d 81 (2007), cert. denied, 2007 Ga. LEXIS 821 (Ga. 2007).

Expert on DNA testing. — No error resulted by admitting expert testimony on the issue of DNA testing and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. *Carruth v. State*, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Elevator inspector as expert. — In a premises liability case involving an elevator that stopped above landing level, a person who had worked for 31 years for an elevator company, with responsibilities including maintenance, repair, and upgrading of existing elevators for customers, and who was certified as a qualified elevator inspector, was

properly accepted as an expert. *Brady v. Elevator Specialists, Inc.*, 287 Ga. App. 304, 653 S.E.2d 59 (2007).

During a malpractice case alleging that a patient's doctor failed to timely examine and treat the patient after the patient broke a hip at a long-term care facility, the trial court did not abuse the court's discretion in finding that the patient's expert witness (who, like the doctor, was board certified in internal medicine) was qualified under O.C.G.A. § 24-9-67.1(c)(2). The witness saw about six patients per week, including patients who resided in long-term-care facilities; the fact that the witness had not ordered an x-ray or CT-scan or admitted anyone to the hospital in the past five years did not disqualify the witness as an expert. *Carter v. Smith*, 294 Ga. App. 590, 669 S.E.2d 425 (2008), cert. denied, No. S09C0463, 2009 Ga. LEXIS 194 (Ga. 2009).

Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the trial court correctly determined that the expert's opinion was based on sufficient facts and data in order to be admissible at trial; the expert deposed that the expert's opinion of the cause of the patient's epidural hematoma was derived from applying the expert's medical knowledge and the expert's experience with previous cases to the patient's medical records and deposition testimony regarding the incident given by the doctor and the patient. *Bd. of Regents of the Univ. Sys. v. Casey*, 300 Ga. App. 850, 686 S.E.2d 807 (2009).

Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the expert reviewed the medical records of the patient's case as well as the deposition testimony of the doctor and the patient before using a differential diagnosis to explain the expert's theory of the cause of the patient's epidural hematoma; the trial court denied the motion in limine based on the expert's use of differential diagnosis because, the expert explained, based on prior experiences and medical knowledge as applied to the medical records, time-line, and testimony given in the case, why the expert believed that the patient's interaction

with the doctor caused the epidural hematoma either to form or to worsen to the point that it caused the damage suffered by the patient. *Bd. of Regents of the Univ. Sys. v. Casey*, 300 Ga. App. 850, 686 S.E.2d 807 (2009).

Given an expert witness's qualifications, including his advanced degrees in civil engineering and public administration, professional engineer's license, certification as a professional traffic operations engineer, fifteen years experience working at the DOT, and eight years experience at the local government level, and the expert's testimony based on personal knowledge of the DOT's manuals and inspection policies, a trial court did not err in allowing the witness to give an opinion of whether the DOT had complied with its storm inspection policy. *Ga. DOT v. Miller*, 300 Ga. App. 857, 686 S.E.2d 455 (2009).

In a property owner's action for trespass and nuisance, the trial court did not abuse the court's discretion by allowing the owner's expert witness to testify because the expert (1) relied on sufficient facts and data; (2) was a civil engineer with a doctorate in engineering science and mechanics; and (3) had consulted and testified as an expert in numerous water intrusion/infiltration and related cases; although the expert deposed that the expert's opinion was a theory that was impossible to prove since the expert could not repeat the owner's initial water leak, the expert had factual information showing that the owner had not had an excessive rainwater problem before a sprinkler vault leak and that chlorinated water flowed to the owner's property in large volumes and could have done so for months, and the expert had factual information that the owner experienced excessive flooding during rains thereafter. *Bailey v. Annistown Rd. Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009).

Expert's opinions were improperly found not to be reliable under O.C.G.A. § 24-9-67.1(b)(2) and (b)(3) in a negligence action on the basis that the opinions were products of the engineer's exercise of engineering judgment and thus inadmissible because the expert was not required to point to a specific provision in the Manual of Uniform Traffic Control Devices that required the exact safety measures the expert pro-

posed, the expert could rely on the expert's 48 years as a licensed professional engineer, and the expert was also not required to validate the expert's opinion by showing a series of similar accidents that could constitute test results. *Hamilton-King v. HNTB Ga., Inc.*, 296 Ga. App. 864, 676 S.E.2d 287 (2009).

Jury instructions. — In a medical malpractice case when evidence of an expert's personal practices is admitted, the trial court must give jury instructions that clearly define the legal meaning of standard of care; enunciate the principle that a mere difference in views between physicians does not by itself prove malpractice; and clarify concepts such as burden of proof and credibility of

witnesses. In addition, the party whose expert has been cross-examined has the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. *Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667, 681 S.E.2d 152 (2009).

Cited in *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006); *Ga. Dep't of Transp. v. Douglas Asphalt Co.*, 295 Ga. App. 421, 671 S.E.2d 899 (2009); *Roberts v. Nessim*, 297 Ga. App. 278, 676 S.E.2d 734 (2009); *McKesson Corp. v. Green*, 299 Ga. App. 91, 683 S.E.2d 336 (2009); *In the Interest of S. N. H.*, 300 Ga. App. 321, 685 S.E.2d 290 (2009).

RESEARCH REFERENCES

Am. Jur. Trials. — Defense Use of Economist, 31 Am. Jur. Trials 287.

ALR. — Medical negligence in extraction of tooth, established through expert testimony, 18 ALR6th 325.

Admissibility in evidence, in civil action, of

tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 ALR6th 613.

Admissibility of expert testimony by nurses, 24 ALR6th 549.

24-9-68. Witness's feelings and relationship to parties provable.

The state of a witness's feelings toward the parties and his relationship to them may always be proved for the consideration of the jury. (Orig. Code 1863, § 3800; Code 1868, § 3820; Code 1873, § 3876; Code 1882, § 3876; Civil Code 1895, § 5289; Penal Code 1895, § 1023; Civil Code 1910, § 5878; Penal Code 1910, § 1049; Code 1933, § 38-1712; Ga. L. 1995, p. 10, § 24.)

Law reviews. — For comment on *Smith v. State*, 225 Ga. 328, 168 S.E.2d 587 (1969) and the right to prove relationship of a

witness to a party, see 21 Mercer L. Rev. 347 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FEELINGS

RELATIONSHIPS

General Consideration

In general. — Public trial tends to ensure the truth by forcing those who testify to relate their memories without embellish-

ment for fear that there may be those in attendance who could call the testimony into question if not truthful. *Montgomery v. State*, 156 Ga. App. 448, 275 S.E.2d 72 (1980).

As one party to the trial, the state is entitled to require common witnesses, both those charged and observers of the charged acts, to present their version of the occurrences in the presence of each other, thereby minimizing witness bias or the possibility of each defendant singly shifting blame to other absent defendants without opportunity of searching inquiry into the truth. *Montgomery v. State*, 156 Ga. App. 448, 275 S.E.2d 72 (1980).

History. — Statute is simply declaratory of a general common law principle. *Georgia R.R. & Banking Co. v. Lybrend*, 99 Ga. 421, 27 S.E. 794 (1896).

Credibility. — As a general rule, a party may show any fact or circumstance that may affect the credibility of an opposing witness. *Fowler v. Waldrip*, 10 Ga. 350 (1851); *Simpson v. State*, 78 Ga. 91 (1886); *Daniel v. State*, 103 Ga. 202, 29 S.E. 767 (1897); *Neill v. Hill*, 32 Ga. App. 381, 123 S.E. 30 (1924); *Lloyd v. State*, 40 Ga. App. 230, 149 S.E. 174 (1929); *Walker v. State*, 74 Ga. App. 48, 39 S.E.2d 75 (1946); *Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974); *Southeast Transp. Corp. v. Hogan Livestock Co.*, 133 Ga. App. 825, 212 S.E.2d 638 (1975).

Relevancy. — In a criminal prosecution, it was error for the trial court to permit the state, in argument and in testimony, to identify a fingerprint expert who testified for the state as having originally been hired by the defendant; the fact of the expert's original employment by defendant was irrelevant and could be prejudicial. *Blige v. State*, 264 Ga. 166, 441 S.E.2d 752 (1994).

O.C.G.A. § 24-2-1 and 24-9-68 should be considered in *pari materia*; thus, even if testimony sought to be admitted relates to the feelings a witness has toward a party, if that particular feeling would have no relevance to the questions being tried by the jury, then such evidence may be excluded in the sound discretion of the trial court. *Lockett v. State*, 217 Ga. App. 328, 457 S.E.2d 579 (1995).

In a personal injury suit filed by a car driver against a truck driver because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's treating emergency room physician, a new

trial was ordered. *Laukaitis v. Basadre*, 287 Ga. App. 144, 650 S.E.2d 724 (2007).

Criminal record. — It was not error to refuse to admit evidence pertaining to a witness's criminal record since there was nothing to show that the witness's past record would motivate the witness to be untruthful or "shade" the witness's testimony to please the state, there were no outstanding criminal charges against the witness, and the state did not open the door to admission of such evidence. *Jenkins v. State*, 215 Ga. App. 540, 451 S.E.2d 457 (1994).

While it was error under O.C.G.A. § 24-9-68 not to allow the defendant to cross-examine a witness about pending felony charges against the witness, it was highly probable that the error did not contribute to the verdict, and was therefore harmless error, because the witness was not present at the crime scene and the witness's testimony that the defendant bragged about committing an assault was put in doubt by another witness. *Fields v. State*, 285 Ga. App. 345, 646 S.E.2d 326 (2007).

Jury charge not appropriate. — In the absence of any evidence regarding the feelings or bias of witnesses toward defendant, or why the witnesses were familiar with defendant's appearance, defendant's requested charge on the language of O.C.G.A. § 24-9-68 was not authorized. *Scruggs v. State*, 227 Ga. App. 35, 488 S.E.2d 110 (1997).

Jury charge appropriate. — Trial court did not err in refusing to charge the jury regarding O.C.G.A. § 24-9-68, as it was sufficient that the jury was charged that, in passing upon credibility of witnesses, it could consider their interest or lack of interest in the occurrences about which the witnesses testified. *Stinson v. State*, 256 Ga. App. 902, 569 S.E.2d 858 (2002).

Cited in *Duncan v. State*, 58 Ga. App. 551, 199 S.E. 319 (1938); *Kelly v. State*, 63 Ga. App. 231, 10 S.E.2d 417 (1940); *Griffin v. Kelley*, 227 F.2d 258 (5th Cir. 1955); *Lightfoot v. Applewhite*, 212 Ga. 136, 91 S.E.2d 37 (1956); *Independent Life & Accident Ins. Co. v. Thornton*, 102 Ga. App. 285, 115 S.E.2d 835 (1960); *Benefield v. Benefield*, 224 Ga. 208, 160 S.E.2d 895 (1968); *Clayton County Bd. of Educ. v. Hooper*, 128 Ga. App. 817, 198 S.E.2d 373 (1973); *Cross v. State*, 136 Ga. App. 400, 221

General Consideration (Cont'd)

S.E.2d 615 (1975); *Caldwell v. State*, 142 Ga. App. 831, 237 S.E.2d 452 (1977); *Carter v. State*, 150 Ga. App. 119, 257 S.E.2d 11 (1979); *Schuh v. State*, 150 Ga. App. 700, 258 S.E.2d 328 (1979); *P.D. v. State*, 151 Ga. App. 662, 261 S.E.2d 413 (1979); *Pace v. State*, 157 Ga. App. 442, 278 S.E.2d 90 (1981); *Arnold v. State*, 163 Ga. App. 10, 293 S.E.2d 501 (1982); *Russell v. State*, 174 Ga. App. 1, 329 S.E.2d 168 (1985); *Hooper v. State*, 181 Ga. App. 645, 353 S.E.2d 843 (1987); *Jolly v. State*, 183 Ga. App. 370, 358 S.E.2d 912 (1987); *Bogan v. State*, 206 Ga. App. 696, 426 S.E.2d 392 (1992); *Heaton v. State*, 214 Ga. App. 460, 448 S.E.2d 49 (1994); *Beam v. State*, 265 Ga. 853, 463 S.E.2d 347 (1995); *Georgia Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 478 S.E.2d 437 (1996); *Bryant v. State*, 226 Ga. App. 135, 486 S.E.2d 374 (1997); *Crosby v. Cooper Tire & Rubber Co.*, 240 Ga. App. 857, 524 S.E.2d 313 (1999); *Bolden v. Ruppenthal*, 286 Ga. App. 800, 650 S.E.2d 331 (2007); *Corn v. State*, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

Feelings

In general. — State of the witness's feelings to the parties may always be proved for the consideration of the jury. *Bishop v. State*, 9 Ga. 121 (1850); *Whitlow v. State*, 74 Ga. 819 (1855); *Durham v. State*, 45 Ga. 516 (1872) (role of accused unpopular with witness); *Skipper v. State*, 59 Ga. 63 (1877); *Georgia R.R. & Banking Co. v. Lybrend*, 99 Ga. 421, 27 S.E. 794 (1896) (personal conduct); *Patman v. State*, 61 Ga. 379 (1878); *Shaw v. State*, 102 Ga. 660, 29 S.E. 477 (1897) (witness subject to similar acts of injury as done by accused); *Daniel v. State*, 103 Ga. 202, 29 S.E. 767 (1897); *Purdee v. State*, 118 Ga. 798, 45 S.E. 606 (1903); *McDuffie v. State*, 121 Ga. 580, 49 S.E. 708 (1905); *Sasser v. State*, 129 Ga. 541, 59 S.E. 255 (1907); *Parker v. State*, 11 Ga. App. 251, 75 S.E. 437 (1912), later appeal, 17 Ga. App. 252, 87 S.E. 705 (1915) (subordination of another witness); *Smith v. State*, 12 Ga. App. 13, 76 S.E. 647 (1912); *Sisk v. Landers*, 67 Ga. App. 538, 21 S.E.2d 449 (1942); *Walker v. State*, 74 Ga. App. 48, 39 S.E.2d 75 (1946); *Miller v. Smith*, 302 F. Supp. 385 (N.D. Ga. 1968); *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).

Statute relates to the state of the witness's feelings to the parties, and not the state of the feelings of a party toward the witness. *Jones v. State*, 75 Ga. App. 610, 44 S.E.2d 174 (1947).

Trial court did not err in refusing to permit the condemnee to show, by a witness for the condemnee, the bias and prejudice of a witness for the condemnor against the condemnee, where the questions asked the witness related to the feelings of the condemnor's witness at a time before the trial and did not attempt to show the feelings of the condemnor's witness at the time of the trial. *Sutton v. State Hwy. Dep't*, 103 Ga. App. 29, 118 S.E.2d 285 (1961).

Interest. — Cross-examination of an adverse witness as to interest, attitude, and feelings is admissible. *Jeter & Forbes v. Haviland, Keese & Co.*, 24 Ga. 252 (1858); *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 688 (1954); *Miller v. Smith*, 302 F. Supp. 385 (N.D. Ga. 1968); *Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974); *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).

Jury may not arbitrarily disregard the testimony of a witness by reason of interest in the result. *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

After a defendant was charged with aggravated assault, but claimed self defense, the trial court erred in prohibiting the defendant from eliciting from the victim that the victim had pending a civil action against the defendant for the victim's injuries; the defendant was entitled to prove the victim's interest in the outcome of the criminal trial and so attack the victim's credibility, and to show the state of the witness's feelings toward the defendant and the witness's relationship to the defendant. *Boggs v. State*, 195 Ga. App. 605, 394 S.E.2d 401 (1990).

Bias and prejudice. — Jury is authorized to consider the bias or prejudices of the witnesses in a criminal case, if any exist. *Wall v. State*, 153 Ga. 309, 112 S.E. 142 (1922); *Couch v. State*, 73 Ga. App. 153, 35 S.E.2d 708 (1945); *Dennis v. State*, 216 Ga. 206, 115 S.E.2d 527 (1960).

Fact that, in the investigating officer's previous experience, most of the sexual abuse victims' mothers had sided with their defendant-husbands was not relevant to explain either the conduct or the testimony of

the victim's mother in the instant case, insofar as the testimony did not relate to the state of specifically her feelings towards the parties and specifically her relationship to the parties. *Lott v. State*, 206 Ga. App. 886, 426 S.E.2d 667 (1992).

In a prosecution for aggravated assault, when defendant was allowed to testify that the victim was a drug dealer who had furnished drugs to defendant's nephew, which had prompted the confrontation between them, the exclusion of additional evidence of the victim's drug dealing was not a curtailment of defendant's right to show the bias of the victim. *Hayes v. State*, 211 Ga. App. 801, 440 S.E.2d 539 (1994).

In a criminal prosecution, when the state's eyewitness was never asked what the witness's personal feelings were toward defendant, further inquiry into the basis for any bias or prejudice that the witness might have against African-Americans would not have been relevant. *Farley v. State*, 225 Ga. App. 687, 484 S.E.2d 711 (1997).

Racial bias of officer. — Trial court did not abuse the court's discretion in restricting the defendant's examination of an officer regarding the officer's alleged racial bias because the defendant had an opportunity to develop testimony regarding the officer's alleged racial bias but failed to do so, and, to the extent that the defendant's enumeration was premised upon evidence reflected in the officer's personnel file, the defendant failed to perfect the record with a sufficient proffer of the excluded evidence; although the officer's personnel file was presented to the trial court for consideration, such evidence was not introduced and included in the record for appellate review, and in the absence of the evidence, the court of appeals could not reach the merits of the claim. *Williams v. State*, No. A09A1854, 2010 Ga. App. LEXIS 321 (Mar. 29, 2010).

Motive. — Intent or motive of a witness is a legitimate subject of inquiry, and the fact that a witness is influenced by financial considerations may affect a witness's credit and diminish the weight of a witness's testimony. *Lloyd v. State*, 40 Ga. App. 230, 149 S.E. 174 (1929).

If an attempt be made to discredit a witness on the ground that the witness's testimony is given under the influence of some motive prompting the witness to make

a false or colored statement, the witness may be allowed to show in reply that the witness made similar declarations at a time when the motive imputed to the witness did not exist. *Fuller v. State*, 197 Ga. 714, 30 S.E.2d 608 (1944); *Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974).

Relationships

In general. — Relationship of a witness to a party is a relevant consideration for the jury. *Fowler v. Waldrip*, 10 Ga. 350 (1851); *Simpson v. State*, 78 Ga. 91 (1886); *Futch v. State*, 90 Ga. 472, 16 S.E. 102 (1892); *Myers v. State*, 97 Ga. 76, 25 S.E. 252 (1895); *Shaw v. State*, 102 Ga. 660, 29 S.E. 477 (1897); *Daniel v. State*, 103 Ga. 202, 29 S.E. 767 (1897); *Brown v. State*, 119 Ga. 572, 46 S.E. 833 (1904); *Perdue v. State*, 126 Ga. 112, 54 S.E. 820 (1906); *Bates v. State*, 4 Ga. App. 486, 61 S.E. 888 (1908) (bailor and bailee); *Clark v. State*, 5 Ga. App. 605, 63 S.E. 606 (1909); *Union v. State*, 7 Ga. App. 27, 66 S.E. 24 (1909); *Billings v. State*, 8 Ga. App. 672, 70 S.E. 36 (1911); *Watts v. State*, 9 Ga. App. 500, 71 S.E. 766 (1911); *Smith v. State*, 15 Ga. App. 713, 84 S.E. 159 (1915) (police work); *Berry v. City of Jackson*, 16 Ga. App. 479, 85 S.E. 683 (1915); *Lundy v. State*, 144 Ga. 833, 88 S.E. 209 (1916); *Neill v. Hill*, 32 Ga. App. 381, 123 S.E. 30 (1924); *Lloyd v. State*, 40 Ga. App. 230, 149 S.E. 174 (1929); *Georgia Hwy. Express, Inc. v. Sturkie*, 62 Ga. App. 741, 9 S.E.2d 683 (1940); *Walker v. State*, 74 Ga. App. 48, 39 S.E.2d 75 (1946); *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954); *Dennis v. State*, 216 Ga. 206, 115 S.E.2d 527 (1960) (lover); *Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974) (prosecutor); *Southeast Transp. Corp. v. Hogan Livestock Co.*, 133 Ga. App. 825, 212 S.E.2d 638 (1975) (employer and employee); *Fletcher v. Fletcher*, 242 Ga. 158, 249 S.E.2d 530 (1978) (marital status).

Expert's relationship to party and to attorney. — In a personal injury action, it was not error to allow evidence showing the close relationship between the medical witness and the plaintiff, a long-time patient, and between the witness and plaintiff's counsel. *Canada v. Shropshire*, 232 Ga. App. 341, 501 S.E.2d 860 (1998).

In defendant's trial on charges of malice murder and aggravated assault, the trial court did not err by allowing the state to ask

Relationships (Cont'd)

an expert witness who opined that defendant was insane at the time defendant stabbed two people if the witness had been hired by defendant's counsel to testify in other cases and how much the witness was being paid to testify in defendant's case. *Whitner v. State*, 276 Ga. 742, 584 S.E.2d 247 (2003).

Expert testimony limited. — In a medical malpractice action, the trial court did not err in limiting a patient's cross-examination of the doctor's expert witness, and hence, the patient's ability to show bias on the expert's part as: (1) the rules of evidence specifically prohibited a party from eliciting evidence that the expert had testified in a previous lawsuit, as such would have shown that the doctor had been sued before and suggested a proclivity for negligent conduct; and (2) the mere fact that a juror with an interest in the doctor's liability insurer would have been stricken for cause did not grant the patient an allowance to cross-examine a witness about that witness's interest in the insurer. *Carlisle v. Abend*, 288 Ga. App. 150, 653 S.E.2d 388 (2007).

Sexual. — Trial court did not err in allowing the state to ask a defense witness whether the witness had a sexual relationship with defendant, not to impeach the witness by reason of the immorality, but to show the witness's intimate relations with the accused and the witness's probable bias as a witness. *Watkins v. State*, 206 Ga. App. 701, 426 S.E.2d 238 (1992).

Even though the evidence already shows close friendship and cohabitation, a lesbian relationship between a party and a witness on the party's behalf may be proved to show their intimate relations and the witness's potential bias. *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

Alibi witness. — In a criminal prosecution, proof that the alibi witness had accused the defendant, her boyfriend, of kidnapping and rape but then declined to prosecute her paramour was relevant and admissible to show bias on her part as an alibi witness. *Hood v. State*, 245 Ga. App. 391, 537 S.E.2d 788 (2000).

Employer and employee. — Jury could consider whether a witness had an interest in providing testimony favorable to the employer that insulated the employer from liability and whether the witness/employee received a promotion and pay increase as a reward for such testimony. *McNeely v. Wal-Mart Stores, Inc.*, 246 Ga. App. 852, 542 S.E.2d 575 (2000).

Evidence of defendant's gang affiliation shared with an alibi witnesses and a police officer's testimony that the name of the gang meant "I will die for you, you will die for me" was relevant to show the state of the witnesses' feelings toward defendant and the witnesses' relationship to the defendant. *Hayes v. State*, 265 Ga. 1, 453 S.E.2d 11 (1995). But see *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999).

RESEARCH REFERENCES

ALR. — Admissibility, to show bias or interest of witness, of evidence that he or his employer had compensated the party for whom he testified, in circumstances creating right to subrogation, 128 ALR 1110.

Cross-examination of adversary witness regarding compromise or settlement of his claim against the party calling him, for purpose of affecting his credibility, 161 ALR 395.

Relationship between party and witness as giving rise to or affecting presumption or inference from failure to produce or examine witness, 5 ALR2d 893.

Right of accused in homicide case to

cross-examine prosecution's witness as to latter's pending or contemplated civil action against accused arising out of same transaction, 41 ALR2d 1205.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 ALR2d 610.

Necessity and sufficiency of foundation for discrediting evidence showing bias or prejudice of adverse witness, 87 ALR2d 407.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Right to cross-examine prosecuting witness as to his pending or contemplated civil

action against accused for damages arising out of same transaction, 98 ALR3d 1060.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 ALR4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases, 77 ALR4th 463.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 ALR4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 ALR4th 616.

Adverse presumption or inference based

on party's failure to produce or examine spouse—modern cases, 79 ALR4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 ALR4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 ALR4th 337.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 ALR4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 ALR4th 939.

24-9-69. Testifying after recollection refreshed; swearing from written memorandum.

A witness may refresh and assist his memory by the use of any written instrument or memorandum, provided he shall finally speak from his recollection thus refreshed or shall be willing to swear positively from the paper. (Orig. Code 1863, § 3790; Code 1868, § 3810; Code 1873, § 3866; Code 1882, § 3866; Civil Code 1895, § 5284; Penal Code 1895, § 1020; Civil Code 1910, § 5873; Penal Code 1910, § 1046; Code 1933, § 38-1707.)

Law reviews. — For article advocating admissibility of business entries, see 14 Ga. B.J. 7 (1951). For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For annual survey of evidence

law, see 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006).

For note, "Hypnosis in Court: A Memory Aid for Witnesses," see 1 Ga. L. Rev. 268 (1967).

For comment on *Smith v. Morning News, Inc.*, 99 Ga. App. 547, 109 S.E.2d 639 (1959), see 22 Ga. B.J. 380 (1960).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
WRITTEN INSTRUMENT OR MEMORANDUM
ILLUSTRATIONS

General Consideration

History. — Apparently this section is not based on any statute, but is a codification of the general law existing before the statute's adoption. *Lenney v. Finley*, 118 Ga. 427, 45 S.E. 317 (1903) (see O.C.G.A. § 24-9-69).

Obvious purpose of the statute is to allow proper and legitimate aid to a witness which will enable the witness to testify fully as to the witness's knowledge. *Whitaker v. State*, 199 Ga. 344, 34 S.E.2d 499 (1945) (see O.C.G.A. § 24-9-69).

Rule stated in *Weldon v. State*, 21 Ga. App.

General Consideration (Cont'd)

330, 94 S.E. 326 (1917).

Illegal evidence must not be allowed to reach the jury on the pretense that the evidence is offered in compliance with this statute. *Whitaker v. State*, 199 Ga. 344, 34 S.E.2d 499 (1945); *Hull v. State*, 265 Ga. 757, 462 S.E.2d 596 (1995) (see O.C.G.A. § 24-9-69).

Past and present recollections distinguished. — For discussion of the distinction between cases where the witness finally testifies to a “past” recollection, and where the witness finally testifies to a “present” recollection, see *Stansall v. Columbian Nat'l Life Ins. Co.*, 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924).

Testimony must be based on memory and not on memorandum. — Witness may, for the purpose of refreshing the witness's recollection, use any memoranda useful for that purpose; and the witness's testimony will not be objectionable if it is not dependent upon the memoranda, but is based upon the memory of the witness, even though the memoranda may be necessary in order to refresh the witness's recollection. *Southern Ry. v. Cowan*, 52 Ga. App. 360, 183 S.E. 331 (1936).

Independent memory of contents not required. — Witness may testify from the witness's memory refreshed by a writing that the witness made, though the witness has no independent memory of the writing's contents. *Bridges v. Mutual Benefit Health & Accident Ass'n*, 49 Ga. App. 552, 176 S.E. 543 (1934); *Steinmetz v. Chambley*, 90 Ga. App. 519, 83 S.E.2d 318 (1954); *Woodward v. City Council*, 117 Ga. App. 857, 162 S.E.2d 304 (1968); *State Hwy. Dep't v. Godfrey*, 118 Ga. App. 560, 164 S.E.2d 340 (1968); *Marby v. Henley*, 123 Ga. App. 561, 181 S.E.2d 884 (1971).

Does not affect probative value. — Rule relates as to the admissibility of testimony, and not a rule for the determination of the testimony's probative value. *Scott v. Gidelight Mfg. Co.*, 37 Ga. App. 240, 139 S.E. 686 (1927); *Kines v. State*, 67 Ga. App. 314, 20 S.E.2d 89 (1942).

Reading record in hearing of jury. — Witness may not only read the witness's own deposition but it may be read to the witness in the presence and hearing of the jury to

refresh the witness's memory. *Burney v. Ball*, 24 Ga. 505 (1858).

Waiver. — When only part of the memorandum was admitted in evidence at the instance of the party who offered the witness, over objection urged by the opposite party that it was inadmissible, the putting in evidence later by the opposite party of the remainder of the memorandum amounted to a waiver of the party's objection. *Scott v. Gidelight Mfg. Co.*, 37 Ga. App. 240, 139 S.E. 686 (1927).

Error in allowing counsel to view witness's notes harmless. — Though the trial court erred in permitting the plaintiff's counsel to examine the notes used by defendant's witness to refresh the witness's memory, defendant failed to show how this error prejudiced the defense, therefore, the error was harmless. *Seaboard Coastline R.R. v. Delahunt*, 179 Ga. App. 647, 347 S.E.2d 627 (1986), overruled on other grounds, *CSX Transp. v. Williams*, 230 Ga. App. 573, 497 S.E.2d 66 (1998).

Preserving error. — While it was true that under O.C.G.A. § 24-9-69, a witness whose memory was refreshed with a document had to continue their testimony on the basis of recollection alone, when such was not the basis of the defendant's objection at trial, the claim was not preserved for review. *Hunter v. State*, 282 Ga. App. 355, 638 S.E.2d 804 (2006).

Cited in *Johnson v. State*, 125 Ga. 243, 54 S.E. 184 (1906); *Adams v. State*, 34 Ga. App. 144, 128 S.E. 924 (1925); *Southern Cotton Oil Co. v. Raines*, 171 Ga. 154, 155 S.E. 484 (1930); *Trammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315 (1935); *Harris v. State*, 191 Ga. 243, 12 S.E.2d 64 (1940); *Van Gundy v. Wilson*, 84 Ga. App. 429, 66 S.E.2d 93 (1951); *Hill v. State*, 211 Ga. 683, 88 S.E.2d 145 (1955); *Kiser v. Kiser*, 101 Ga. App. 511, 114 S.E.2d 397 (1960); *Moon v. State*, 120 Ga. App. 141, 169 S.E.2d 632 (1969); *Blair v. State*, 230 Ga. 409, 197 S.E.2d 362 (1973); *Massee v. State Farm Mut. Auto. Ins. Co.*, 128 Ga. App. 439, 197 S.E.2d 459 (1973); *Shouse v. State*, 231 Ga. 716, 203 S.E.2d 537 (1974); *Baker v. State*, 137 Ga. App. 33, 222 S.E.2d 865 (1975); *Smith v. State*, 235 Ga. 852, 221 S.E.2d 601 (1976); *Crawford v. State*, 226 Ga. 491, 224 S.E.2d 365 (1976); *Workman v. State*, 137 Ga. App. 746, 224 S.E.2d 757 (1976); *Harper v. State*,

142 Ga. App. 879, 237 S.E.2d 240 (1977); *Hunter v. State*, 143 Ga. App. 541, 239 S.E.2d 212 (1977); *Myron v. State*, 248 Ga. 200, 281 S.E.2d 600 (1981); *Nationwide Mut. Fire Ins. Co. v. Rhee*, 160 Ga. App. 468, 287 S.E.2d 257 (1981); *Rucker v. State*, 250 Ga. 371, 297 S.E.2d 481 (1982); *Growth Properties of Fla., Ltd. v. Wallace*, 168 Ga. App. 893, 310 S.E.2d 715 (1983); *Kelley v. State*, 169 Ga. App. 917, 315 S.E.2d 916 (1984); *Simon v. State*, 253 Ga. 681, 324 S.E.2d 455 (1985); *Cooper v. State*, 174 Ga. App. 464, 330 S.E.2d 402 (1985); *Herrington v. State*, 177 Ga. App. 632, 340 S.E.2d 637 (1986); *Stoneridge Properties, Inc. v. Kuper*, 178 Ga. App. 409, 343 S.E.2d 424 (1986); *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986); *Henderson v. State*, 182 Ga. App. 513, 356 S.E.2d 241 (1987); *Holland v. State*, 182 Ga. App. 611, 356 S.E.2d 700 (1987); *Williams v. State*, 257 Ga. 788, 364 S.E.2d 569 (1988); *McNeil v. Cowart*, 186 Ga. App. 411, 367 S.E.2d 291 (1988); *Hollis v. State*, 191 Ga. App. 525, 382 S.E.2d 145 (1989); *Singleton v. State*, 193 Ga. App. 778, 389 S.E.2d 269 (1989); *Williamscraft Dev., Inc. v. Vulcan Materials Co.*, 196 Ga. App. 703, 397 S.E.2d 122 (1990); *Spencer v. State*, 260 Ga. 640, 398 S.E.2d 179 (1990); *Taylor v. State*, 230 Ga. App. 749, 498 S.E.2d 113 (1998); *Holiday v. State*, 272 Ga. 779, 534 S.E.2d 411 (2000); *Williams v. State*, 253 Ga. App. 458, 559 S.E.2d 516 (2002); *Morris v. State*, 275 Ga. 601, 571 S.E.2d 358 (2002); *Keller v. State*, 286 Ga. App. 292, 648 S.E.2d 714 (2007); *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Written Instrument or Memorandum

Either personal preparation or knowledge that facts true. — In order to testify positively from paper itself, the witness must either have made the paper personally, or, at some time when facts were fresh in the witness's memory, the witness must have known the facts stated in the paper to be correct. *Bradshaw v. State*, 162 Ga. App. 750, 293 S.E.2d 360 (1982).

After a defendant was charged with DUI, the trial court did not err in allowing one of the police witnesses to refresh the witness's recollection from a written document without any showing that the witness had prepared the document personally; so long as a witness is testifying from personal recollec-

tion, the witness is entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. *Ussery v. State*, 195 Ga. App. 394, 393 S.E.2d 522 (1990).

Paper itself as evidence. — When a witness testifies from the witness's recollection refreshed as provided by statute, the paper itself, where not otherwise binding upon the party against whom the witness testifies, is without probative value and is not admissible as documentary evidence for any purpose. *Stansall v. Columbian Nat'l Life Ins. Co.*, 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924).

Excluding such memoranda as are admissible as business records or as part of the *res gestae*, it is generally held that the memorandum has no present evidentiary value, since it is not the memorandum that is the evidence, but the recollection of the witness. An exception is when the opposite side wished to introduce the memorandum in order to weaken the effect of the testimony. *Woodward v. City Council*, 117 Ga. App. 857, 162 S.E.2d 304 (1968); *State Hwy. Dep't v. Godfrey*, 118 Ga. App. 560, 164 S.E.2d 340 (1968); *Mason v. State*, 147 Ga. App. 179, 248 S.E.2d 302 (1978).

Memorandum prepared by another. — If the writing, instrument, document, or other thing from which the witness refreshes the witness's recollection was made in the witness's presence or at the witness's direction and if the witness knows that it contains true and correct information and is willing to swear positively to that effect, it is immaterial that the witness did not personally make the thing from which the witness testified. *Smith v. Morning News, Inc.*, 99 Ga. App. 547, 109 S.E.2d 639 (1959), for comment, see 22 Ga. B.J. 380 (1960).

Although a witness may refresh the witness's memory from a writing prepared by another, the witness must nevertheless testify from the witness's memory thus refreshed. When the document is prepared by a third person not in the presence of a witness, the memory is not refreshed by such memorandum and such testimony is inadmissible. *Zilinmon v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

In view of a prosecution witness's aver-

Written Instrument or Memorandum (Cont'd)

ment that the witness was testifying from the witness's refreshed memory, the trial court did not err in permitting the witness to testify to the tag number on defendant's truck, even though the witness refreshed the witness's memory by viewing a computer printout bearing the tag number; since the witness was entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. *Byrd v. State*, 182 Ga. App. 284, 355 S.E.2d 666 (1987).

Trial court correctly allowed a testifying police officer to refresh the officer's memory of the incident using a report written by someone else; O.C.G.A. § 24-9-69, permitted a witness to refresh and assist the witness's memory by the use of any written instrument or memorandum. *Penland v. State*, 258 Ga. App. 659, 574 S.E.2d 880 (2002).

Witness at some time must have had personal knowledge of the memorandum's correctness. *Davis v. State*, 91 Ga. 167, 17 S.E. 292 (1893); *Hematite Mining Co. v. East Tenn., Va. & Ga. Ry.*, 92 Ga. 268, 18 S.E. 24 (1893); *Jones v. State*, 99 Ga. 46, 25 S.E. 617 (1896); *Lenney v. Finley*, 118 Ga. 427, 45 S.E. 317 (1903); *Shrouder v. State*, 121 Ga. 615, 49 S.E. 702 (1905); *Smith v. City of Atlanta*, 22 Ga. App. 511, 96 S.E. 334 (1918); *Stansall v. Columbian Nat'l Life Ins. Co.*, 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924); *Herring v. State*, 122 Ga. App. 730, 178 S.E.2d 551 (1970); *Morris v. State*, 228 Ga. 39, 184 S.E.2d 82 (1971), cert. denied, 405 U.S. 1050, 92 S. Ct. 1511, 31 L. Ed. 2d 786 (1972); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978).

Investigation reports prepared by witness. — In a proceeding to terminate the parental rights of a parent who had been convicted of molesting the parent's children, the trial court did not err in allowing a probation official to use a confidential presentence investigation report to refresh the official's recollection about interviews the official had with the parent. *In re S.M.L.*, 228 Ga. App. 81, 491 S.E.2d 186 (1997).

It was not improper for an officer to use a police report to refresh the officer's recol-

lection about a prior driving under the influence incident involving the defendant. *Becker v. State*, 280 Ga. App. 97, 633 S.E.2d 436 (2006).

Investigation reports prepared by another witness. — An investigating officer's report can be used to refresh another witness's recollection. *Brown v. State*, 247 Ga. App. 741, 545 S.E.2d 114 (2001).

Statement as past recollection recorded. — Although it is preferable to ask a witness specifically at trial whether the witness had told the truth as the witness then perceived it when the witness gave the witness's oral statement and whether a transcript thereof constituted an accurate recording in toto of what the witness had personally stated, since an adequate foundation was established, the transcribed statement may qualify as past recollection recorded under O.C.G.A. § 24-9-69. *Platt v. National Gen. Ins. Co.*, 205 Ga. App. 705, 423 S.E.2d 387, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992).

Statement was inadmissible as a past recollection recorded or under the medical diagnosis exception to the hearsay rule because after reviewing the typed statement, the social worker testified that the worker's memory was not refreshed and the worker was unwilling to swear that the statement accurately reflected the interview as required under O.C.G.A. § 24-9-69. *Sandlin v. State*, 273 Ga. 440, 542 S.E.2d 496 (2001).

Transcript allowed to go out with jury. — Transcript of statement by witness which was admissible as past recollection recorded should not have been allowed to go out with the jury during deliberation. *Platt v. National Gen. Ins. Co.*, 205 Ga. App. 705, 423 S.E.2d 387, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992).

Cross-examination concerning contents. — Cross-examiner should and does possess the right to quiz the witness concerning the contents of the written instrument without introduction of the document. In doing so the witness is entitled to shed light on the relevant issues whether this be favorable or unfavorable to the client's cause. *Lester v. S.J. Alexander, Inc.*, 127 Ga. App. 470, 193 S.E.2d 860 (1972).

Examination of memorandum by opposing counsel. — Trial court does not err in refusing to allow defense counsel to examine all a police officer's notes in the officer's file,

although defense counsel is allowed to cross-examine the officer with reference to the notes used to refresh the officer's recollection. *Sprague v. State*, 147 Ga. App. 347, 248 S.E.2d 711 (1978). See also *Ellison v. Robinson*, 96 Ga. App. 882, 101 S.E.2d 902 (1958).

Testimony is not subject to "best evidence" objections if the witness merely used records made, kept, and maintained in the regular course of business under the witness's supervision, direction, and control to refresh the witness's memory and the records were admitted into evidence. *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga. App. 380, 170 S.E.2d 724 (1969).

Use of codefendant's testimony prohibited. — Witness may not refresh witness's memory from testimony given at the trial of another defendant under the same indictment. *Brown v. State*, 28 Ga. 199 (1859).

Illustrations

Recollection refreshed. — Testimony was admissible in the following cases, where witness's recollection was refreshed by a memorandum: *Veal v. Wood*, 29 Ga. App. 94, 113 S.E. 818 (1922); *Lazar v. Black & White Cab Co.*, 50 Ga. App. 567, 179 S.E. 250 (1935).

Since the doctor was present when the plaintiff was brought into the hospital immediately after plaintiff's injury, was present when X-ray pictures were taken and developed, examined the x-rays immediately thereafter and ascertained therefrom that the nature of the plaintiff's injury was such that it was necessary to refer the plaintiff to an orthopedic surgeon, the refusal of the court to allow the witness to refresh the witness's memory under the circumstances shown was probably harmful error and required a reversal of the case. *Smith v. Morning News, Inc.*, 99 Ga. App. 547, 109 S.E.2d 639 (1959), for comment, see 22 Ga. B. J. 380 (1960).

Trial court did not improperly allow a prosecutor to refresh a victim's recollection with a letter the victim wrote to the district attorney's office expressing fear of the defendant as: (1) the defense counsel asked to see the letter before the prosecutor handed the letter to the victim; (2) the prosecutor granted that request; (3) after previewing the letter, the defense counsel did not object

to the victim using the letter to refresh the victim's memory; and (4) the letter was neither admitted into evidence nor read to the jury. *Haggins v. State*, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Detective's use of a photograph to refresh that detective's recollection as to which of the codefendants was the defendant on trial went to the weight of the detective's testimony, but did not require that the identification of the defendant on trial be excluded due to a substantial likelihood of irreparable misidentification. *Ford v. State*, 285 Ga. App. 106, 645 S.E.2d 590 (2007).

Trial court did not err in allowing an attorney to read a letter memorializing a conversation between the attorney and a decedent because a proper foundation was laid for the attorney to read the letter to the jury as a past recollection recorded when the attorney testified that the attorney personally prepared the letter and that the conversation concerning the scope of a receipt that was recounted in the letter occurred no more than three days before the letter was prepared; although the attorney could not presently recall being told by the decedent that the release from indebtedness contained in the receipt was intended to be limited in scope, the attorney testified that based on the wording of the letter the attorney believed that such a conversation with the decedent and the executor's two siblings had taken place, and that testimony established that the attorney memorialized the conversation in the letter when it was fresh in the attorney's mind and that the attorney believed that the letter was true and accurate when written. *Jerkins v. Jerkins*, 300 Ga. App. 703, 686 S.E.2d 324 (2009).

Swearing positively from paper. — Testimony was admissible in the following cases when witness swore positively from the paper that the facts contained therein were correct: *Williams v. C. & G.H. Kelsey & Halsted*, 6 Ga. 365 (1849); *Black v. Thornton*, 30 Ga. 361 (1860); *Schmidt v. Wambacker & Weil*, 62 Ga. 321 (1879); *Scott v. Gidelight Mfg. Co.*, 37 Ga. App. 240, 139 S.E. 686 (1927); *Clackum v. State*, 55 Ga. App. 44, 189 S.E. 397 (1936); *Elliott v. Georgia Power Co.*, 58 Ga. App. 151, 197 S.E. 914 (1938); *Brown-Rogers-Dixon Co. v. Southern Ry.*, 79 Ga. App. 449, 53 S.E.2d 702 (1949); *Haskins v. Carson*, 115 Ga. App. 336, 154 S.E.2d 626 (1967).

Illustrations (Cont'd)

Before a witness may swear positively from a paper it is not necessary that the witness show a present recollection of the contents of the document. *Mincey v. State*, 257 Ga. 500, 360 S.E.2d 578 (1987).

Reading from paper for rebuttal purposes. — Trial court properly permitted an arresting officer to read that portion of the form containing the Miranda warnings which the witness had administered to the defendant for the sole purpose of rebutting the defendant's contention that the defendant had not been advised of the defendant's Miranda rights. *Adams v. State*, 260 Ga. 298, 392 S.E.2d 866 (1990).

Inadequate basis for use of memorandum. — Witness could not, over objection, testify to the contents of a typewritten signed memorandum which purported to be a statement of the witness's account with the plaintiff when on cross-examination the witness admitted that the witness did not prepare the memorandum, that the witness did not know who did, that the witness received the memorandum through the mail, but the witness did not recall even the return address on the envelope, that the memorandum was not signed, and that the witness had no independent knowledge of the memorandum's contents or that the items had in fact been charged back to the witness's account. *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937).

No refreshment absent personal knowledge. — Trial court did not err by refusing to allow one of the prosecution witnesses (a

police officer) to refresh the officer's recollection from a police report prepared by another officer since the officer testified that the officer had no such personal knowledge. *Sweat v. State*, 203 Ga. App. 290, 416 S.E.2d 845 (1992).

Refusal to refresh recollection appropriate. — Refusal to allow defendant to use an officer's report to refresh a witness's recollection was harmless error since defendant's goal was to use the witness's refreshed recollection to impeach the witness in an impermissible manner — with a document created by one other than the witness and which the witness had not signed. *Woods v. State*, 269 Ga. 60, 495 S.E.2d 282 (1998).

Pursuant to O.C.G.A. § 24-9-69, a witness is allowed to refresh and assist the witness's memory by the use of any written instrument or memorandum; trial counsel's failure to object to the refreshing of a witness's recollection was not ineffective assistance of counsel. *Usher v. State*, 258 Ga. App. 459, 574 S.E.2d 580 (2002).

Failure to object to reading of transcript from preliminary hearing did not constitute ineffective assistance of counsel. — As counsel allowed a detective to read from a transcript of the defendant's preliminary hearing so that counsel could cross-examine the detective about a "blank" in the transcript and thus imply that it did not reflect the defendant's entire statement, counsel's strategic decision not to object to the reading of the transcript under O.C.G.A. § 24-9-69 did not constitute ineffective assistance. *Nesbitt v. State*, 296 Ga. App. 139, 673 S.E.2d 652 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 742.

ALR. — Use of memorandum by witness to refresh recollection as affected by the time when it was made, 65 ALR 1478; 125 ALR 19.

Refreshment of recollection by use of memoranda or other writings, 125 ALR 19; 82 ALR2d 473.

Admissibility of testimony of witness at former trial or in another case to cover gaps or omissions, due to faulty memory or other

causes, in his present testimony given in person or by deposition, 129 ALR 843.

Refreshment of recollection by use of memoranda or other writings, 82 ALR2d 473.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Fact that witness undergoes hypnotic examination as affecting admissibility of testimony in civil case, 31 ALR4th 1239.

Admissibility of hypnotically refreshed or enhanced testimony, 77 ALR4th 927.

24-9-70. Objection not waived by cross-examination or introduction of evidence.

If on direct examination of a witness objection is made to the admissibility of evidence, neither cross-examination of the witness on the same subject matter nor the introduction of evidence on the same subject matter shall constitute a waiver of the objection made on direct examination. (Code 1933, § 38-1713, enacted by Ga. L. 1971, p. 460, § 1.)

Law reviews. — For comment on *Carlton Co. v. Poss*, 124 Ga. App. 154, 183 S.E.2d 231, aff'd, 228 Ga. 402, 185 S.E.2d 803 (1971), see 23 Mercer L. Rev. 691 (1972).

JUDICIAL DECISIONS

Inapplicable if complainant was first to raise matter. — Statute is not applicable if the complaining party first introduced evidence in regard to the matter to which the party subsequently interposed an objection. *Halm v. State*, 125 Ga. App. 618, 188 S.E.2d 434 (1972).

Harmless error. — While an objection may not be waived as to the introduction of evidence on the same subject matter through cross-examination or otherwise; nevertheless, a new trial will not be granted for harmless error in the admission of evidence. *Eiberger v. Martel Elec. Sales, Inc.*, 125 Ga. App. 253, 187 S.E.2d 327 (1972).

Statute deals with the waiver of an objection to evidence, and not to harmless error which results from legally admissible evidence rendering harmless the admission of incompetent or inadmissible evidence of the same fact. *Robinson v. State*, 229 Ga. 14, 189 S.E.2d 53 (1972); *Thomas v. State*, 128 Ga. App. 32, 195 S.E.2d 681 (1973); *Prater v. State*, 135 Ga. App. 341, 217 S.E.2d 644 (1975); *Stamper v. State*, 235 Ga. 165, 219 S.E.2d 140 (1975).

When the objection is to documentary rather than oral evidence, the principle regarding waiver should be the same. *Shue v. State*, 129 Ga. App. 757, 201 S.E.2d 174 (1973).

Provisional admission of evidence. —

When evidence is provisionally admitted to the condition that it should be connected up, it is incumbent on the objecting party to renew the objection after the opposing party has closed. *Hawthorne Indus. v. Attaway Assocs.*, 153 Ga. App. 155, 264 S.E.2d 663 (1980).

Instructions. — Refusal to instruct the jury to disregard testimony to which objection was sustained is not harmful error. *Thomas v. State*, 128 Ga. App. 32, 195 S.E.2d 681 (1973).

Statute was applied in *Carlton Co. v. Poss*, 124 Ga. App. 154, 183 S.E.2d 231, aff'd, 228 Ga. 402, 185 S.E.2d 803 (1971), for comment, see 23 Mercer L. Rev. 691 (1972).

Cited in *Griffin v. State*, 126 Ga. App. 294, 190 S.E.2d 553 (1972); *Satterfield v. State*, 127 Ga. App. 528, 194 S.E.2d 295 (1972); *Rowell v. State*, 128 Ga. App. 138, 195 S.E.2d 790 (1973); *Steverson v. Hospital Auth.*, 129 Ga. App. 510, 199 S.E.2d 881 (1973); *Watson v. State*, 132 Ga. App. 204, 207 S.E.2d 685 (1974); *Shepherd v. State*, 234 Ga. 75, 214 S.E.2d 535 (1975); *Carter v. State*, 141 Ga. App. 464, 233 S.E.2d 856 (1977); *Jelks v. World of Realty, Inc.*, 153 Ga. App. 720, 266 S.E.2d 357 (1980); *Delaney v. State*, 154 Ga. App. 772, 270 S.E.2d 48 (1980); *Rice v. State*, 178 Ga. App. 748, 344 S.E.2d 720 (1986); *Fields v. State*, 180 Ga. App. 771, 350 S.E.2d 488 (1986).

RESEARCH REFERENCES

ALR. — Right to cross-examine witness in respect of facts not included in his direct examination, but which negative a prima facie case, presumption, or inference otherwise made by his testimony on direct examination, 108 ALR 167.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 ALR3d 249.

ARTICLE 4

CREDIBILITY

Cross references. — Criminal penalties for perjury and related offenses, § 16-10-70.

JUDICIAL DECISIONS

ANALYSIS

IMPEACHMENT GENERALLY

IMPEACHMENT BY CONVICTION OF CRIME

Impeachment Generally

At any stage of any trial when one party has the right to present oral testimony, the other party has a right to offer evidence tending to impeach the credibility of such witness by any method sanctioned under the law. *Krasner v. Lester*, 130 Ga. App. 234, 202 S.E.2d 693 (1973).

Other reasons for impeachment. — While the law prescribes but three methods of impeachment, it clearly does not mean that for no other reason can a witness be discredited. *Lewis v. American Rd. Ins. Co.*, 119 Ga. App. 507, 167 S.E.2d 729 (1969).

Subject must be material. — Witness may not be impeached upon a subject immaterial to the issues involved in the trial of the case. *J.F. McKinney & Co. v. Darby*, 56 Ga. App. 621, 193 S.E. 594 (1937).

Instruction required. — When inadmissible evidence as to a confession is offered and admitted, the evidence's admission constitutes that the evidence is admitted for the purpose of impeachment only, whether or not a request to so charge be made, and whether or not any exceptions are made to the charge as given. *Askea v. State*, 153 Ga. App. 849, 267 S.E.2d 279 (1980).

Instruction not required. — When there was no effort to formally impeach any witness by any of the means provided by statute and there was no substantial conflict in the

evidence, defendant's statement not being such proof of contradictory facts as would authorize a charge on this subject in the absence of a timely written request, there was error in failing to charge the law on impeachment of witnesses. *Peterson v. State*, 97 Ga. App. 898, 104 S.E.2d 629 (1958).

Good character will not rehabilitate. — In Georgia, it has never been considered as law that a witness impeached by disproving the truth of the witness's evidence, but not otherwise, could be sustained by evidence of the witness's good character. *Hall v. Burpee*, 176 Ga. 270, 168 S.E. 39 (1933).

Interrogatories. — Great latitude should be allowed by the court if the purpose of the interrogatories is to impeach or discredit the witness by showing the witness's bias or prejudice in the case. *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Impeachment by Conviction of Crime

There are other legal ways of discrediting a witness than those prescribed by the Code, e.g., a witness may be impeached by proof of conviction of a crime involving moral turpitude. *Sheffield v. Hammond*, 41 Ga. App. 76, 151 S.E. 663 (1930); *Johnson v. State*, 144 Ga. App. 406, 240 S.E.2d 919 (1977).

Legal method of impeachment. — While

there are other legal ways of impeaching a witness, such as proof by competent evidence of a crime involving moral turpitude, yet even competent proof of an offense not involving moral turpitude, or incompetent proof of an offense involving moral turpitude, such as a mere indictment, a charge, an arrest, or a trial and acquittal, are not legal methods of impeachment. *Whitley v. State*, 188 Ga. 177, 3 S.E.2d 588 (1939); *Smallwood v. State*, 95 Ga. App. 766, 98 S.E.2d 602 (1957). But see, *Taylor v. State*, 136 Ga. App. 31, 330 S.E.2d 49 (1975) (overruled in concurring opinion by only two judges).

Moral turpitude required. — Witness cannot be impeached by introducing a record of the witness's conviction for a misdemeanor, it not appearing that the offense for which the witness was found guilty was one involving moral turpitude. *Andrews v. State*, 118 Ga. 1, 43 S.E. 852 (1903); *Howard v. State*, 144 Ga. 169, 86 S.E. 540 (1915); *Williams v. State*, 42 Ga. App. 225, 155 S.E. 511 (1930); *Groves v. State*, 175 Ga. 37, 164 S.E. 822 (1932).

Crimes involving moral turpitude are restricted to the gravest offenses, consisting of felonies, infamous crimes, and those that are malum in se and disclose a depraved mind. *Seaboard Coast Line R.R. v. West*, 155 Ga. App. 391, 271 S.E.2d 36 (1980).

Proof of conviction of crime. — Fact of conviction of a crime of moral turpitude must be shown by record evidence and not by testimony. *Johnson v. State*, 144 Ga. App. 406, 240 S.E.2d 919 (1977); *Allen v. State*, 152 Ga. App. 481, 263 S.E.2d 259 (1979).

Insufficient evidence generally. — While a witness may be discredited by proof of general bad character or conviction of a crime involving moral turpitude, it is not competent to discredit the witness by showing that the witness has committed, been arrested for, confined for, or even indicted for such an offense. *McCarty v. State*, 139 Ga. App. 101, 227 S.E.2d 898 (1976).

Witness's own testimony insufficient. — Witness cannot be discredited even by the witness's own testimony that the witness had been convicted of a crime involving moral turpitude; it is necessary to introduce an authenticated copy of the record of the court in which the witness was convicted. *Howard v. State*, 144 Ga. 169, 86 S.E. 540

(1915); *McCarty v. State*, 139 Ga. App. 101, 227 S.E.2d 898 (1976); *Drake v. State*, 245 Ga. 798, 267 S.E.2d 237 (1980); *Dabney v. State*, 154 Ga. App. 355, 268 S.E.2d 408 (1980).

Parol evidence of commission of crime is inadmissible to impeach a witness. *Green v. State*, 125 Ga. 742, 54 S.E. 724 (1906); *Wheeler v. State*, 4 Ga. App. 325, 61 S.E. 409 (1908); *Hunter v. State*, 133 Ga. 78, 65 S.E. 154 (1909).

Proof of indictment insufficient. — Witness's character may be impeached only by introduction of witness's criminal convictions involving moral turpitude, not by showing the witness was indicted. *Hall v. State*, 241 Ga. 252, 244 S.E.2d 833 (1978).

Proof of confinement insufficient. — It is improper to attempt to discredit a witness by showing that the witness is confined in jail, as one may be in jail accused of a crime and may be in fact not guilty. The law is that conviction impeaches; accusation does not. *Johnson v. State*, 144 Ga. App. 406, 240 S.E.2d 919 (1977).

Proof of warrant and bond insufficient. — When an accusation and a warrant had been issued against a witness and the witness had been given a bond, this did not afford grounds for the witness's impeachment. *Williams v. State*, 42 Ga. App. 225, 155 S.E. 511 (1930).

Documents showing guilty plea and sentencing of defendant in federal district court for making false and fictitious statements to F.B.I. agent, an offense involving moral turpitude, were relevant and competent for the purpose of impeaching defendant. *Mercer v. Foster*, 210 Ga. 546, 81 S.E.2d 458 (1954).

No moral turpitude was involved in the convictions in the following cases: *Andrews v. State*, 118 Ga. 1, 43 S.E. 852 (1903) (fighting); *Wheeler v. State*, 4 Ga. App. 325, 61 S.E. 409 (1908) (selling liquor); *Edenfield v. State*, 14 Ga. App. 401, 81 S.E. 253 (1914) (selling liquor); *Curry v. State*, 17 Ga. App. 312, 86 S.E. 742 (1915) (fighting); *Bivins v. State*, 147 Ga. 229, 93 S.E. 213 (1917) (carrying a concealed weapon); *Williams v. State*, 42 Ga. App. 225, 155 S.E. 511 (1930) (selling liquor).

Conviction of larceny. — Record of conviction of a witness of larceny is admissible in evidence to impeach the witness. *McGruder v. State*, 71 Ga. 864 (1883); *Coleman v. State*,

Impeachment by Conviction of Crime (Cont'd)

94 Ga. 85, 21 S.E. 124 (1894).

Evidence not considered. — Evidence that workers' compensation claimant had been

convicted of a crime involving moral turpitude did not have the effect of impeaching the claimant as a witness in view of the finding by the board that this evidence was not considered by it. *Whitener v. Baly Tire Co.*, 98 Ga. App. 257, 105 S.E.2d 775 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 208, 209.

ALR. — Effect of witness qualifying his testimony with "I think," "I believe," or the like, when expressing thereby indistinct observation or recollection, 4 ALR 979.

Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility, 6 ALR 1608; 25 ALR 339; 103 ALR 350; 161 ALR 233.

Impeachment of witness by expert evidence tending to show mental or moral defects, 15 ALR 932.

Admissibility of evidence of good reputation for truth and veracity of witness who has not been impeached, 33 ALR 1220.

Cross-examination as proper method of showing conviction for purpose of impeaching witness other than accused, 41 ALR 337.

Cross-examination of character witness for accused with reference to particular acts or crimes, 71 ALR 1504; 47 ALR2d 1258.

Comment by prosecution on failure of defendant to call character witnesses, 80 ALR 227.

Conviction upon plea of *nolo contendere* as admissible for purpose of impeaching witness, 146 ALR 867.

Right of witness whose credibility has been impeached by evidence of previous conviction, charge of crime, or arrest, to assert innocence or to explain or show circumstances, 166 ALR 211.

Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution, 20 ALR2d 1421.

Pardon as affecting impeachment by proof of conviction of crime, 30 ALR2d 893.

Impeachment of witness by showing conviction of contempt, 49 ALR2d 845.

Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony, 75 ALR2d 909.

Right to elicit expert testimony from adverse party called as witness, 88 ALR2d 1186.

Effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial, 3 ALR3d 965.

Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial, 16 ALR3d 726.

Discovery, in civil case, of material which is or may be designed for use in impeachment, 18 ALR3d 922.

Use of judgment in prior juvenile court proceeding to impeach credibility of witness, 63 ALR3d 1112.

Use of drugs as affecting competency or credibility of witness, 65 ALR3d 705.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment, 67 ALR3d 761.

Propriety, on impeaching credibility of witness in criminal case by showing former conviction, of questions relating to nature and extent of punishment, 67 ALR3d 775.

Right to impeach credibility of accused by showing prior conviction, as affected by remoteness in time of prior offense, 67 ALR3d 824.

Use of unrelated traffic offense conviction to impeach general credibility of witness in state civil court, 88 ALR3d 74.

Use of unrelated misdemeanor conviction (other than for traffic offense) to impeach general credibility of witness in state civil case, 97 ALR3d 1150.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 ALR3d 1060.

Propriety of jury instruction regarding credibility of witness who has been convicted of a crime, 9 ALR4th 897.

Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules, 13 ALR4th 796.

Impeachment of defense witness in criminal case by showing witness's prior silence or failure or refusal to testify, 20 ALR4th 245.

Right to impeach witness in criminal case by inquiry or evidence as to witness's criminal activity for which witness was arrested or charged, but not convicted — modern state cases, 28 ALR4th 505.

Permissibility of impeaching credibility of witness by showing verdict of guilty without judgment of sentence thereon, 28 ALR4th 647.

Admissibility of impeached witness's prior consistent statement—modern state civil cases, 58 ALR4th 1014; 59 ALR4th 1000.

Impeachment or cross-examination of

prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 ALR4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Propriety of questioning expert witness regarding specific incidents or allegations of expert's unprofessional conduct or professional negligence, 11 ALR5th 1.

Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of a witness's prior consistent statement, 47 ALR Fed. 639.

24-9-80. Credibility a jury question.

The credibility of a witness is a matter to be determined by the jury under proper instructions from the court. (Civil Code 1895, § 5294; Penal Code 1895, § 1028; Civil Code 1910, § 5883; Penal Code 1910, § 1054; Code 1933, § 38-1805.)

History of Code section. — This Code section is derived from the decision in *Strozier v. Carroll*, 31 Ga. 557 (1860).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CIVIL CASES

CRIMINAL CASES

CHILDREN

APPEALS

General Consideration

Weight of evidence and credibility of witnesses are matters for jury. — See *Sindy v. State*, 120 Ga. 202, 47 S.E. 554 (1904); *Trammell v. State*, 183 Ga. 711, 189 S.E. 529 (1937); *A.A.A. Hwy. Express, Inc. v. Hagler*, 72 Ga. App. 519, 34 S.E.2d 462 (1945); *Davis v. State*, 424 Ga. 901, 252 S.E.2d 443 (1979); *Johnson v. State*, 150 Ga. App. 405, 258 S.E.2d 22 (1979); *Parks v. State*, 150 Ga. App. 446, 258 S.E.2d 66 (1979); *A & N Inv., Inc. v. Cronin*, 151 Ga. App. 738, 261 S.E.2d 469 (1979); *Armour v. State*, 154 Ga. App. 740, 270 S.E.2d 22 (1980); *Harris v. State*, 155 Ga. App. 530, 271 S.E.2d 668 (1980); *Price v. State*, 159 Ga. App. 662, 284 S.E.2d 676

(1981); *Alonso v. State*, 190 Ga. App. 26, 378 S.E.2d 354 (1989); *Jenkins v. State*, 269 Ga. 282, 498 S.E.2d 502 (1998), cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

Determination of a witness's credibility is within the discretion of the trier of fact. *Burnette v. State*, 165 Ga. App. 768, 302 S.E.2d 621 (1983).

Any question as to credibility of a witness is for the jury to resolve. *Murff v. State*, 165 Ga. App. 808, 302 S.E.2d 697, rev'd on other grounds, 251 Ga. 478, 306 S.E.2d 267 (1983).

In jury trial, jurors are sole judges of credibility of witnesses. *Godfrey v. State*, 187 Ga. App. 319, 370 S.E.2d 183 (1988); *Ward v.*

General Consideration (Cont'd)

State, 205 Ga. App. 584, 423 S.E.2d 288 (1992).

Testimony that victim was "genuine". — Trial court did not abuse the court's discretion in refusing to grant defendant's motion for a mistrial after a witness improperly testified that a victim was "genuine" as defendant failed to renew the motion for a mistrial following a curative instruction; further, the curative instruction was the proper corrective measure as the credibility of the witness was a matter for the jury. *Cook v. State*, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Resolution of conflicting theories drawn from evidence is for jury and it is not the court's province to reweigh the evidence and the jury's inferences drawn from the evidence. *Robinson v. State*, 203 Ga. App. 759, 417 S.E.2d 404, cert. denied, 203 Ga. App. 907, 417 S.E.2d 404 (1992).

Defendant's motion for a directed verdict of acquittal in trial for theft by taking a motor vehicle was properly denied since the jury properly assessed the evidence, although conflicting, and found each fact necessary to make out the state's case. *Sherls v. State*, 272 Ga. App. 152, 611 S.E.2d 780 (2005).

Trial without jury. — When the judge tried the accused without intervention of a jury, the credibility of the witnesses was for the judge's determination. *Boynton v. State*, 11 Ga. App. 268, 75 S.E. 9 (1912).

Under O.C.G.A. § 24-9-80, in a trial, the credibility of the witnesses is a matter which should be resolved by the jurors who have heard all of the relevant evidence, and not by the text of the pretrial order. *Ballard v. Meyers*, 275 Ga. 819, 572 S.E.2d 572 (2002).

Alibi evidence need not be accepted. — When defendant's alibi witnesses were unimpeached, the trial court, sitting as trier of fact, was not bound to accept the evidence introduced of alibi as true, since the trier of fact determines the credibility of the witnesses and weight to be given their testimony. *Gatling v. State*, 203 Ga. App. 407, 416 S.E.2d 877 (1992).

Value of testimony. — It was for the jury to determine whether the testimony of a witness was so vague, indefinite, and uncertain as to be worthless, or whether the testimony,

though contradictory in some respects, possessed some degree of probative value. *Sappington v. Bell*, 115 Ga. 856, 42 S.E. 233 (1902); *O'Brien v. Ellarbee*, 14 Ga. App. 333, 80 S.E. 864 (1914); *Sherman v. Stephens*, 30 Ga. App. 509, 118 S.E. 567 (1923); *Reaves v. Columbus Elec. & Power Co.*, 32 Ga. App. 140, 122 S.E. 824, cert. denied, 32 Ga. App. 807 (1924).

In a negligence action seeking compensatory damages for a disabling injury, because the injured plaintiff's use of morphine at the time of trial raised a credibility issue, the trial court did not abuse the court's discretion in overruling plaintiff's relevance objection. *Imm v. Chaney*, 287 Ga. App. 606, 651 S.E.2d 855 (2007).

Only limitation to power of jury to credit witnesses is when the facts testified to are inherently at variance with the common knowledge and experience of mankind. *Haywood v. State*, 114 Ga. 111, 39 S.E. 948 (1901); *Alexander v. State*, 1 Ga. App. 289, 57 S.E. 996 (1907); *Reed v. State*, 130 Ga. 52, 60 S.E. 191 (1908); *Watson v. State*, 13 Ga. App. 181, 78 S.E. 1014 (1913).

Contradictory statements as affecting credibility. — When witness testified as to defendant's reputation in community, any subsequent contradiction simply went to the witness's credibility with the jury, and it was error for the court to strike such witness's testimony in toto. *Hudson v. State*, 163 Ga. App. 845, 295 S.E.2d 123 (1982).

Reconciliation of conflicts. — When there are conflicts in the testimony of witnesses, it is the duty of the jury to reconcile these conflicts if possible so as to make every witness speak the truth. However, if this cannot be done, it then becomes the duty of the jury to believe those whom the jury thinks most entitled to credit. *Cotton v. State*, 81 Ga. App. 753, 59 S.E.2d 741 (1950).

It is the function of the jury to determine the credibility of the witnesses, and the jurors must weigh and resolve any conflicts presented by the evidence; the appellate court must view the evidence in the light most favorable to the jury's verdict. *King v. State*, 157 Ga. App. 733, 278 S.E.2d 491 (1981).

Jury may not arbitrarily disregard testimony. — Rule that the uncontradicted testimony of unimpeached witnesses cannot be arbitrarily disregarded does not mean that

the jurors are obliged to believe testimony which the jurors in fact discredit, but means that the jurors are to consider the testimony of every witness who is sworn, and not arbitrarily disregard the testimony of any witness. *Fincher v. Harlow*, 56 Ga. App. 578, 193 S.E. 452 (1937); *Lankford v. Holton*, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943); *Stow v. Hargrove*, 203 Ga. 735, 48 S.E.2d 454 (1948); *Wilson v. Professional Ins. Corp.*, 151 Ga. App. 712, 261 S.E.2d 450 (1979).

Rejection of part of evidence. — Jury in arriving at a conclusion upon disputed issues of fact may believe part of the testimony of a witness or witnesses, and reject another part. *Brown v. O'Neal*, 59 Ga. App. 560, 1 S.E.2d 601 (1939); *Lawhon v. Henshaw*, 63 Ga. App. 683, 11 S.E.2d 846 (1940); *Johnson v. State*, 69 Ga. App. 663, 26 S.E.2d 482 (1943); *Johnson v. Woodward Lumber Co.*, 76 Ga. App. 152, 45 S.E.2d 294 (1947); *Nashville, C. & St. L. Ry. v. Ham*, 78 Ga. App. 403, 50 S.E.2d 831 (1948); *Davis v. State*, 205 Ga. 248, 53 S.E.2d 454 (1949); *Frazier v. State*, 152 Ga. App. 743, 264 S.E.2d 35 (1979).

Jury may disbelieve witness. — If a witness is impeached or discredited in some legal manner, a jury, or a trial judge in a nonjury case, may disbelieve the witness altogether. *Mustang Transp., Inc. v. W.W. Lowe & Sons*, 123 Ga. App. 350, 181 S.E.2d 85 (1971).

Sufficient evidence supported the defendant's convictions of false statements under O.C.G.A. § 16-10-20 and conspiracy to commit theft by shoplifting under O.C.G.A. § 16-4-8, as the co-conspirator testified as to the defendant's request for specific items to be stolen, the special agent testified about the defendant's false statements, and the defendant gave a statement admitting to the conduct; the testimony of the co-conspirator and of the special agent established the elements of the offenses, and the jury, under O.C.G.A. § 24-9-80, had the right to disbelieve the defendant's testimony to the contrary. *Acey v. State*, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

Single witness may be believed by jury in preference to any number of witnesses whose testimony may contradict the single witness. *Pyles v. State*, 3 Ga. App. 29, 59 S.E. 193 (1907); *Jolly v. State*, 5 Ga. App. 454, 63 S.E. 520 (1909); *Gordon v. State*, 7 Ga. App. 691, 67 S.E. 893 (1910); *Lambert v. State*, 11

Ga. App. 764, 76 S.E. 73 (1912); *Cook v. State*, 13 Ga. App. 308, 79 S.E. 87 (1913).

Rejection of defendant's explanation. — When defendant's statements are not consistent with and do not explain other direct and circumstantial evidence, defendant's explanation may be rejected by the trier of fact. *Green v. State*, 155 Ga. App. 795, 272 S.E.2d 761 (1980).

Testimony and circumstances. — Jury is to look to the testimony itself, as well as to the circumstances attending the testimony's introduction, in determining the testimony's probative value. *Smith v. State*, 124 Ga. 213, 52 S.E. 329 (1905).

Demeanor of witness. — Trier of facts in determining the worthiness of belief of a witness may take into consideration the witness's appearance, the witness's demeanor, or the witness's manner upon the stand. *Mustang Transp., Inc. v. W.W. Lowe & Sons*, 123 Ga. App. 350, 181 S.E.2d 85 (1971).

Interest of witness in the result of the suit may always be considered in passing upon the witness's credibility; and, if there are circumstances inconsistent with the truth of the witness's testimony, the jury is not obliged to believe the witness, even though the witness is not contradicted by any other witness. *Fincher v. Harlow*, 56 Ga. App. 578, 193 S.E. 452 (1937); *Lankford v. Holton*, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943); *Smith v. Davis*, 203 Ga. 175, 45 S.E.2d 609 (1947); *Dunagan v. Elder*, 154 Ga. App. 728, 270 S.E.2d 18 (1980).

Implications inconsistent with testimony may arise from proven facts; and in still other ways the question of what is the truth may remain as an issue of fact despite uncontradicted evidence in regard thereto. *Short & Paulk Supply Co. v. Dykes*, 120 Ga. App. 639, 171 S.E.2d 782 (1969).

Allowance of impeachment of witness by prior inconsistent statement which is indirectly material to the issue in the case is not error. *Hudson Properties, Inc. v. Citizens & S. Nat'l Bank*, 168 Ga. App. 331, 308 S.E.2d 708 (1983).

Statement not admissible as prior inconsistent statement. — Doctor's conversation in the hospital with a patient was not admissible as a prior consistent statement to show that the patient had pointed out a lesion to the doctor as the excluded testimony was not

General Consideration (Cont'd)

as specific to that issue as the patient claimed; the doctor testified that the patient felt that the doctor had delayed the treatment and that the doctor told the patient that they should concentrate on the patient getting well and that the doctor would discuss it with the patient later in the office. *Davis v. Reid*, 272 Ga. App. 312, 612 S.E.2d 112 (2005).

Excluded testimony of two witnesses that a patient told the witnesses that the patient had pointed out a bump on the patient's breast to a doctor and that the doctor told the patient not to be concerned about it was not admissible as prior consistent statements as the doctor did not place the patient's veracity at issue; the fact that the doctor's testimony was at odds with the patient's testimony did not open the door to the admission of hearsay evidence and, further, the witnesses were allowed to testify that the patient showed the witnesses the lesion and that after the check-up, the patient was relieved *Davis v. Reid*, 272 Ga. App. 312, 612 S.E.2d 112 (2005).

Interference with verdict by court. — Only in very extreme cases ought the court to interfere with a verdict turning on the credit to be given to the witnesses testifying on the trial. *Wright v. State*, 34 Ga. 110 (1864); *Whitten v. State*, 47 Ga. 297 (1872); *Crawford v. State*, 50 Ga. 249 (1873); *May v. State*, 94 Ga. 76, 20 S.E. 251 (1894).

Credibility as basis for denial of summary judgment. — When, on motion for summary judgment, the credibility of a witness or witnesses upon whose testimony the grant of the summary judgment depends is at issue in the case, neither the trial court nor the Court of Appeals will resolve the matter or is concerned with the credibility but will leave this matter to the jury, rather than grant summary judgment. *Raven v. Dodd's Auto Sales & Serv., Inc.*, 117 Ga. App. 416, 160 S.E.2d 633 (1968).

Former Civil Code 1910, § 5884 (see O.C.G.A. § 24-9-85) was not an abridgment of the absolute right of the jury to determine the credibility of witnesses. *Brown v. State*, 10 Ga. App. 50, 72 S.E. 537 (1911).

State's repeated questions to the state's witness specifically pertaining to defendant's credibility were improper under O.C.G.A.

§ 24-9-80. *Griffin v. State*, 267 Ga. 586, 481 S.E.2d 223 (1997).

Improper bolstering cured by instruction. — Trial court properly denied defendant's motion for a mistrial pursuant to O.C.G.A. § 24-9-80 during trial on a charge of child molestation as the trial court took remedial measures to cure testimony which tended to bolster the victim's credibility by giving a general instruction concerning improper bolstering of another witness's credibility. *Howell v. State*, 278 Ga. App. 634, 629 S.E.2d 398 (2006).

Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object to certain testimony by the investigating officer that commented upon the victim's credibility as, even though trial counsel did not object, the trial court gave a curative instruction that specifically informed the jury to disregard the officer's testimony commenting on the victim's credibility, which was adequate to correct any harm. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

Improper bolstering was prejudicial error. — It was improper bolstering of an officer's credibility for a special agent to testify that based upon the agent's experience and training, the agent thought that the officer had acted appropriately during a traffic stop of the defendant; special agent had not witnessed the stop, and agent's testimony was not admissible as an expert opinion on an issue beyond the ken of the average layperson, and because credibility of the officer and of defendant was the pivotal issue and there was no other disinterested testimony and no ameliorative instructions, error was not harmless. *Bly v. State*, 283 Ga. 453, 660 S.E.2d 713 (2008).

Testimony by a defendant's sister, who was also a second victim's aunt, that the sister knew that the second victim was telling the truth when the second victim told the sister that the defendant wanted to have sex with the second victim should have been objected to as the credibility of the second victim was a matter for the jury's determination under O.C.G.A. § 24-9-80; because the defendant denied touching the second victim and there was no evidence of the crime other than the second victim's testimony, defense

counsel's error was prejudicial, and a conviction for child molestation against the second victim had to be reversed. *Walker v. State*, 296 Ga. App. 531, 675 S.E.2d 270 (2009).

No improper bolstering of other witness's testimony. — Testimony of the treating psychologist of a child sexual abuse victim that the results of the psychologist's testing were "consistent" with the victim's statements that the victim had been sexually abused was not improper bolstering, and a caseworker who testified was not expressing an opinion about the victim's truthfulness when the caseworker testified that the caseworker's own investigation was closed with a determination of substantiated sexual abuse since the caseworker was testifying as to why the caseworker's investigation was closed and why the caseworker did not continue to follow the family; the caseworker's statement that the victim seemed very truthful and honest violated O.C.G.A. § 24-9-80, but since the trial court immediately gave a curative instruction, and it was highly probable that this testimony did not contribute to the verdict, this did not require a reversal. *Williams v. State*, 266 Ga. App. 578, 597 S.E.2d 621 (2004).

Defendant's argument that defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to the testimony of two of the state's witnesses that bolstered the credibility of the victims in violation of O.C.G.A. § 24-9-80, failed; one of the allegedly bolstering statements was stricken and the jury was instructed to disregard that statement, one of the statements did not express an opinion about whether the victims were telling the truth because that statement related to the officer's investigation and the implications of a probable cause finding, and the statement by the expert that the expert's findings were consistent with the sexual abuse allegations was a permissible comment on medical or scientific tests. *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

With regard to a defendant's conviction for terroristic threats, an officer's testimony that indicated the victim's statements were consistent with the officer's observations of the victim's injuries and the disarray in a hotel room where the alleged incident oc-

curred did not constitute improper bolstering or a comment on the victim's veracity. *Mullins v. State*, 298 Ga. App. 368, 680 S.E.2d 474 (2009).

Failure to charge statute is not error in the absence of a timely written request. *Fraser v. State*, 52 Ga. App. 92, 182 S.E. 418 (1935); *Benton v. State*, 185 Ga. 254, 194 S.E. 166 (1937); *Brooks v. State*, 63 Ga. App. 575, 11 S.E.2d 688 (1940); *Georgia Power Co. v. Burger*, 63 Ga. App. 784, 11 S.E.2d 834 (1940); *Tiller v. State*, 196 Ga. 508, 26 S.E.2d 883 (1943); *Grier v. State*, 196 Ga. 515, 26 S.E.2d 889 (1943); *Hodnett v. State*, 197 Ga. 730, 30 S.E.2d 606 (1944); *Shewmade v. State*, 71 Ga. App. 349, 30 S.E.2d 816 (1944); *Guy v. State*, 72 Ga. App. 395, 33 S.E.2d 853 (1945); *Summerour v. State*, 85 Ga. App. 94, 68 S.E.2d 158 (1951); *Wheeler v. State*, 220 Ga. 535, 140 S.E.2d 258 (1965); *Tanner v. State*, 228 Ga. 829, 188 S.E.2d 512 (1972); *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974) (see O.C.G.A. § 24-9-80).

Charge substantially in language of statute, in the absence of any request for a more specific charge on the subject, was sufficient. *Central of Ga. Ry. v. McGuire*, 10 Ga. App. 483, 73 S.E. 702 (1912); *Chandler v. Alabama Power Co.*, 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962) (see O.C.G.A. § 24-9-80).

Instructions proper in the following cases: *Hall v. Burpee*, 176 Ga. 270, 168 S.E. 39 (1933); *Coates v. State*, 192 Ga. 130, 15 S.E.2d 240 (1941); *Crosby v. State*, 92 Ga. App. 335, 88 S.E.2d 523 (1955); *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977).

Trial court's instruction that "you must not base your verdict on inferences or speculation or anything that is not supported by the evidence" was a correct statement of the law and was not plain error on the basis of a claim that such instruction interfered with the jury's function as sole arbiter of the credibility of witnesses. *Caldwell v. State*, 247 Ga. App. 191, 542 S.E.2d 564 (2000).

Use of jury instruction that the jury could consider the level of certainty shown by a witness about identification of the defendant is error. — Trial court erred in charging the jury that one of the factors to be considered when evaluating the reliability of an eyewitness identification is "the level of certainty shown by the witness about her

General Consideration (Cont'd)

identification." *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005); *Brown v. State*, 277 Ga. App. 396, 626 S.E.2d 596 (2006).

Cited in *U.S. Fid. & Guar. Co. v. Hall*, 34 Ga. App. 307, 129 S.E. 305 (1925); *Luke v. Ashburn Bank*, 40 Ga. App. 802, 151 S.E. 562 (1930); *Newsom v. Reynolds Chevrolet Co.*, 43 Ga. App. 376, 158 S.E. 763 (1931); *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935); *Aycock v. State*, 188 Ga. 551, 4 S.E.2d 221 (1939); *Elliott v. State*, 190 Ga. 803, 10 S.E.2d 843 (1940); *Mickle v. Moore*, 193 Ga. 150, 17 S.E.2d 728 (1941); *Quinton v. Peck*, 195 Ga. 299, 24 S.E.2d 36 (1943); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263 (1943); *Hardware Mut. Cas. Co. v. Mullis*, 75 Ga. App. 233, 43 S.E.2d 122 (1947); *Edge v. Dorsey*, 78 Ga. App. 70, 50 S.E.2d 227 (1948); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Martin v. Waltman*, 82 Ga. App. 375, 61 S.E.2d 214 (1950); *Zetterower v. State*, 87 Ga. App. 24, 73 S.E.2d 88 (1952); *Chapman v. State*, 90 Ga. App. 564, 83 S.E.2d 572 (1954); *Cash v. Cash*, 212 Ga. 416, 93 S.E.2d 346 (1956); *Georgia R.R. & Banking Co. v. Cook*, 94 Ga. App. 650, 95 S.E.2d 703 (1956); *Bennett v. Taylor*, 94 Ga. App. 873, 96 S.E.2d 507 (1957); *Scoggins v. State*, 98 Ga. App. 360, 106 S.E.2d 39 (1958); *Clark v. State*, 216 Ga. 459, 117 S.E.2d 160 (1960); *Neal v. Dover*, 217 Ga. 545, 123 S.E.2d 760 (1962); *Taylor v. Marsh*, 107 Ga. App. 575, 130 S.E.2d 770 (1963); *Durand v. Reeves*, 219 Ga. 182, 132 S.E.2d 71 (1963); *Life Ins. Co. v. Williams*, 109 Ga. App. 264, 135 S.E.2d 925 (1964); *Williams v. State*, 222 Ga. 208, 149 S.E.2d 449 (1966); *Lingo v. State*, 224 Ga. 333, 162 S.E.2d 1 (1968); *Ryder v. Schreeder*, 224 Ga. 382, 162 S.E.2d 375 (1968); *Pinion v. State*, 225 Ga. 36, 165 S.E.2d 708 (1969); *Lewis v. American Rd. Ins. Co.*, 119 Ga. App. 507, 167 S.E.2d 729 (1969); *Wheeler v. State*, 228 Ga. 402, 185 S.E.2d 900 (1971); *Wells v. State*, 126 Ga. App. 130, 190 S.E.2d 106 (1972); *Hutchins v. State*, 229 Ga. 804, 194 S.E.2d 442 (1972); *Clayton County Bd. of Educ. v. Hooper*, 128 Ga. App. 817, 198 S.E.2d 373 (1973); *Insurance Co. of N. Am. v. City of Dalton*, 128 Ga. App. 853, 198 S.E.2d 401 (1973); *Clark v. State*, 131 Ga. App. 583, 206 S.E.2d 717 (1974); *Thomas v. State*, 133 Ga. App. 893, 212 S.E.2d 648 (1975); *Adkins v. State*, 134

Ga. App. 507, 215 S.E.2d 270 (1975); *Rini v. State*, 235 Ga. 60, 218 S.E.2d 811 (1975); *Collier v. Sinkoe*, 135 Ga. App. 732, 218 S.E.2d 910 (1975); *Burns v. State*, 135 Ga. App. 842, 219 S.E.2d 487 (1975); *Head v. State*, 235 Ga. 677, 221 S.E.2d 435 (1975); *Turner v. State*, 235 Ga. 826, 221 S.E.2d 590 (1976); *Speagle v. Nationwide Mut. Fire Ins. Co.*, 138 Ga. App. 384, 226 S.E.2d 459 (1976); *Venable v. State Hwy. Dep't*, 138 Ga. App. 788, 227 S.E.2d 509 (1976); *Bramblett v. State*, 139 Ga. App. 745, 229 S.E.2d 484 (1976); *Harrison v. State*, 140 Ga. App. 296, 231 S.E.2d 809 (1976); *King v. State*, 238 Ga. 386, 233 S.E.2d 340 (1977); *Carson v. Parks*, 141 Ga. App. 466, 233 S.E.2d 857 (1977); *Leach v. State*, 143 Ga. App. 598, 239 S.E.2d 177 (1977); *Shipp v. Rakestraw*, 234 Ga. 8, 243 S.E.2d 52 (1978); *Burns v. State*, 145 Ga. App. 357, 243 S.E.2d 746 (1978); *Childers v. State*, 145 Ga. App. 594, 244 S.E.2d 108 (1978); *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978); *Cravey v. State*, 147 Ga. App. 29, 248 S.E.2d 13 (1978); *Bennett v. State*, 148 Ga. App. 409, 251 S.E.2d 324 (1978); *Weeks v. State*, 152 Ga. App. 629, 263 S.E.2d 513 (1979); *Young v. State*, 153 Ga. App. 454, 265 S.E.2d 362 (1980); *Brand v. State*, 154 Ga. App. 781, 270 S.E.2d 206 (1980); *Horne v. State*, 155 Ga. App. 851, 273 S.E.2d 193 (1980); *Geter v. State*, 157 Ga. App. 165, 276 S.E.2d 676 (1981); *Stevens v. State*, 158 Ga. App. 656, 281 S.E.2d 629 (1981); *Walnut Equip. Leasing Co. v. Williams*, 159 Ga. App. 679, 285 S.E.2d 54 (1981); *Cooper v. State*, 249 Ga. 58, 287 S.E.2d 212 (1982); *Griffin v. Bremen Steel Co.*, 161 Ga. App. 768, 288 S.E.2d 874 (1982); *Raven v. State*, 168 Ga. App. 398, 309 S.E.2d 656 (1983); *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984); *Goode v. State*, 171 Ga. App. 901, 321 S.E.2d 410 (1984); *Opatut v. Guest Pond Club, Inc.*, 254 Ga. 258, 327 S.E.2d 487 (1985); *Pennymann v. State*, 175 Ga. App. 405, 333 S.E.2d 659 (1985); *Graham v. State*, 175 Ga. App. 411, 333 S.E.2d 664 (1985); *Bragg v. State*, 175 Ga. App. 640, 334 S.E.2d 184 (1985); *Collins v. State*, 176 Ga. App. 634, 337 S.E.2d 415 (1985); *Stubbs v. Tri-State Culvert Corp.*, 177 Ga. App. 113, 338 S.E.2d 449 (1985); *Kilgore v. State*, 177 Ga. App. 656, 340 S.E.2d 640 (1986); *Trenor v. State*, 178 Ga. App. 351, 343 S.E.2d 408 (1986); *Board of Trustees v.*

Englade, 256 Ga. 458, 349 S.E.2d 703 (1986); Crump v. State, 183 Ga. App. 43, 357 S.E.2d 863 (1987); Neese v. State, 183 Ga. App. 773, 360 S.E.2d 1 (1987); Johnson v. State, 185 Ga. App. 167, 363 S.E.2d 773 (1987); McClendon v. State, 187 Ga. App. 666, 371 S.E.2d 139 (1988); DOT v. A.R.C. Sec., Inc., 189 Ga. App. 46, 375 S.E.2d 42 (1988); Cable v. State, 191 Ga. App. 46, 380 S.E.2d 715 (1989); Abernathy v. State, 192 Ga. App. 355, 385 S.E.2d 25 (1989); Dover v. State, 192 Ga. App. 429, 385 S.E.2d 417 (1989); Roundtree v. State, 192 Ga. App. 803, 386 S.E.2d 548 (1989); Gordon v. State, 193 Ga. App. 94, 387 S.E.2d 40 (1989); Tilley v. State, 197 Ga. App. 97, 397 S.E.2d 506 (1990); Alexander v. State, 199 Ga. App. 228, 404 S.E.2d 616 (1991); Peppers v. State, 261 Ga. 338, 404 S.E.2d 788 (1991); Gorski v. State, 201 Ga. App. 122, 410 S.E.2d 338 (1991); Hurd v. State, 201 Ga. App. 373, 411 S.E.2d 111 (1991); Gordon v. State, 206 Ga. App. 450, 425 S.E.2d 906 (1992); Perryman v. State, 208 Ga. App. 754, 431 S.E.2d 742 (1993); Malcolm v. State, 263 Ga. 369, 434 S.E.2d 479 (1993); Vincent v. State, 264 Ga. 234, 442 S.E.2d 748 (1994); Campbell v. State, 221 Ga. App. 135, 470 S.E.2d 524 (1996); Walls v. State, 233 Ga. App. 601, 504 S.E.2d 471 (1998); Macon-Bibb County Bd. of Tax Assessors v. J.C. Penney Co., 239 Ga. App. 322, 521 S.E.2d 234 (1999); Romano v. State, 272 Ga. 238, 527 S.E.2d 184 (2000); Campbell v. Breedlove, 244 Ga. App. 819, 535 S.E.2d 308 (2000); Pryer v. State, 245 Ga. App. 279, 537 S.E.2d 717 (2000); Johnson v. State, 245 Ga. App. 690, 538 S.E.2d 766 (2000); Williams v. State, 246 Ga. App. 347, 540 S.E.2d 305 (2000); Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001); Castleberry v. State, 274 Ga. 290, 553 S.E.2d 606 (2001); Baker v. State, 252 Ga. App. 238, 555 S.E.2d 899 (2001); Frei v. State, 252 Ga. App. 535, 555 S.E.2d 530 (2001); Stanley v. State, 267 Ga. App. 656, 601 S.E.2d 141 (2004); Harper v. Patterson, 270 Ga. App. 437, 606 S.E.2d 887 (2004); Slaughter v. State, 278 Ga. 896, 608 S.E.2d 227 (2005); Hill v. State, 276 Ga. App. 874, 625 S.E.2d 108 (2005); Whitley v. Piedmont Hosp., Inc., 284 Ga. App. 649, 644 S.E.2d 514 (2007); Murray v. Stone, 283 Ga. 6, 655 S.E.2d 821 (2008); McKenzie v. State, 284 Ga. 342, 667 S.E.2d 43 (2008); Green v. State, 301 Ga. App. 866, 689 S.E.2d 132 (2010).

Civil Cases

Credibility when issue is attorney's fees.

— When plaintiff, a former client of defendant attorney, appealed the grant of summary judgment to defendant in defendant's suit over unpaid attorney fees, and there was a dispute that defendant and plaintiff had agreed that defendant was to spend as much time as reasonable to produce a second brief, that there was no cap on the fee, and that \$5,000 was reasonable, the matter of the parties' credibility was peculiarly for the jury. *Brygider v. Atkinson*, 192 Ga. App. 424, 385 S.E.2d 95 (1989).

Value of condemned property. — When a lessee of condemned property testified as to the lessee's business' diminished value, based on loss of customers and other factors, as a result of relocating due to the condemnation, whether there was adequate supporting data for one's conclusion was a jury question. *Fulton County v. Dangerfield*, 195 Ga. App. 208, 393 S.E.2d 285, rev'd on other grounds, 260 Ga. 665, 398 S.E.2d 14 (1990).

Testimony in a lease agreement. — Verdict by jury for past rent owed to a landlord by a tenant who defaulted in the tenant's monthly lease payments, and as to the jury's finding that the tenant had failed to exercise an option to purchase in the lease, was supported by sufficient evidence since there was a showing by the landlord of a lease agreement and supporting testimony by the landlord; an alternate, allegedly forged lease submitted by the tenant, together with the tenant's testimony, were all issues that went to the weight and credibility and were properly resolved by the jury. *Burnett v. Reeves*, 258 Ga. App. 846, 575 S.E.2d 747 (2002).

Expert witness. — In an action to recover for disability, the jurors were not bound to credit an expert medical opinion since the rule prescribing the arbitrary rejection of testimony applies, by definition, to direct and positive testimony, as distinguished from circumstantial, opinion, or actually negative testimony. *Wilson v. Professional Ins. Corp.*, 151 Ga. App. 712, 261 S.E.2d 450 (1979).

Judge's favorable comments in divorce case about witness required new trial. — Judgment in a divorce case was reversed and a new trial was ordered after the trial court, in comments made to the jury following the testimony of a witness, stated the court's high opinion of the witness and bolstered

Civil Cases (Cont'd)

the witness's credibility, influencing an issue that was solely for the jury to determine. *Hubbard v. Hubbard*, 277 Ga. 729, 594 S.E.2d 653 (2004).

Criminal Cases**Credibility of victim in rape prosecution.**

— In a rape trial, the trial court properly sustained an objection to a question asked of the victim's examining physician which called for a comment on the credibility of the victim. *Lamb v. State*, 196 Ga. App. 665, 396 S.E.2d 497 (1990).

Testimony of rape victim. — Trial court properly denied the defendant's motion for a directed verdict of acquittal, and the defendant's rape conviction was upheld on appeal, given the victim's testimony at trial that the defendant's sexual organ penetrated hers after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement; hence, the jury had the right to accept the victim's testimony depicting non-consensual, forcible intercourse, as satisfying the requirements of O.C.G.A. § 16-6-1. *Scott v. State*, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

Witnesses' credibility is for jury. — Evidence of defendant's conduct in confronting victim, that defendant stood over the victim just after the victim had been shot and announcing the victim had been warned about what would happen, and that defendant calmly walked away after that was sufficient to find defendant guilty of murder and aggravated assault even though a codefendant actually shot the victim even though defendant claimed that certain witness's testimony was unreliable since witness's credibility was an issue for the jury's determination. *Dillingham v. State*, 275 Ga. 665, 571 S.E.2d 777 (2002).

Misdemeanor theft conviction. — Evidence was legally sufficient to support defendant's convictions for misdemeanor theft in violation of O.C.G.A. § 16-8-2 and for practicing dentistry without a license in violation of an earlier version of O.C.G.A. § 43-11-50, after defendant held oneself out as a dentist to numerous individuals, obtained loans for business ventures involving a dentistry practice, obtained services for the dentist prac-

tice which the dentist did not pay for, and performed services on patients; the jury resolved the credibility and weight of the evidence issues pursuant to O.C.G.A. § 24-9-80. *McMillan v. State*, 266 Ga. App. 729, 598 S.E.2d 17 (2004), overruled in part by *Gidwell v. State*, 279 Ga. App. 114, 630 S.E.2d 621 (2006).

Criminal convictions supported. — On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the conviction as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under O.C.G.A. § 24-9-80, the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. *Reid v. State*, 281 Ga. App. 640, 637 S.E.2d 62 (2006).

Credibility of witnesses at a probation revocation hearing is for the court. *Caldwell v. State*, 166 Ga. App. 657, 305 S.E.2d 407 (1983).

When self-defense is claimed. — Consideration of the uncorroborated testimony of the victim, non-recovery of the weapon used in an assault, and the defendant's claim of self-defense go only to the weight and credibility of the witnesses' testimony, not to the sufficiency of the evidence, and are solely within the domain of the jury. *Landers v. State*, 236 Ga. App. 368, 511 S.E.2d 889 (1999).

Self-defense a jury question. — Witness credibility is to be determined by the jury, as is the question of self-defense when there is conflicting evidence on the issue. *Holmes v. State*, 273 Ga. 644, 543 S.E.2d 688 (2001).

Instruction in criminal case. — Charge to the jury on the question of credibility of witnesses is a correct abstract principle of law applicable even in a criminal case. *Blackston v. State*, 209 Ga. 160, 71 S.E.2d 221 (1952).

Jury can disregard confession of another if evidence shows defendant's guilt. — When the evidence was sufficient to find the defendant guilty of armed robbery beyond a reasonable doubt, the confession of the defendant's brother to the commission of the crime was properly disregarded by the jury

in the jury's capacity as fact-finder. *Burkes v. State*, 177 Ga. App. 90, 338 S.E.2d 522 (1985).

Police officers testimony about commission of offense. — Police officer's testimony that the officer observed the defendant run a stop sign that was "clearly visible" to oncoming traffic was sufficient to authorize the trial court's finding that the defendant was guilty, beyond a reasonable doubt, of disregarding a stop sign. *Evans v. State*, 235 Ga. App. 877, 510 S.E.2d 619 (1999).

Testimony of officer regarding belief of victim. — Permitting the state to introduce a police officer's testimony bolstering a child molestation victim's credibility was reversible error since the truthfulness or credibility of the victim was not beyond the ken of the jurors. *Guest v. State*, 201 Ga. App. 506, 411 S.E.2d 364 (1991).

Trial court erred in allowing an officer to testify regarding whether the officer believed or disbelieved what the victim said during an interview as the truthfulness of the victim's testimony was a question for the jury; since there was no physical evidence presented, the victim's testimony was the only evidence against defendant, and any bolstering of that testimony was harmful to defendant. *Orr v. State*, 262 Ga. App. 125, 584 S.E.2d 720 (2003).

Defendant failed to establish ineffective assistance of counsel under Ga. Const. 1983, Art. I, Sec. I, Para. XIV due to defense counsel's failure to request a mistrial when a police officer testified that the officer believed that the victim in the child molestation case was telling the truth; while the witness was prohibited under O.C.G.A. § 24-9-80 from bolstering the victim's testimony, it was not clear that the trial court would have granted a mistrial if the defendant requested one as the defense counsel objected to the statement and the trial court issued a curative instruction. *Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, 2007 Ga. LEXIS 338 (April 24, 2007).

In rape prosecution, defendant cannot ask victim's mother whether she believed daughter's statements about the offense or could tell her daughter was lying from her body language. *Nichols v. State*, 221 Ga. App. 600, 473 S.E.2d 491 (1996).

In a prosecution for statutory rape, the

trial court properly prohibited the defendant from presenting evidence that the victim's family and friends did not believe her statements about the sexual assault by the defendant since credibility of a witness is a matter solely within the province of the jury. *Patterson v. State*, 233 Ga. App. 776, 505 S.E.2d 518 (1998).

Expert witness. — O.C.G.A. § 24-9-80 was not violated by the testimony of a pediatrician, who gave an opinion that the results of an examination of a child victim were consistent with the victim's claim of child molestation. *Harris v. State*, 279 Ga. App. 570, 631 S.E.2d 772 (2006).

Trial court did not err in denying the defendant's motion in limine to exclude a nurse's testimony, stating that the victim's normal physical examination was consistent with claims of molestation, as the nurse simply testified that the victim's physical examination results were consistent with the allegations, and as such was a permissible expression of the expert's opinion. *Noe v. State*, 287 Ga. App. 728, 652 S.E.2d 620 (2007).

Value of stolen property for purposes of restitution. — When an owner of stolen property is attempting to establish value for purposes of restitution by the thief, if there is any doubt as to whether the witness has shown a sufficient basis or foundation for the witness's opinion as to value, there are particularly sound reasons of justice why the evidence ought to be admitted, and the evidence's weight and credibility, and indeed the question of whether the witness has given sufficient foundation, should be left to the trier of fact. *Maddox v. State*, 157 Ga. App. 696, 278 S.E.2d 480 (1981).

Children

Testimony from child molestation victim. — Although defendant testified that he had not molested the victim, the victim, his 15-year-old stepdaughter, testified that defendant had been molesting her since she was three-years-old, and other evidence indicated that the victim told several witnesses it was her half-brother who impregnated her, such conflicts in the evidence only raised issues of credibility, which were for the jury to decide, and the jury's verdict finding defendant guilty of two counts of molestation of the victim was upheld since sufficient

Children (Cont'd)

evidence supported the convictions. *Dowd v. State*, 261 Ga. App. 306, 582 S.E.2d 235 (2003).

Credibility of children. — Although after a preliminary examination the court may hold a child competent to testify, the credibility of the witness is for the jury; and in determining whether or not the jury will credit the testimony of such witness, the age of the witness and the witness's understanding or lack of understanding as to the nature of an oath, as developed on the examination before the jury, are matters for the consideration of the jury. *Young v. State*, 122 Ga. 725, 50 S.E. 996 (1905); *Frasier v. State*, 143 Ga. 322, 85 S.E. 124 (1915).

In a prosecution for child molestation and aggravated rape, the trial court committed reversible error in allowing the victim's grandmother to testify that she had never had "any problems with the victim's telling stories." *Lagana v. State*, 219 Ga. App. 220, 464 S.E.2d 625 (1995).

In a prosecution for child molestation, the trial court did not err in refusing defendant's requested instruction as follows: "The fact that one or more of the witnesses in this case is a child should not ... bring any more weight to her or their testimony." *Patterson v. State*, 222 Ga. App. 166, 473 S.E.2d 255 (1996).

Testimony of an expert regarding the expert's conclusion that child victims' allegations of sexual abuse were the result of projection and payback was properly excluded. *Duncan v. State*, 232 Ga. App. 157, 500 S.E.2d 603 (1998).

Trial court erred by allowing a state's expert to testify, over the defendant's objection, that the expert did not believe the victim made up the allegations against the defendant, as such was an ultimate issue of fact, and nothing suggested that the determination of the victim's credibility was beyond the ken of the jurors; thus, to the extent that *Smith v. State*, 257 Ga. App. 88, 570 SE2d 400 (2002), allowed an expert to give an opinion on a witness's credibility or to express an opinion on the ultimate issue of defendant's guilt to rehabilitate the credibility of a witness whose veracity was attacked, it was overruled. *Patterson v. State*, 278 Ga. App. 168, 628 S.E.2d 618 (2006).

Trial court did not abuse the court's discretion in admitting a videotaped forensic interview of a child molestation victim because the victim testified at trial and was subject to cross-examination about the circumstances surrounding the videotaped interview and statements the victim made during the interview; accordingly, it was the jury's responsibility, as the trier of fact, to resolve any inconsistencies in the victim's statements and judge the victim's credibility. *Lynn v. State*, 300 Ga. App. 170, 684 S.E.2d 325 (2009).

Expert witness on ability of child to distinguish truth. — An expert witness may testify generally about the ability of children of a certain age to distinguish truth from reality. The witness may also express an opinion as to whether medical or other objective evidence in the case is consistent with the victim's story. However, an expert witness may not put the expert's stamp of believability on the victim's story. *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256 (1988); *Roberson v. State*, 214 Ga. App. 288, 447 S.E.2d 640 (1994); *Buice v. State*, 239 Ga. App. 52, 520 S.E.2d 258 (1999), *aff'd*, 528 S.E.2d 788 (2000); *Alford v. State*, 243 Ga. App. 212, 534 S.E.2d 81 (2000).

Credibility of recanting child witness. — Witnesses testified pursuant to O.C.G.A. § 24-3-16 that the defendant's stepchild, then 12, told the witnesses about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under § 24-3-16, and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molestation. *Harvey v. State*, 295 Ga. App. 458, 671 S.E.2d 924 (2009).

Child's inconsistent testimony. — Fact that a child's testimony may have been inconsistent does not render child incompetent to testify, but goes to the child's credibility as a witness. *Hayes v. State*, 152 Ga. App. 858, 264 S.E.2d 307 (1980).

There was no abuse of discretion in the trial court's decision to allow a twenty-minute conference between the prosecutor and the defendant's eight-year-old son, especially given the tender age of the victim, the nature of the charges, and the

child's admitted fear of the defendant. To the extent that the witness altered the witness's testimony after the recess, the credibility of the witness's testimony was for the jury to determine. *Carter v. State*, 195 Ga. App. 489, 393 S.E.2d 746 (1990).

Raising issue of victim's veracity. — Because it was necessary for trial counsel, as part of the trial strategy, to raise the issue of the minor sexual abuse victim's veracity, the trial counsel could not subsequently object to the victim's prior consistent statement, which was entered to verify the victim's testimony. *Mealor v. State*, 266 Ga. App. 274, 596 S.E.2d 632 (2004).

No improper bolstering of other witness's testimony. — In defendant's appeal from a verdict convicting defendant of voluntary manslaughter, the court rejected defendant's claim that a detective's testimony that the detective received no statements inconsistent with the testimony of other trial witnesses did not improperly bolster the opinion of another witness in violation of O.C.G.A. § 24-9-80. *Lester v. State*, 262 Ga. App. 707, 586 S.E.2d 408 (2003).

Directed verdict of acquittal unwarranted as: (1) the credibility of the child victim and any the conflicts in the trial testimony were matters solely within the province of the jury

to decide; (2) physical findings were not required to corroborate the charges of child molestation, aggravated sexual battery, and aggravated child molestation; and (3) the victim's testimony alone was sufficient to authorize the jury to find the defendant guilty of the crimes charged under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Hutchinson v. State*, 287 Ga. App. 415, 651 S.E.2d 523 (2007).

Appeals

Test on appeal. — On appeal, the appellate tribunal does not determine the credibility of witnesses or the preponderance of the evidence, but rather utilizes the "any evidence test," which is not available to the trier of facts in deciding disputed factual issues. *Crawley v. Marta*, 147 Ga. App. 293, 248 S.E.2d 555 (1978).

Acceptance by appellate court. — Unless it appears from the testimony itself that the fact testified to is a physical impossibility, contrary to known physical laws, or is incredible, impossible, or inherently improbable, the appellate court must accept its veracity as the jury has done. *Bell v. State*, 52 Ga. App. 249, 183 S.E. 93 (1935); *Hayslip v. Liberty Mut. Ins. Co.*, 72 Ga. App. 509, 34 S.E.2d 319 (1945).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 283, 285, 479 et seq.

ALR. — Cross-examination for purpose of showing bias or hostility on part of witness, 74 ALR 1157.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached, of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 ALR 1266.

Cross-examination of witness in criminal case as to whether, and with whom, he has discussed facts of case, 35 ALR2d 1045.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 ALR2d 610.

Credibility of witness giving uncontradict-

ed testimony as matter for court or jury, 62 ALR2d 1191.

Propriety, and prejudicial effect of, comments by counsel vouching for credibility of witness, 81 ALR2d 1240.

Propriety of specific jury instructions as to credibility of accomplices, 4 ALR3d 351.

Necessity and admissibility of expert testimony as to credibility of witness, 20 ALR3d 684.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 ALR3d 1203.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 ALR3d 617.

Propriety of consideration of credibility of witness in determining probable cause at state preliminary hearing, 84 ALR3d 811.

Instructions to jury as to credibility of child's testimony in criminal case, 32 ALR4th 1196.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 ALR4th 602.

Propriety, and prejudicial effect, of comments by counsel vouching for credibility of witness—federal cases, 78 ALR Fed. 23.

24-9-81. Impeachment of witnesses by any party; right to call, examine, and impeach opposite party.

Any party, including the party calling the witness, may attack the credibility of a witness. In the trial of all civil cases, either plaintiff or defendant shall be permitted to make the opposite party, or anyone for whose immediate benefit the action is prosecuted or defended, or any agent of said party, or agent of any person for whose immediate benefit such action is prosecuted or defended, or officer or agent of a corporation when a corporation is such party or for whose benefit such action is prosecuted or defended a witness, with the privilege of subjecting such witness to a thorough and sifting examination and with the further privilege of impeachment, as if the witness had testified in his or her own behalf and were being cross-examined. (Orig. Code 1863, § 3793; Code 1868, § 3813; Code 1873, § 3869; Code 1882, § 3869; Ga. L. 1890-91, p. 78, § 1; Civil Code 1895, § 5290; Penal Code 1895, § 1024; Civil Code 1910, § 5879; Penal Code 1910, § 1050; Code 1933, § 38-1801; Ga. L. 1945, p. 227, § 1; Ga. L. 1947, p. 568, § 1; Ga. L. 2005, p. 20, § 15/HB 170.)

Cross references. — Right of thorough and sifting cross-examination of witnesses called by opponent, § 24-9-64.

Editor's notes. — Ga. L. 2005, p. 20, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all trials which commence on or after July 1, 2005.

Law reviews. — For survey article on evidence, see 34 Mercer L. Rev. 163 (1982). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For survey article on evidence

law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 249 (2003). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007).

For note, "Impeachment of One's Own Witness in Georgia," see 9 Ga. St. B.J. 355 (1973). For note discussing party's right to impeach own witness in light of *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975), see 28 Mercer L. Rev. 389 (1976).

For comment on *Bacon v. State*, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967). For comment on *Mullis v. Chaika*, 118 Ga. App. 11, 162 S.E.2d 448 (1968), see 5 Ga. St. B.J. 377 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

IMPEACHMENT OF OWN WITNESS

1. IN GENERAL

2. WHAT MUST BE SHOWN

EXAMINATION OF OPPOSITE PARTY

1. IN GENERAL

2. WHO MAY BE EXAMINED

EXAMINATION OF OWN WITNESS

General Consideration

Neither the arrest nor the indictment of a witness is impeaching, since, until proof of conviction, the witness is protected by the legal presumption of innocence. *Hood v. State*, 179 Ga. App. 387, 346 S.E.2d 867 (1986).

Allowing witness not within purview of statute to be called for purposes of cross-examination is harmful error. *Mullis v. Chaika*, 118 Ga. App. 11, 162 S.E.2d 448 (1968); *Jackson v. State*, 124 Ga. App. 488, 184 S.E.2d 185 (1971) (see O.C.G.A. § 24-9-81).

Failure to charge statute is not error in absence of a timely written request. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

Cited in *Lovett v. Gaskins*, 23 Ga. App. 623, 99 S.E. 156 (1919); *Booth v. State*, 24 Ga. App. 275, 100 S.E. 723 (1919); *Rainey v. Moon*, 187 Ga. 712, 2 S.E.2d 405 (1939); *Hause v. State*, 65 Ga. App. 765, 16 S.E.2d 520 (1941); *Lefkoff v. Sicro*, 193 Ga. 292, 18 S.E.2d 464 (1942); *Smith v. State*, 74 Ga. App. 685, 41 S.E.2d 179 (1947); *Garmon v. Cassell*, 78 Ga. App. 730, 52 S.E.2d 631 (1949); *Southern Ry. v. Allen*, 88 Ga. App. 435, 77 S.E.2d 277 (1953); *Warren Co. v. Starling*, 98 Ga. App. 371, 106 S.E.2d 69 (1958); *Atlanta Joint Terms. v. Knight*, 98 Ga. App. 482, 106 S.E.2d 417 (1958); *Norman v. Norman*, 103 Ga. App. 626, 120 S.E.2d 42 (1961); *Porter v. Jack's Cookie Co.*, 106 Ga. App. 497, 127 S.E.2d 313 (1962); *Ingalls Iron Works Co. v. Standard Accident Ins. Co.*, 107 Ga. App. 454, 130 S.E.2d 606 (1963); *Bartell v. Del Cook Lumber Co.*, 108 Ga. App. 592, 133 S.E.2d 903 (1963); *Young v. State*, 220 Ga. 75, 137 S.E.2d 34 (1964); *State Hwy. Dep't v. Ball*, 112 Ga. App. 480, 145 S.E.2d 577 (1965); *Timeplan Loan & Inv. Corp. v. Moorehead*, 221 Ga. 648, 146 S.E.2d 748 (1966); *Stansell v. Fowler*, 113 Ga. App. 377, 147 S.E.2d 793 (1966); *Bacon v. State*, 222 Ga. 151, 149 S.E.2d 111 (1966); *Hirsh v. Dobb*, 224 Ga. 130, 160 S.E.2d 386

(1968); *Holmes v. State*, 224 Ga. 553, 163 S.E.2d 803 (1968); *Taylor v. Floyd Pike Elec. Contractors*, 121 Ga. App. 440, 174 S.E.2d 278 (1970); *Ryder v. State*, 121 Ga. App. 796, 175 S.E.2d 882 (1970); *Colbert Co. v. Newsom*, 125 Ga. App. 571, 188 S.E.2d 266 (1972); *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972); *Hutchins v. State*, 229 Ga. 804, 194 S.E.2d 442 (1972); *Wisdom v. State*, 234 Ga. 650, 217 S.E.2d 244 (1975); *McNeese v. State*, 236 Ga. 26, 222 S.E.2d 318 (1976); *Allen v. State*, 137 Ga. App. 755, 224 S.E.2d 834 (1976); *King v. King*, 238 Ga. 268, 232 S.E.2d 549 (1977); *Johnson v. Rheney*, 245 Ga. 316, 264 S.E.2d 872 (1980); *White v. Front Page, Inc.*, 154 Ga. App. 518, 268 S.E.2d 732 (1980); *Murdock v. Godwin*, 154 Ga. App. 824, 269 S.E.2d 905 (1980); *Mason v. State*, 156 Ga. App. 11, 274 S.E.2d 23 (1980); *Gary v. State*, 156 Ga. App. 856, 275 S.E.2d 830 (1980); *Geter v. State*, 157 Ga. App. 165, 276 S.E.2d 676 (1981); *Foster v. State*, 248 Ga. 409, 283 S.E.2d 873 (1981); *Green v. State*, 249 Ga. 369, 290 S.E.2d 466 (1982); *Conyers v. State*, 249 Ga. 438, 291 S.E.2d 709 (1982); *Nicholson v. State*, 249 Ga. 775, 294 S.E.2d 485 (1982); *Brown v. State*, 350 Ga. 862, 302 S.E.2d 347 (1983); *McConnell v. State*, 166 Ga. App. 530, 304 S.E.2d 733 (1983); *Wright v. State*, 167 Ga. App. 445, 306 S.E.2d 428 (1983); *Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983); *DOT v. Wright*, 169 Ga. App. 332, 312 S.E.2d 824 (1983); *Schroeder v. Hunter Douglas, Inc.*, 172 Ga. App. 897, 324 S.E.2d 746 (1984); *Stevenson v. Newsome*, 774 F.2d 1558 (11th Cir. 1985); *Jones v. Padgett*, 186 Ga. App. 362, 367 S.E.2d 88 (1988); *Central of Ga. R.R. v. Cole*, 191 Ga. App. 53, 381 S.E.2d 60 (1989); *Georgia Bldg. Servs., Inc. v. Perry*, 193 Ga. App. 288, 387 S.E.2d 898 (1989); *Turpin v. Worley*, 206 Ga. App. 341, 425 S.E.2d 895 (1992); *Brice v. State*, 242 Ga. App. 163, 529 S.E.2d 178 (2000); *Smith v. State*, 261 Ga. App. 871, 583 S.E.2d 914 (2003); *TGM Ashley Lakes, Inc. v. Jennings*,

General Consideration (Cont'd)

264 Ga. App. 456, 590 S.E.2d 807 (2003).

Impeachment of Own Witness**1. In General**

Statute prohibits a party from impeaching the party's own witness. — See *Ellenburg v. State*, 239 Ga. 309, 236 S.E.2d 650 (1977).

Even if a trial court erred by allowing the state to impeach the state's own witness with a prior statement when the witness could not vouch for the statement's accuracy pursuant to O.C.G.A. § 24-9-81, no harm resulted due to the overwhelming evidence of defendant's guilt. *Coleman v. State*, 278 Ga. 486, 604 S.E.2d 151 (2004).

Broad construction. — Right to impeach one's own witness is broadly construed. *Canady v. State*, 147 Ga. App. 640, 249 S.E.2d 690 (1978); *Robinson v. State*, 150 Ga. App. 642, 258 S.E.2d 294 (1979).

Strict construction. — Party may be "misled" but not "entrapped," since this statute, which is in derogation of the common law and must be construed strictly, uses the word "entrapped" and not "misled." *Jeens v. Wrightsville & T.R.R.*, 144 Ga. 48, 85 S.E. 1055 (1915); *Jenkins v. State*, 73 Ga. App. 515, 37 S.E.2d 230 (1946) (see O.C.G.A. § 24-9-81).

Applicability to state. — Statute applies to the state as well as to the defendant. *Dixon v. State*, 86 Ga. 754, 13 S.E. 87 (1891) (see O.C.G.A. § 24-9-81).

Treatment as hostile witness. — Trial court did not err in declaring that defendant's cousin, who had earlier pled guilty to the theft for which defendant was on trial, was a hostile witness and in allowing the state to ask the cousin leading questions because the trial court had great latitude to allow the state to treat a person as a hostile witness and propound leading questions, and allowing it in the present case was proper because the state was not aware that the cousin would change the cousin's testimony at trial from earlier statements the cousin had made about the theft. *Wilson v. State*, 258 Ga. App. 166, 573 S.E.2d 432 (2002).

Effect of exercising constitutional privilege. — After defendant's counsel pleaded entrapment but when called upon to testify, defendant availed himself under oath of the

constitutional privilege of refusing to answer on the ground that to answer might tend to incriminate the defendant, and thereafter counsel attempted to cross-examine the witness as to what this witness told counsel about the circumstances surrounding this matter, the court erred in refusing to allow a thorough and sifting cross-examination of the witness as to the entrapment. *Interstate Life & Accident Ins. Co. v. Wilmont*, 123 Ga. App. 337, 180 S.E.2d 913 (1971).

Entrapment refers to the right of a party to impeach the party's own witness after the party testifies to matters which are contradictory to statements previously made, authorizing a thorough and sifting cross-examination of the party's own witness. *Interstate Life & Accident Ins. Co. v. Wilmont*, 123 Ga. App. 337, 180 S.E.2d 913 (1971).

Function of cross-examination. — When the introduction of earlier out-of-court statements might occasion confusion, it is the function of a thorough and sifting cross-examination to explore the circumstances of each of the witness's pronouncements in the ultimate quest for truth. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

Testimony cannot be withdrawn. — Witness who has delivered testimony hurtful to the party introducing the witness cannot be withdrawn; but if the party has been entrapped by the witness, the law permits the witness's impeachment by the party introducing the witness. *Zipperer v. Mayor of Savannah*, 128 Ga. 135, 57 S.E. 311 (1907).

Showing contradictions of facts. — Although a party may not impeach the party's own witness, unless entrapped by the party, the party may show that the facts are different from the statement of the witness. *Cronan v. Roberts & Co.*, 65 Ga. 678 (1880); *Hollingsworth v. State*, 79 Ga. 605, 4 S.E. 560 (1887); *McElmurray v. Turner*, 86 Ga. 215, 12 S.E. 359 (1890); *Christian v. Macon Ry. & Light Co.*, 120 Ga. 314, 47 S.E. 923 (1904); *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S.E. 143 (1904); *Robert R.Sizer & Co. v. G. T. Melton & Sons*, 129 Ga. 143, 58 S.E. 1055 (1907); *Luke v. Cannon*, 4 Ga. App. 538, 62 S.E. 110 (1908); *Sessions v. State*, 6 Ga. App. 336, 64 S.E. 1101 (1909); *Carter & Martin v. Carter*, 7 Ga. App. 216, 66 S.E. 630 (1909); *Southern Ry. v. Wessinger*, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924); *Lewis v. American Rd. Ins. Co.*, 119

Ga. App. 507, 167 S.E.2d 729 (1969).

Refusal to respond to questions in discovery proceedings is not tantamount to making a statement or giving testimony contradictory to testimony on trial. *Lewis v. American Rd. Ins. Co.*, 119 Ga. App. 507, 167 S.E.2d 729 (1969).

Putting witness up merely for purpose of discrediting the witness, or merely to lay a foundation for the witness to be contradicted on a material point and thereby rendered unworthy of belief, is reversible error. *Eberhart v. State*, 121 Ga. App. 663, 175 S.E.2d 73 (1970).

Proof of bad character. — One who knows the general bad character of a witness by reason of previous felony convictions should not be allowed first to impliedly accredit the witness by offering the witness before a jury as worthy of belief, and then, when entrapped by the witness's testimony, prove, in addition to the contradictory statements by which the witness was surprised and deceived, the general bad character which neither surprised nor misled the witness. *Kitchens v. Hall*, 116 Ga. App. 41, 156 S.E.2d 920 (1967).

Trial court did not err by refusing to allow defendant to impeach defendant's own witness, who had not been declared hostile, by proof of convictions of misdemeanors involving moral turpitude. *Paradise v. State*, 212 Ga. App. 166, 441 S.E.2d 497 (1994).

Either party may waive the statutory requirements and allow a party to impeach the party's own witness without first having shown the court that the witness had entrapped the party. *O'Dell v. State*, 120 Ga. 152, 47 S.E. 577 (1904).

Directing witness to time and place of previous testimony. — Witness cannot be impeached by proof of contradictory statement until the witness's attention has been directed to the time, as well as the place, at which the alleged previous contradictory statements are alleged to have been made. *Luke v. Cannon*, 4 Ga. App. 538, 62 S.E. 110 (1908).

Admission for impeachment only. — When impeachment is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only. *Kemp v. State*, 214 Ga. 558, 105 S.E.2d 582 (1958); *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

Impeachment of prior testimony. — Trial court did not err in allowing one of the state's witnesses to testify that another state witness told the witness immediately before the shooting that the witness had seen the defendant get a gun from the car in which the defendant was a passenger that night because the statement was offered and admitted to impeach the other witness's prior testimony that the witness had never witnessed the defendant retrieve anything from the car after the concert. *Anderson v. State*, 286 Ga. 57, 685 S.E.2d 716 (2009).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse, would have been proper as prior inconsistent statements under O.C.G.A. §§ 24-9-81 and 24-9-83, but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. *Moxley v. Moxley*, 281 Ga. 326, 638 S.E.2d 284 (2006).

Deposition admitted for impeachment. — When it appears that the witness was questioned about the depositions while the witness was on the stand, and that the witness testified somewhat at variance from the depositions, it was not an abuse of discretion for the court to allow the depositions in evidence for the purpose of impeachment. *Parker & Co. v. Glenn*, 90 Ga. App. 500, 83 S.E.2d 263 (1954).

Admission of repudiated statement. — It was not erroneous to admit written statement later repudiated by witness, over the objection made to the state's admission, since the repudiation would tend to impeach the witness. *Fincher v. State*, 211 Ga. 89, 84 S.E.2d 76 (1954).

When, on direct examination, a witness testified that the witness had lied in a statement the witness gave the police, the trial court did not err in allowing the state to impeach the state's own witness by admitting the witness's prior inconsistent statement as substantive evidence. *Willis v. State*, 214 Ga. App. 659, 448 S.E.2d 755 (1994).

Statute inapplicable to witness who must explain or deny contradictory statement. —

Impeachment of Own Witness (Cont'd)**1. In General (Cont'd)**

First sentence of O.C.G.A. § 24-9-81 is applicable to impeachment of witnesses by prior contradictory statements, but since a prior contradictory statement of a witness is admissible as substantive evidence, the first sentence is inapplicable to a witness who must be given an opportunity to explain or deny the prior contradictory statement. *Riley v. State*, 166 Ga. App. 369, 304 S.E.2d 497 (1983).

Inconsistent statement admissible for impeachment purposes only. — When impeachment of one's own witness is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only and not to prove the truth of the prior statement. *Arnold v. State*, 166 Ga. App. 313, 304 S.E.2d 118 (1983).

Use of prior inconsistent statements. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence and is not limited in value only to impeachment purposes. *Ranger v. State*, 249 Ga. 315, 290 S.E.2d 63 (1982); *Riley v. State*, 166 Ga. App. 369, 304 S.E.2d 497 (1983); *Jackson v. Ensley*, 168 Ga. App. 822, 310 S.E.2d 707 (1983).

In defendant's trial on a charge that the defendant molested his 13-year-old stepdaughter by touching her "private area" and placing his hands under her shirt, the record did not support defendant's claim that the state called the stepdaughter's mother solely for the purpose of impeaching her, and the trial court properly allowed the state to call two investigators to testify that the mother gave them a statement that was not the same as her testimony at trial. *Black v. State*, 261 Ga. App. 263, 582 S.E.2d 213 (2003).

Witness's testimony that the witness did not recall details included in a prior statement given to police was inconsistent with the prior statement about those details, and thus, the requirements of O.C.G.A. § 24-9-81 were met; a trial court thus properly allowed the state to impeach the state's own witness who, *inter alia*, denied having previously identified the defendant as the shooter in a murder incident. *Cummings v. State*, 280 Ga. 831, 632 S.E.2d 152 (2006).

Defendant as witness for state. — Introduction by state in a criminal prosecution of

defendant's statement to police did not make defendant a witness for the state. *Wiley v. State*, 250 Ga. 343, 296 S.E.2d 714 (1982).

When counsel elicits testimony unfavorable to a client, counsel will not be heard to object to the testimony, no matter how prejudicial the testimony may be, if the testimony is a direct and pertinent response to the question propounded. *Rutland v. State*, 158 Ga. App. 315, 279 S.E.2d 757 (1981).

2. What Must Be Shown

Statement made to party or attorney. — Party may not impeach party's own witness by proof of a previous contradictory statement, even if the party claims to have been surprised and entrapped, unless the statement was made directly to the party or the party's attorney, or was made to some third person with instruction to communicate it or for the purpose of being communicated to the party or the party's counsel. *Jeens v. Wrightsville & T.R.R.*, 144 Ga. 48, 85 S.E. 1055 (1915); *Carter v. State*, 17 Ga. App. 244, 86 S.E. 413 (1915); *Burns v. State*, 20 Ga. App. 77, 92 S.E. 548 (1917); *Allen v. State*, 71 Ga. App. 517, 31 S.E.2d 107 (1944); *Sparks v. State*, 209 Ga. 250, 71 S.E.2d 608 (1952).

Statements made to others. — Prior inconsistent statements made by a witness called by the state were not limited to those given to police investigators or prosecuting attorneys. *Park v. State*, 230 Ga. App. 274, 495 S.E.2d 886 (1998).

Showing of entrapment required. — Prosecutor must show to the court that the prosecutor has been entrapped by the witness by a previous contradictory statement. *Jenkins v. State*, 73 Ga. App. 515, 37 S.E.2d 230 (1946).

One's own witness may be impeached when one can show the court that one has been entrapped by that witness by a previous contradictory statement. *James v. State*, 157 Ga. App. 763, 278 S.E.2d 696 (1981).

Party may not impeach party's own witness without a showing of entrapment. *Hood v. State*, 179 Ga. App. 387, 346 S.E.2d 867 (1986).

Impeachment error absent entrapment. — Admittance of a certified copy of a witness's prior felony conviction was harmful error if it was for the purpose of impeachment, no announcement having been made by the state that this witness was being called for the

purpose of cross-examination and no entrapment on the part of the witness having been shown. *Hicks v. State*, 204 Ga. App. 232, 418 S.E.2d 794 (1992).

Surprise and prejudice. — Term “entrapment” requires that one desiring to impeach one’s own witness show both surprise and prejudice by the actual testimony as opposed to the earlier statement. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

While a defendant was entitled to cross-examine a state’s witness about pending criminal charges to show the witness’s bias, that right did not extend to the defendant’s own witness when the defendant failed to show surprise or entrapment by the witness’s previous contradictory statement. *Arnold v. State*, 284 Ga. App. 598, 645 S.E.2d 68 (2007).

Total surprise unnecessary. — To establish entrapment, it is not required that the witness’s testimony be a total surprise or that it be affirmatively damaging. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975); *Ellenburg v. State*, 239 Ga. 309, 236 S.E.2d 650 (1977); *Johnson v. State*, 150 Ga. App. 405, 258 S.E.2d 22 (1979); *Wofford v. State*, 152 Ga. App. 739, 263 S.E.2d 707 (1979); *Bryant v. State*, 155 Ga. App. 652, 271 S.E.2d 904 (1980); *Andrews v. State*, 156 Ga. App. 734, 275 S.E.2d 782 (1980); *Young v. State*, 156 Ga. App. 865, 275 S.E.2d 804 (1981); *Ingram v. State*, 161 Ga. App. 5, 288 S.E.2d 842 (1982); *Davis v. State*, 249 Ga. 309, 290 S.E.2d 273 (1982).

Prior showing of surprise unnecessary. — Since it is not error for the trial judge to allow an attorney to cross-examine and lead the witness without first subjecting the attorney personally to an examination, any rule under which a showing of surprise and prejudice must first be made is wrong. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

What constitutes surprise. — Even though the state in a criminal case knows of a repudiation of an earlier statement by one of the state’s witnesses before one testifies at trial, if it only goes to the details of the defendant’s alleged confession, there is still sufficient “surprise” to admit into evidence the witness’s prior statement for impeachment purposes only. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

Showing of surprise is no longer required before a party is allowed to impeach the

party’s own witness. *Davis v. State*, 249 Ga. 309, 290 S.E.2d 273 (1982); *Coleman v. State*, 162 Ga. App. 340, 291 S.E.2d 402 (1982).

Showing of surprise is no longer required under O.C.G.A. § 24-9-81. *Coleman v. State*, 162 Ga. App. 340, 291 S.E.2d 402 (1982).

Surprise or prejudice unnecessary. — To meet the requirement of establishing entrapment before one might impeach one’s own witness, a showing of prejudice or surprise is no longer necessary. *Peterson v. State*, 166 Ga. App. 719, 305 S.E.2d 447 (1983).

Refusing party opportunity to introduce further testimony. — There is no abuse of discretion if the trial court refuses party opportunity to introduce further evidence which would impeach the party’s previous testimony absent surprise or entrapment. *Gorrell v. Fowler*, 248 Ga. 801, 286 S.E.2d 13, appeal dismissed, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982).

Belief of prosecutor. — To establish entrapment, it is sufficient that prosecutor believed witness would testify consistently with the earlier testimony. *Johnson v. State*, 150 Ga. App. 405, 258 S.E.2d 22 (1979); *Bryant v. State*, 155 Ga. App. 652, 271 S.E.2d 904 (1980).

Statement by district attorney that the district attorney has been surprised by the testimony is sufficient, in the absence of a showing to the contrary, to show entrapment. *Thomas v. State*, 239 Ga. 734, 238 S.E.2d 888 (1977); *James v. State*, 157 Ga. App. 763, 278 S.E.2d 696 (1981); *Foskey v. State*, 229 Ga. App. 209, 493 S.E.2d 595 (1997).

Testimony failing to bolster case. — Trial court does not err in allowing the district attorney to impeach the state’s own witness by introducing prior inconsistent statements, even though the witness’s testimony did not damage the state’s case save by failing to bolster it as hoped. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

Inconsistent testimony. — Impeachment is allowed when the testimony is merely “inconsistent” with a prior written statement. *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

Although the requirements of surprise and prejudice have been removed from the element of entrapment in the statute, the plain language of O.C.G.A. § 24-9-81 still

Impeachment of Own Witness (Cont'd)**2. What Must Be Shown (Cont'd)**

requires as a threshold matter a showing that the witness made a statement inconsistent with the witness's testimony at trial. *Jones v. State*, 270 Ga. 25, 505 S.E.2d 749 (1998).

Cross-examination not error. — When the prosecutor stated that the prosecutor had been entrapped by a witness called by the prosecutor and further proved the entrapment by introducing a written statement made by the witness which was contrary to the witness's testimony given upon the trial, it was not error for the trial court to permit the prosecutor to cross-examine the witness. *Allen v. State*, 71 Ga. App. 517, 31 S.E.2d 107 (1944); *Anderson v. State*, 103 Ga. App. 83, 118 S.E.2d 381 (1961); *Lashley v. State*, 132 Ga. App. 427, 208 S.E.2d 200 (1974).

No entrapment shown. — Evidence did not show that the prosecutor was entrapped by a witness. *King v. State*, 166 Ga. 10, 142 S.E. 160 (1928).

Examination of Opposite Party**1. In General**

Real purpose of statute is that of allowing a party to call for cross-examination those persons who by reason of a relationship existing at the time of the examination are subject to "all of the pressures and possible prejudices ... which that relationship would tend to engender," and where such relationship is no longer in existence it is not error, in the absence of any basis other than a former relationship, to refuse to allow the party calling the witness to treat such person as an adverse witness. *Atlanta Americana Motor Hotel Corp. v. Sika Chem. Corp.*, 117 Ga. App. 707, 161 S.E.2d 342 (1968).

Use of statute not presumed. — There is no presumption to the effect that when one party puts an opposing party on the stand, or puts an agent or officer of the opposing party on the stand, the witness is put on the stand for the purpose of cross-examination and not as a witness for the party putting such a witness on the stand. *Wight Hdwe. Co. v. American Lubricants Co.*, 91 Ga. App. 339, 85 S.E.2d 507 (1954).

Balancing of rights. — Former Code 1933, § 38-1801 (see O.C.G.A. § 24-9-81), providing for the right of thorough and sifting

cross-examination, must be balanced with former Code 1933, § 38-1704 (see O.C.G.A. § 24-9-62), protecting the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor. *Crawford v. State*, 144 Ga. App. 622, 241 S.E.2d 492 (1978), overruled on other grounds, *Stephens v. State*, 245 Ga. 825, 268 S.E.2d 330 (1980).

"Present" and "available" are not criteria for determining the qualification of witness for cross-examination. A person not a party may be called for such purpose only if such person is one for whose immediate benefit such suit is prosecuted or defended or is an agent of that party or agent of any person for whose immediate benefit such suit is prosecuted or defended or is an official or agent of a corporation when a corporation is such party, or for whose benefit such suit is prosecuted or defended. *Logan v. Turner*, 97 Ga. App. 866, 104 S.E.2d 627 (1958); *Mullis v. Chaika*, 118 Ga. App. 11, 162 S.E.2d 448 (1968).

Calling opposite party for direct examination. — When the witness is called to the stand for cross-examination, it is to be understood that the opposite party is to be examined, but a plaintiff who merely calls a defendant as "a witness against himself" in order to prove a prima facie case is not proceeding under the provisions thereof. *Jones v. Chambers*, 94 Ga. App. 433, 95 S.E.2d 335 (1956).

Calling opposite party for purposes of impeachment. — When defendant was not permitted to recall the victim as the defendant's own witness for purposes of impeachment, since there was no showing of entrapment, this is not permitted. *Mingo v. State*, 195 Ga. App. 438, 394 S.E.2d 104 (1990).

Belated announcement of calling adverse party as witness. — If the adverse party or agent as specified in O.C.G.A. § 24-9-81 is called, and an announcement is made by the calling party that the witness is being called for cross-examination, but that announcement is not timely made, the calling party may cross-examine the adverse witness and the other party may or may not be allowed to cross-examine the witness, in the discretion of the trial court, depending upon when in the course of the witness's testimony the announcement was made, the relationship

and attitude of the witness to the parties, and the nature of the testimony given or sought to be elicited. *Colwell v. Voyager Cas. Ins. Co.*, 251 Ga. 744, 309 S.E.2d 617 (1983).

Cross-examination within court's discretion. — When a witness has been called for cross-examination under O.C.G.A. § 24-9-81, it is within the discretion of the trial court to allow the witness to be cross-examined by the attorney for the opposite party, as well as to ask leading questions. *Thomas v. Baxter*, 234 Ga. App. 663, 507 S.E.2d 766 (1998).

Trial court erred in improperly limiting defense counsel's cross-examination of the alleged victim's financial interest in the trial based upon the victim's claim for financial assistance from the Georgia Crime Victims Emergency Fund. *Bowen v. State*, 252 Ga. App. 382, 556 S.E.2d 252 (2001).

Subsequent examination by own attorney. — When the opposite party has been called as a witness for cross-examination, it is within the discretion of the court as to whether to allow the witness to be questioned by the witness's own attorney at the conclusion of the examination by the opposite party. *Scarborough v. Wilson*, 36 Ga. App. 428, 136 S.E. 830 (1927); *Akridge v. Atlanta Journal Co.*, 56 Ga. App. 812, 194 S.E. 590 (1937); *Davis v. Wright*, 194 Ga. 1, 21 S.E.2d 88 (1942); *Barton v. Strickland*, 208 Ga. 163, 65 S.E.2d 602 (1951); *Southeastern Metal Prods., Inc. v. De Vaughn*, 99 Ga. App. 569, 109 S.E.2d 305 (1959).

Cross-examination on irrelevant matters. — It is not error to refuse to allow a party to call for cross-examination of a former employee, even though while employed the employee may have been an agent of the opposite party within the sense of the term, although it may be error, as an abuse of discretion, to allow a party to call an employee of the other party for cross-examination on irrelevant matters, irrespective of whether the employee's actions were within or outside the employee's authority as an agent. *Atlanta Americana Motor Hotel Corp. v. Sika Chem. Corp.*, 117 Ga. App. 707, 161 S.E.2d 342 (1968).

There was no prohibition about the prior inconsistent statement being lengthier than the in-court testimony; also, the fact that a witness admitted to making the inconsistent pre-trial statement did not render the state-

ment inadmissible. *Warner v. State*, 281 Ga. 763, 642 S.E.2d 821 (2007).

2. Who May Be Examined

Agent at time of trial. — Statute was intended to apply only to those situations where the witness sought to be examined was, at the time of trial, an agent of an opposite party; for only at that time would such witness be subject to pressure and possible prejudice in favor of one's present employer. *Mullis v. Chaika*, 118 Ga. App. 11, 162 S.E.2d 448 (1968).

Definition of agent. — Word "agent" means any agent available to the party (principal) as a witness in a pending case, and does not refer merely to an agent who has some relation or connection with the transaction in litigation. *Mullis v. Chaika*, 118 Ga. App. 11, 162 S.E.2d 448 (1968).

Agency can be proved by agent's sworn testimony. — See *Terminal Transp. Co. v. Decatur Truck & Equip. Co.*, 90 Ga. App. 859, 84 S.E.2d 494 (1954).

Prosecution witness not agent or party. — Statute does not permit a defendant to call a prosecution witness for cross-examination as an agent of the state or as a party for whom the suit is being prosecuted. *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974).

When plaintiff is called as defense witness. — When the plaintiff is called as a defense witness upon an objection to the plaintiff's being recalled for further cross-examination, this tactic entitles counsel for the plaintiff to cross-examine plaintiff just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there is no abuse of discretion in allowing them. *Mercer v. Woodard*, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Deponent as opposite party. — Mere fact that, prior to the trial, the plaintiff had taken a deposition of the president of the defendant corporation, who was subpoenaed "to testify and the truth say in behalf of the plaintiff," would not prevent the president being called by the plaintiff at the trial of the case for the purpose of cross-examination since the deposition was not introduced in evidence at the trial. *Southeastern Metal Prods., Inc. v. De Vaughn*, 99 Ga. App. 569, 109 S.E.2d 305 (1959).

Examination of Opposite Party (Cont'd)
2. Who May Be Examined (Cont'd)

Third-party defendant. — Trial court properly allowed party to call third-party defendant as witness for purposes of cross-examination. *Ranger Constr. Co. v. Robertshaw Controls Co.*, 166 Ga. App. 679, 305 S.E.2d 361 (1983); *Wilson v. Childers*, 174 Ga. App. 179, 329 S.E.2d 503 (1985).

Agent of opposing party at time of trial. — When a witness called by plaintiff was a former employee of plaintiff and was employed by defendant at the time of trial, under the provisions of O.C.G.A. § 24-9-81 plaintiff had a right to cross-examine the witness as an agent of the opposite party, although there was no showing that the witness was a hostile witness. *Henderson v. Glen Oak, Inc.*, 179 Ga. App. 380, 346 S.E.2d 842 (1986), *aff'd*, 256 Ga. 619, 351 S.E.2d 640 (1987).

Effect of testimony. — When witness sworn by plaintiff testified as the defendant corporation's employee, the legal effect of the employee's testimony conflicting with that of another witness called by plaintiff would be the same as if they had both been sworn as the plaintiff's witnesses generally. *Emory Univ. v. Lee*, 97 Ga. App. 680, 104 S.E.2d 234 (1958).

Witness previously sworn. — When the firefighter was agent of the opposite party within the meaning of the statute, the fact that this witness was previously sworn in behalf of the plaintiff would not prevent the witness being called by the plaintiff for the purpose of cross-examination. *Thompson v. Central of Ga. Ry.*, 102 Ga. App. 5, 115 S.E.2d 471 (1960) (see O.C.G.A. § 24-9-81).

Witness not agent. — When witness called by plaintiff to testify under cross-examination was not an agent of the defendant individually and since the action was not prosecuted or defended for the witness's immediate benefit and since the witness was not an agent of any person for whose immediate benefit the suit was prosecuted or defended, the witness was not qualified as a witness for cross-examination. *Logan v. Turner*, 97 Ga. App. 866, 104 S.E.2d 627 (1958).

Employee as agent. — One in the employ of another is subject to all the pressure and possible prejudice in favor of one's employer

which such relationship would tend to engender and therefore should be subject to cross-examination by the opposite party. *Terminal Transp. Co. v. Decatur Truck & Equip. Co.*, 90 Ga. App. 859, 84 S.E.2d 494 (1954); *Mullis v. Chaika*, 118 Ga. App. 11, 162 S.E.2d 448 (1968).

Former employees. — Statute does not allow the cross-examination of ex-employees of a party. *Massey Junior College v. Taggart*, 140 Ga. App. 591, 231 S.E.2d 540 (1976).

Corporation or individual as principal. — When an employee of the opposite party is called on the theory that such employee is the agent of that party, the procedure is equally proper whether the principal is in fact a corporation or an individual. *Wall v. Rhodes*, 112 Ga. App. 572, 145 S.E.2d 756 (1965).

Operator of bus being used as a common carrier of passengers is the agent and alter ego of the common carrier bus company, and as such is subject to cross-examination by the opposite party, and to refuse the opposite party such right is error. *Huell v. Southeastern Stages, Inc.*, 78 Ga. App. 311, 50 S.E.2d 745 (1948).

Agents of school board. — Provisions of statute are broad enough to include agents of a school board and the principal of a school which was destroyed by fire. *Rodgers v. Styles*, 100 Ga. App. 124, 110 S.E.2d 582 (1959).

Legatee. — Statute is applicable on appeal from probate of a will in solemn form; person designated as a legatee in the will, whose interest would be adversely affected if the caveat should be sustained, may be called as a witness by the caveatrix for the purpose of cross-examination and impeachment. *Peretzman v. Simon*, 185 Ga. 681, 196 S.E. 471 (1938).

Endorser of check. — When one defendant was sued as an endorser and two other defendants as makers, and the case was in default as to the endorser, the court did not err in not permitting the plaintiff (holder of the check) to put endorser on the stand for cross-examination for the purpose of making out a case against the makers. *A.J. Cannon & Co. v. Collier*, 91 Ga. App. 40, 84 S.E.2d 482 (1954).

Parent in termination proceeding. — O.C.G.A. § 24-9-81 applies to termination proceedings which are civil, not criminal, in

nature; therefore, a mother had no right to refuse to be called as a witness for cross-examination by the Department of Family and Children Services. In the Interest of A.R.A.S., 278 Ga. App. 608, 629 S.E.2d 822 (2006).

Testimony of deceased party. — Defendant can introduce former testimony of deceased plaintiff, and then impeach the testimony by defendant's own testimony. *McLendon v. Baldwin*, 166 Ga. 794, 144 S.E. 271 (1928), later appeal, 170 Ga. 437, 153 S.E. 18 (1930).

Defendant's mother questioned about prior inconsistent statement. — State properly questioned defendant's mother as to whether the mother believed that the crimes defendant was on trial for were gang-related as the question was asked for the purpose of laying a foundation to introduce the mother's prior inconsistent statement after the mother had testified in response to a defense question that the mother did not believe that defendant was involved in gang activity, pursuant to O.C.G.A. §§ 24-9-81 and 24-9-83. *Garrett v. State*, 280 Ga. 30, 622 S.E.2d 323 (2005).

Examination of Own Witness

Insurer's cross-examination of own witness. — Insurer was entitled to cross-examine insurer's own witness after witness was determined to have played a key part in the case by, inter alia, finding items of importance matchable to plaintiff's car. Although witness did not concededly fall within the expressly authorized categories of O.C.G.A. § 24-9-81, O.C.G.A. § 24-9-63 permitted such testimony in the interests of justice. *Hicks v. Doe*, 206 Ga. App. 596, 426 S.E.2d 174 (1992).

Use of inconsistent prior statements. — Because a state witness, who was also one of defendant's cohorts, was evasive concerning the facts stated in the witness's prior interview and also testified to facts that were inconsistent with those previously stated in the interview, the trial court did not err in permitting the state to ask leading questions or in allowing the taped interview to be introduced into evidence. *Johnson v. State*, 279 Ga. App. 489, 631 S.E.2d 720 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 447 et seq., 501, 506, 509.

ALR. — Estoppel of party to contradict what he testified to, adversely to his present opponent, in a prior action to which he was not a party, 5 ALR 1505.

Impeaching witness examined by both parties, 54 ALR 1374.

Right of party surprised by unfavorable testimony of own witness to ask him concerning previous inconsistent statements, 74 ALR 1042.

Proper practice and relief on development of hostility by party's own witness, 117 ALR 326.

May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him, 158 ALR 820.

Federal Civil Procedure Rule 43(b), and similar state rule, relating to the calling and interrogation of adverse party as witness at trial, 35 ALR2d 756.

Right of counsel representing party at

trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements, 48 ALR2d 1239.

Party litigant in civil personal injury or death case as bound by conflicting testimony of his own medical witnesses, 53 ALR2d 1229.

Who is "employee" within statute permitting examination, as adverse witness, of employee of party, 56 ALR2d 1108.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 ALR5th 277.

Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness, 3 ALR6th 269.

Propriety, under Federal Rule of Evidence 607, of impeachment of party's own witness, 89 ALR Fed. 13.

24-9-82. How witness impeached — Disproving testimony.

A witness may be impeached by disproving the facts testified to by him. (Orig. Code 1863, § 3795; Code 1868, § 3815; Code 1873, § 3871; Code 1882, § 3871; Civil Code 1895, § 5291; Penal Code 1895, § 1025; Civil Code 1910, § 5880; Penal Code 1910, § 1051; Code 1933, § 38-1802.)

Law reviews. — For article surveying recent legislative and judicial developments in

Georgia's evidence laws, see 31 Mercer L. Rev. 107 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION INSTRUCTIONS

General Consideration

In general. — Witness may be impeached by proving that the statements made by the witness in the witness's testimony are not the truth. *Middle Ga. & A. Ry. v. Barnett*, 104 Ga. 582, 30 S.E. 771 (1898).

Criminal defendant is subject to impeachment, and defendant may be impeached by disproving the facts to which defendant testified. *Laney v. State*, 159 Ga. App. 609, 284 S.E.2d 114 (1981).

Witness can be impeached as to matters relevant to the witnesses testimony and to the case, and by disproving facts testified to by the witness. *Morris v. State Farm Mut. Auto. Ins. Co.*, 203 Ga. App. 839, 418 S.E.2d 119 (1992).

Statute applies whenever there is a conflict in testimony. *Southern Ry. v. O'Bryan*, 119 Ga. 147, 45 S.E. 1000 (1903); *Yaryan Rosin & Turpentine Co. v. Haskins*, 29 Ga. App. 753, 116 S.E. 913 (1923); *Wilcox v. Wilcox*, 31 Ga. App. 486, 119 S.E. 445 (1923); *Swift & Co. v. Lawson*, 95 Ga. App. 35, 97 S.E.2d 168 (1957).

Impeachment by unconstitutionally obtained evidence. — Even evidence which violates constitutional standards of due process, such as unlawfully obtained confessions, may be admitted for impeachment purposes. *Ensley v. Jordan*, 244 Ga. 435, 260 S.E.2d 480 (1979).

No foundation is required for impeachment. *Deaton v. Swanson*, 196 Ga. 833, 28 S.E.2d 126 (1943); *Swift & Co. v. Lawson*, 95 Ga. App. 35, 97 S.E.2d 168 (1957); *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

Challenge of witness on cross-examination is not required before the witness's testimony could be impeached by another witness. *Martin v. State*, 205 Ga. App. 591, 422 S.E.2d 876, cert. denied, 205 Ga. App. 900, 422 S.E.2d 876 (1992).

Immaterial matter. — Witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. *Daniels v. Luton*, 40 Ga. App. 741, 151 S.E. 659 (1930); *Gilbert v. State*, 159 Ga. App. 326, 283 S.E.2d 361 (1981).

While a witness may be impeached on a collateral issue which is indirectly material to the issue in the case, a witness may not be impeached because of a discrepancy as to a wholly immaterial matter. *Strickland v. State*, 166 Ga. App. 702, 305 S.E.2d 434 (1983).

Witness may not be impeached because of a discrepancy as to a wholly immaterial matter. *Thomas v. State*, 168 Ga. App. 587, 309 S.E.2d 881 (1983).

Although a witness may be impeached by disproving the facts testified to by the witness, a witness may not be impeached based upon a discrepancy relating to a wholly immaterial matter. *Brown v. State*, 260 Ga. 153, 391 S.E.2d 108 (1990).

Testimony that was properly excluded as irrelevant to the issues of the case was not admissible for impeachment purposes. *Goss v. Total Chipping, Inc.*, 220 Ga. App. 643, 469 S.E.2d 855 (1996).

In a prosecution for rape, kidnapping, and sodomy, the defendant did not receive ineffective assistance of trial counsel merely because counsel failed to impeach the vic-

tim's credibility with evidence concerning a 1996 drug arrest as: (1) the evidence was irrelevant to the circumstances surrounding the defendant's attack on the victim; and (2) the victim never opened the door to an issue of good character. *Pierce v. State*, 281 Ga. App. 821, 637 S.E.2d 467 (2006).

Evidence of prior crimes or bad acts can be admitted when such evidence is necessary and relevant to impeach defendant's specific testimony. *Lucas v. State*, 215 Ga. App. 293, 450 S.E.2d 313 (1994).

Certified record of a prior conviction allegedly of a witness for obstruction and giving false information was properly excluded because: (1) the witness testified that the signature on the certified record was not the witness's signature; (2) the witness opined that the person named in the record of conviction was the witness's cousin, who had the same name, and explained that the defendant and defendant's cousin were only a few months apart and that the cousin also had a criminal record; (3) the witness testified unequivocally that defendant was never indicted, tried, convicted, or sentenced for the offenses charged in the certified record; and (4) defendant offered no further proof that the person named in the exhibit was in fact the witness. *Payne v. State*, 273 Ga. App. 483, 615 S.E.2d 564 (2005).

It was proper to admit evidence of driving under the influence and suspended license convictions to impeach the defendant, who had denied having a Georgia driver's license or ever having been convicted of driving with a suspended license. *Walsh v. State*, 283 Ga. App. 817, 642 S.E.2d 879 (2007).

Trial court did not err by allowing the state to place the defendant's character in issue by introducing evidence of defendant's prior arrest for possession of marijuana through the police sergeant because the defendant opened the door to the sergeant's testimony; since the defendant testified that the defendant's prior marijuana charge only involved "a couple of joints behind the seat" of which the defendant was unaware and that the charge had been dismissed because the defendant was not guilty, it was not error to allow the state to attempt to impeach the defendant through the rebuttal testimony of the sergeant. *Martinez v. State*, No. A09A1687, 2010 Ga. App. LEXIS 316 (Mar. 26, 2010).

Testimony that facts are true. — State may introduce testimony to the effect that the facts stated by the state's witness, whose character is under attack, are true, even though such corroboration involves information received from the witness. *Stevenson v. State*, 69 Ga. 68 (1882).

Disproving facts only. — When police officer's purported statement to plaintiff's mother that the officer had found plaintiff not to be at fault would have, if at all, served only to rebut that portion of the officer's own testimony wherein the officer tacitly opined the accident was due to plaintiff's fault; such a purported statement did not rebut a fact to which the officer testified and was inadmissible. *Campbell v. Cozad*, 207 Ga. App. 175, 427 S.E.2d 515 (1993).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions is generally irrelevant unless defendant first puts defendant's character in issue, pursuant to O.C.G.A. §§ 24-2-2 and 24-9-20(b), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to O.C.G.A. § 24-9-82. *Lockaby v. State*, 265 Ga. App. 527, 594 S.E.2d 729 (2004).

Trial court did not err by not disclosing a disciplinary report in a police officer's personnel file as: (1) no attempt was made to impeach the officer by disproving the facts testified to by the officer under O.C.G.A. § 24-9-82; (2) there was no showing that any of the documents disallowed contained any contradictory statements previously made by the officer as to matters relevant to the officer's testimony and the case under O.C.G.A. § 24-9-83; (3) there was no contention that the officer had been convicted of a crime involving moral turpitude; and (4) the evidence was, at best, related solely to specific bad acts and not to the general bad character of the officer, which was not admissible as impeachment material under O.C.G.A. § 24-9-84. *Lopez v. State*, 267 Ga. App. 178, 598 S.E.2d 898 (2004).

In a criminal case, the trial court properly excluded impeachment testimony about the

General Consideration (Cont'd)

victim's relationship with the victim's employees; the evidence did not disprove facts to which the victim testified, but was evidence of prior specific acts or bad character. *Jones v. State*, 283 Ga. App. 631, 642 S.E.2d 331 (2007).

Photographs. — In a prosecution for child molestation, photographs showing defendant naked in defendant's home were admissible to impeach the defendant's testimony that the defendant never walked around the house nude. *Kelley v. State*, 233 Ga. App. 244, 503 S.E.2d 881 (1998).

Alibi witnesses. — State was obligated to respond to defendants' notification of their intention to rely upon alibi as a defense; neither the state's general witness list nor the state's entitlement to rebut or impeach a witness's testimony with conflicting testimony or statements under O.C.G.A. §§ 24-9-82 and 24-9-83 was a substitute for compliance with O.C.G.A. § 17-16-5(b). *Hayes v. State*, 249 Ga. App. 857, 549 S.E.2d 813 (2001).

Bias of witness. — Proffered testimony of a witness for the propounder of a will, that had feeling existed between the testator and one of the witnesses for the caveators, who testified that when the witness saw the testator on the day the will was executed the testator did not recognize the witness and did not speak to the witness, and who denied that the testator was unfriendly towards the witness because the witness had testified against the testator in a case in which the testator was a party, was admissible to explain why the testator did not speak to the caveators' witness, and to impeach the witness as to the feeling existing between the witness and the testator. *Orr v. Blalock*, 195 Ga. 863, 25 S.E.2d 668 (1943).

Character evidence. — Witness who is not impeached otherwise than by disproving the truth of the witness's evidence cannot be supported by proof of the witness's general good character. *Miller v. Western & Atl. R.R.*, 93 Ga. 480, 21 S.E. 52 (1893); *Bell v. State*, 100 Ga. 78, 27 S.E. 669 (1896); *Surles v. State*, 148 Ga. 537, 97 S.E. 538 (1918).

Effect of proof of own declaration. — Witness impeached by proof of contradictory statements cannot be sustained by proof of witness's own declarations, consistent with

witness's evidence at the trial, made at other times and places, whether prior or subsequent to the time of making the contradictory statements imputed to the witness. *Fussell v. State*, 93 Ga. 450, 21 S.E. 97 (1893).

Person charged with crime remaining silent. — Plaintiff having testified that a third person stated in the hearing of defendant that the defendant committed a crime, to which the defendant made no response, and this third person when examined in behalf of defendant having denied making the statement, it was error not to allow the plaintiff, in reply, to prove by another witness that the defendant was present and heard the defendant's witness make the statement at the time and place mentioned by the plaintiff in plaintiff's testimony. *Bray v. Latham*, 81 Ga. 640, 8 S.E. 64 (1888).

Mere commission, arrest, or confinement for crime insufficient to impeach. — Witness may be impeached by proof of a crime involving moral turpitude, but not by showing that the witness has committed, been arrested for, confined for, or even indicted for such an offense. *Strickland v. State*, 166 Ga. App. 702, 305 S.E.2d 434 (1983).

Showing of mere accusation of offense. — Prosecutor's cross-examination of defendant about recently having been charged with pointing a pistol at someone was an improper line of questioning, although defendant had denied using a gun during the previous year; competent evidence disproving that testimony would have been proper impeachment but merely showing an accusation of the misdemeanor offense was insufficient for that purpose. *Williams v. State*, 181 Ga. App. 693, 353 S.E.2d 563 (1987).

Evidence of prior DUI admissible. — Defendant's testimony that defendant had never taken a breath alcohol test opened the door for the state to impeach defendant with the defendant's previous DUI conviction. *Renn v. State*, 234 Ga. App. 790, 508 S.E.2d 174 (1998).

Introduction of prior alcohol-related accident. — There is no error in allowing the state to produce evidence of a prior alcohol-related motorcycle accident by the defendant for the purpose of impeaching the testimony of the defendant that the defendant did not ride the defendant's motorcycle when the defendant had been drinking. *Hammond v. State*, 169 Ga. App.

97, 311 S.E.2d 523 (1983).

Alco-sensor results. — Officer's testimony that the numerical value of defendant's alco-sensor test was .089 was properly admitted to impeach and rebut defendant's testimony that the result was .06. *Capps v. State*, 273 Ga. App. 696, 615 S.E.2d 821 (2005).

Evidence of prior interest in drug trafficking admissible. — When a defendant was charged with marijuana trafficking, testimony that, two years prior to the subject sale of marijuana, the defendant expressed an interest in trafficking in illegal drugs logically tended to disprove defendant's defense, and thus was clearly relevant as rebuttal, even though the testimony did not allege participation in the crime at bar and was inadmissible as impeachment testimony. *Kraus v. State*, 169 Ga. App. 54, 311 S.E.2d 493 (1983).

Prior drug conviction admissible. — Defendant was properly impeached by defendant's former contradictory statement after defendant's statement on the stand that the defendant did not "mess with dope" was construed as a denial by the defendant that the defendant had ever been involved with drugs. *Thrasher v. State*, 204 Ga. App. 413, 419 S.E.2d 516 (1992).

Question as to prior arrest. — It is not error to allow a witness to be questioned as to a prior arrest to impeach the witness's testimony that the witness had "never been in a situation dealing with the law." *Parker v. State*, 169 Ga. App. 557, 313 S.E.2d 751 (1984).

Prior adjudication of delinquency admissible. — Any error in admitting impeaching evidence of defendant's prior adjudication of delinquency was harmless because, at the time it was admitted pursuant to O.C.G.A. § 24-9-82, the trial court instructed the jury that the evidence was admitted for the limited purpose of refuting defendant's testimony that defendant was not familiar with criminal cases, and that it could not be considered for any other purpose; it was highly probable that admission of the evidence did not contribute to the jury's finding of guilt. *Emberson v. State*, 271 Ga. App. 773, 611 S.E.2d 83 (2005).

In action for fraud and breach of warranties, oral testimony concerning other lawsuits would be incompetent for impeachment purposes unless it contradicted the

witness's testimony at trial; it cannot be used merely to expose the witness's intelligence, memory, accuracy, judgment, and veracity. *Haley v. Oaks Apts., Ltd.*, 173 Ga. App. 44, 325 S.E.2d 602 (1984).

Province of jury. — When a witness is sought to be impeached by disproving the facts testified to by the witness in such way that there results only a conflict between the witness's testimony and the testimony of other witnesses, it is the province of the jury to determine which of the witnesses has spoken the truth even if in order to do so it is necessary to impute perjury to one or the other. *Champion v. State*, 84 Ga. App. 163, 65 S.E.2d 280 (1951).

Disbelief of impeached witness. — When a witness has been successfully impeached, the witness ought not to be believed, and it is the duty of the trier of fact to disregard the witness's testimony unless the testimony is corroborated, in which case the testimony may be believed. *Pike v. Greyhound Bus Lines*, 140 Ga. App. 863, 232 S.E.2d 143 (1977).

Impeachment as to certain facts does not necessarily exclude the jury from believing the witness as to other facts testified to. *Elliot v. State*, 138 Ga. 23, 74 S.E. 691 (1912).

In a condemnation proceeding, after a city's witness not only directly supported the city's main contention that a landowner's property could not be developed or removed from the flood plain, but the city's appraiser based a valuation on the witness's representations to that effect, the witness's testimony was critical, and the landowner had a right to interview the witness, check the facts to which the witness would testify, and, if indicated, arrange to secure rebuttal evidence or to impeach the witnesses. *Shepherd Interiors v. City of Atlanta*, 263 Ga. App. 869, 589 S.E.2d 640 (2003).

Defendant was not unfairly denied impeachment because defendant was prohibited from asking an ambiguous and prolix question of a witness which, in effect, asked for the witness's opinion concerning the witness's own bad reputation for veracity. *Sewell v. State*, 244 Ga. App. 449, 536 S.E.2d 173 (2000).

Criminal defendant. — While a criminal defendant is not subject to impeachment by proof of general bad character or prior convictions until the defendant put defen-

General Consideration (Cont'd)

dant's general good character in evidence, the defendant is subject to impeachment the same as any other witness. *Favors v. State*, 145 Ga. App. 864, 244 S.E.2d 902 (1978).

Prosecution for rape. — Former Code 1933, § 38-202.1 (see O.C.G.A. § 24-2-3) provided the exclusive means for admitting evidence relating to the past sexual behavior of the complaining witness in prosecutions for rape; the *res gestae* rule, impeachment techniques, and other traditional means for introducing evidence which is otherwise inadmissible are inapplicable. *Johnson v. State*, 146 Ga. App. 277, 246 S.E.2d 363 (1978).

Trial court did not err in refusing to permit defendant to cross-examine prosecutor. *Gresham v. State*, 169 Ga. App. 525, 314 S.E.2d 111 (1984).

Disregarding conflicting testimony. — Since there was a material conflict in the testimony of the plaintiff and that of the agent for the insurance company who procured the application, the jury was authorized under former Code 1933, §§ 38-1802 and 38-1806 (see O.C.G.A. §§ 24-9-82 and 24-9-85) to disregard the testimony of the agent. *Gulf Life Ins. Co. v. Moore*, 90 Ga. App. 791, 84 S.E.2d 696 (1954).

Evidence of prior killing. — There is no error in allowing the district attorney to present evidence of a prior killing by defendant for the purpose of impeaching the testimony of the defendant that defendant had never killed anyone in defendant's whole life. *Lumpkin v. State*, 151 Ga. App. 896, 262 S.E.2d 208 (1979).

Railroad engineer. — If the jury believed that the horse and colt crossed the track in front of the train immediately before the train struck plaintiff's mule, as testified to by two witnesses, the witnesses would be authorized to infer that the engineer was not keeping a proper lookout ahead, although the engineer swore that the engineer was. *Atlantic Coast Line R.R. v. Hodges*, 90 Ga. App. 870, 84 S.E.2d 711 (1954).

Admissibility of evidence initially excluded. — In a prosecution for driving under the influence of alcohol, results of a breath test which had been excluded because the arresting officer had failed to advise defendant of defendant's right to an additional test were admissible to rebut the

testimony of defendant's expert witness. *Charlton v. State*, 217 Ga. App. 842, 459 S.E.2d 455 (1995).

In an action for physical injuries allegedly received in a rear-end collision, the defendant was allowed to show that plaintiff had settled a lawsuit arising from an earlier accident in order to impeach plaintiff's testimony that the complaint had been dismissed. *Bischoff v. Payne*, 239 Ga. App. 824, 522 S.E.2d 257 (1999).

Evidence found admissible. — Fact that one brother had considerable assets and another brother had none is admissible to impeach testimony that the two brothers had shared the benefit of real property equally, and it is not error to admit such evidence. *Fletcher v. Fletcher*, 242 Ga. 158, 249 S.E.2d 530 (1978).

Once defendant testified that the defendant always stopped after one drink if the defendant was going to drive, the state was properly allowed to impeach this testimony by questioning appellant about defendant's prior DUI convictions. *Wyatt v. State*, 179 Ga. App. 327, 346 S.E.2d 387 (1986).

In an action for battery, a witness should have been allowed to impeach defendant's statement that defendant had never ordered defendant's bodyguard or anyone else to strike another person. *Williams v. Knight*, 211 Ga. App. 420, 439 S.E.2d 507 (1994).

When defendant implied on direct examination that defendant had only one prior conviction for a weapons offense, defendant's testimony in this regard was subject to rebuttal proof of other weapons offenses defendant had committed. *Francis v. State*, 266 Ga. 69, 463 S.E.2d 859 (1995).

In a prosecution for driving under the influence, evidence offered by the state concerning defendant's breath test was admissible to rebut defendant's testimony on direct examination that defendant had consumed two and one-half beers on the night of defendant's arrest. *Goodwin v. State*, 222 Ga. App. 285, 474 S.E.2d 84 (1996).

In a personal injury action, since plaintiff specifically denied any prior back, neck, or leg pain at trial, plaintiff's medical records showing otherwise were admissible under O.C.G.A. § 24-9-82. *Barone v. Law*, 242 Ga. App. 102, 527 S.E.2d 898 (2000).

In a prosecution for rape and kidnapping, the trial court should have permitted defen-

dant to impeach the victim by calling witnesses to show that the victim used crack cocaine on the day of the incident, before encountering defendant, because the victim's consumption of drugs shortly before the incident occurred was not immaterial, inasmuch as it might have affected the victim's recollection of events. *Curry v. State*, 243 Ga. App. 712, 534 S.E.2d 168 (2000).

State was entitled to question defendant as to whether defendant changed defendant's name because the authorities in North Carolina were looking for defendant because defendant had been accused of rape in that state after defendant introduced this area of inquiry by offering another reason for leaving North Carolina to explain having two sets of identification in defendant's possession when the defendant was arrested. *Vehaun v. State*, 244 Ga. App. 136, 534 S.E.2d 873 (2000).

Trial court did not err in denying defendant's motion for a mistrial made as to a testifying officer's rebuttal testimony as that testimony was admissible as impeachment going to defendant's veracity, pursuant to O.C.G.A. § 24-9-82. *Cox v. State*, 263 Ga. App. 266, 587 S.E.2d 205 (2003).

In a homeowner's suit against a construction company for failing to remedy a defect in the homeowner's house, when the company's representative claimed remorse in the phase of the trial in which the amount of punitive damages was being determined, a letter from the company to the homeowner threatening to sue the homeowner for abusive litigation if the homeowner pursued a claim was properly admitted. *Bowen & Bowen Constr. Co. v. Fowler*, 265 Ga. App. 274, 593 S.E.2d 668 (2004).

Portion of defendant's pre-trial statement to police in which the defendant admitted to another robbery was properly admitted, even though it reflected negatively on the defendant's character, because it rebutted the defendant's prior testimony. *Jones v. State*, 270 Ga. App. 233, 606 S.E.2d 288 (2004).

Evidence that defendant knew defendant would be incarcerated for 90 days beginning one week after the offense charged contradicted the testimony that defendant expected to be steadily employed in the weeks following the offense; accordingly, the trial court did not abuse the court's discretion in

allowing the evidence to impeach defendant's testimony. *Cooper v. State*, 272 Ga. App. 209, 612 S.E.2d 42 (2005).

Since, at trial, the defendant's girlfriend testified that the girlfriend was certain that the defendant's mother had never told the girlfriend about her son's statement of regret about the victim's murder, but, the girlfriend had earlier told detectives that the conversation had, in fact, happened, and since the defendant's mother also took the witness stand and testified both specifically that the defendant had never told the mother that the defendant had any regret about the crime and more generally that the mother never discussed the crime with the defendant at all, the statement the defendant's girlfriend made to police directly contradicted the facts as recounted by both the defendant's mother and the girlfriend; as such, the girlfriend's prior statement was admissible to impeach both. *Williams v. State*, 280 Ga. 539, 630 S.E.2d 410 (2006).

In a personal injury action filed by a couple, including an injured wife, against a tractor-trailer's owner and its driver, the trial court did not err in admitting doctors' reports outlining that the wife "passed out" before the collision: (1) as substantive evidence, given that the wife was present at trial and subject to cross-examination; and (2) as prior inconsistent statements to impeach the wife based upon earlier testimony that the wife never lost consciousness. *Collins v. Mitchell*, 282 Ga. App. 860, 640 S.E.2d 364 (2006).

It was error under O.C.G.A. § 24-9-82 not to allow a defendant to introduce witness testimony and evidence of negative employer drug tests to rebut an officer's testimony that the defendant had admitted using drugs. *Doyal v. State*, 287 Ga. App. 667, 653 S.E.2d 52 (2007).

In a medical malpractice action, the trial court did not abuse the court's discretion by permitting the plaintiff to cross-examine the defendant doctor with regard to the status of the doctor's medical license from another state for impeachment purposes; the limited investigation by the plaintiff into whether the out-of-state license was renewed or not was permissible after the doctor testified that the doctor had allowed the license to expire. *Barngrover v. Hins*, 289 Ga. App. 410, 657 S.E.2d 14 (2008).

General Consideration (Cont'd)

Trial court erred in disallowing testimony of a defense witness offered to disprove facts testified to by a prosecution witness. *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996).

Ineffective assistance of counsel claims based on impeachment of witnesses. — Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pursuit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the witness by showing the minor nature of one of the violations, were objectively reasonable; when the state broached the subject of the witness's incarceration just before the night in question, it might have gone on to uncover proof of that fact, which would have been admissible as contradictory of the witness's testimony that the witness was in the car with the defendant on the night before the defendant's arrest. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

Evidence found not admissible. — Testimony which showed the defendant had been in possession of a large quantity of marijuana was not admissible as impeachment evidence of the defendant's character in a prosecution for trafficking in cocaine because the fact that defendant at some time in the past possessed a substantial amount of marijuana did not contradict defendant's assertion that the defendant did not deal in cocaine. *Seabrooks v. State*, 164 Ga. App. 747, 297 S.E.2d 745 (1982), *aff'd*, 251 Ga. 564, 308 S.E.2d 160 (1983).

When a physician testified on cross-examination that the physician had never written a history and physical examination in a chart for a patient when the physician had not performed the history and physical examination, the physician's testimony was subject to impeachment by calling the widow of a former patient who testified that the physician had not performed the physical examinations and his-

tory on the widow's late husband contrary to the physician's written entry on the medical chart. *Weaver v. Ross*, 192 Ga. App. 568, 386 S.E.2d 43 (1989).

State had no basis for impeaching the testimony of a witness by the witness's driving record after the witness immediately revised the witness's testimony that the witness had been "pulled over" three or four times to state that the witness did not know the exact number of times the witness had been pulled over. *Waters v. State*, 210 Ga. App. 305, 436 S.E.2d 44 (1993).

In a prosecution for aggravated assault, carrying a concealed weapon, and possession of cocaine, when defendant's prior conviction was for misdemeanor obstruction of a law enforcement officer, which offense did not involve the element of violence, neither a conviction thereof nor an indictment charging a greater offense was admissible to impeach a defense witness's testimony as to defendant's nonviolent character. *Daniel v. State*, 211 Ga. App. 455, 439 S.E.2d 720 (1993).

Erroneous consideration of impeachment evidence harmless error. — Although the defendant's prior burglary conviction, admitted by stipulation of counsel for the purpose of establishing *modus operandi*, could not be considered by the jury for purposes of impeaching the defendant's testimony, the error did not require reversal due to the overwhelming evidence of the defendant's guilt. *Howard v. State*, 202 Ga. App. 574, 415 S.E.2d 45 (1992).

Cited in *Chapman v. State*, 109 Ga. 157, 34 S.E. 369 (1899); *Carson v. State*, 22 Ga. App. 743, 97 S.E. 202 (1918); *Daniels v. Luton*, 40 Ga. App. 741, 151 S.E. 659 (1930); *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935); *Jefferson Std. Life Ins. Co. v. Bentley*, 55 Ga. App. 272, 190 S.E. 50 (1937); *Black & White Cab Co. v. Cowden*, 64 Ga. App. 474, 13 S.E.2d 724 (1941); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263 (1943); *Jacobs v. State*, 71 Ga. App. 808, 32 S.E.2d 403 (1944); *Hardware Mut. Cas. Co. v. Mullis*, 75 Ga. App. 233, 43 S.E.2d 122 (1947); *Ludwig v. J.J. Newberry Co.*, 78 Ga. App. 871, 52 S.E.2d 485 (1949); *Beardsley v. Suburban Coach Co.*, 83 Ga. App. 381, 63 S.E.2d 911 (1951); *Reece v. State*, 208 Ga. 165, 66 S.E.2d 133 (1951); *Roberts v. State*, 86 Ga. App. 768, 72 S.E.2d 551 (1952); *Harris v. State*, 96 Ga.

App. 395, 100 S.E.2d 120 (1957); *McTyre v. King*, 215 Ga. 417, 110 S.E.2d 651 (1959); *Leverette v. State*, 107 Ga. App. 712, 131 S.E.2d 782 (1963); *Phillips v. Howard*, 109 Ga. App. 404, 136 S.E.2d 473 (1964); *Kaplin v. Seiden*, 109 Ga. App. 586, 137 S.E.2d 55 (1964); *McGrew v. Cooper*, 110 Ga. App. 347, 138 S.E.2d 453 (1964); *Norman v. State*, 121 Ga. App. 753, 175 S.E.2d 119 (1970); *McLarty v. Emhart Corp.*, 227 Ga. 104, 179 S.E.2d 46 (1970); *Houser v. State*, 234 Ga. 209, 214 S.E.2d 893 (1975); *Cross v. State*, 136 Ga. App. 400, 221 S.E.2d 615 (1975); *McCarty v. State*, 139 Ga. App. 101, 227 S.E.2d 898 (1976); *Jackson v. State*, 140 Ga. App. 288, 231 S.E.2d 805 (1976); *Gamble v. State*, 141 Ga. App. 304, 233 S.E.2d 264 (1977); *Hughes v. State*, 141 Ga. App. 506, 233 S.E.2d 872 (1977); *St. Paul Ins. Co. v. Henley*, 141 Ga. App. 581, 234 S.E.2d 159 (1977); *Sherman v. State*, 141 Ga. App. 632, 234 S.E.2d 175 (1977); *Orkin Exterminating Co. v. Dauer*, 146 Ga. App. 61, 245 S.E.2d 320 (1978); *Terry v. State*, 243 Ga. 11, 252 S.E.2d 429 (1979); *Williams v. Buckley*, 148 Ga. App. 778, 252 S.E.2d 692 (1979); *Perry v. State*, 158 Ga. App. 349, 280 S.E.2d 390 (1981); *Mitchell v. State*, 158 Ga. App. 628, 281 S.E.2d 260 (1981); *Bernard v. State*, 159 Ga. App. 99, 282 S.E.2d 733 (1981); *Jackson v. State*, 159 Ga. App. 287, 283 S.E.2d 353 (1981); *McDaniel v. State*, 248 Ga. 494, 283 S.E.2d 862 (1981); *Price v. State*, 160 Ga. App. 245, 286 S.E.2d 744 (1981); *McBryde v. Roberts*, 160 Ga. App. 416, 287 S.E.2d 349 (1981); *Weaver v. State*, 161 Ga. App. 421, 288 S.E.2d 687 (1982); *Harvard v. State*, 162 Ga. App. 218, 290 S.E.2d 202 (1982); *Williams v. Bennett*, 162 Ga. App. 850, 292 S.E.2d 521 (1982); *Smith v. State*, 251 Ga. 229, 304 S.E.2d 716 (1983); *Williams v. State*, 171 Ga. App. 927, 321 S.E.2d 423 (1984); *Davis v. State*, 172 Ga. App. 787, 324 S.E.2d 767 (1984); *Cherry v. State*, 174 Ga. App. 145, 329 S.E.2d 580 (1985); *Graham v. State*, 175 Ga. App. 411, 333 S.E.2d 664 (1985); *Clements v. Toombs County Hosp. Auth.*, 175 Ga. App. 651, 334 S.E.2d 188 (1985); *Houston v. State*, 175 Ga. App. 881, 334 S.E.2d 907 (1985); *Hightower v. GMC*, 255 Ga. 349, 338 S.E.2d 426 (1986); *Evans v. State*, 256 Ga. 10, 342 S.E.2d 684 (1986); *Young v. State*, 179 Ga. App. 810, 348 S.E.2d 135 (1986); *Long v. State*, 185 Ga. App. 277, 363 S.E.2d 807 (1987); *Williams v. State*, 185

Ga. App. 780, 366 S.E.2d 200 (1988); *Cooper v. State*, 188 Ga. App. 629, 373 S.E.2d 796 (1988); *Eason v. State*, 260 Ga. 445, 396 S.E.2d 492 (1990); *McGraw v. State*, 199 Ga. App. 389, 405 S.E.2d 53 (1991); *Brantley v. State*, 199 Ga. App. 623, 405 S.E.2d 533 (1991); *Marshall v. State*, 199 Ga. App. 678, 405 S.E.2d 893 (1991); *Salmon v. State*, 206 Ga. App. 469, 426 S.E.2d 160 (1992); *Vincent v. State*, 264 Ga. 234, 442 S.E.2d 748 (1994); *Garrison v. State*, 217 Ga. App. 492, 458 S.E.2d 162 (1995); *McDaniel v. State*, 221 Ga. App. 43, 470 S.E.2d 719 (1996); *Waszczak v. City of Warner Robins*, 221 Ga. App. 528, 471 S.E.2d 572 (1996); *Larkin v. State*, 230 Ga. App. 129, 495 S.E.2d 605 (1998); *Smith v. State*, 237 Ga. App. 582, 516 S.E.2d 92 (1999); *Fulton-Fritchlee v. Douglas*, 240 Ga. App. 413, 240 S.E.2d 413 (1999); *Crosby v. Cooper Tire & Rubber Co.*, 240 Ga. App. 857, 524 S.E.2d 313 (1999); *McNeely v. Wal-Mart Stores, Inc.*, 246 Ga. App. 852, 542 S.E.2d 575 (2000); *Brown v. State*, 300 Ga. App. 359, 685 S.E.2d 377 (2009).

Instructions

Instructions generally. — It is not error for the trial court, in the absence of request, to charge on the subject of impeachment of witnesses. *Hand v. State*, 90 Ga. App. 452, 83 S.E.2d 276 (1954).

Defendant who wishes to have trial judge give limiting instructions for impeachment evidence used in the mode of disproving facts testified to, which incidentally injects character, must request such instructions; the judge is not required to give instructions on the judge's own motion. *Byrd v. State*, 255 Ga. 665, 341 S.E.2d 455 (1986).

Conflict in testimony. — When there is a conflict between the testimony of the defendant and a state's witness, a charge on impeachment is not improper. *McNeill v. State*, 135 Ga. App. 876, 219 S.E.2d 613 (1975).

Failure to charge all methods of impeachment. — When the judge having charged correctly upon one of the modes or methods of impeachment, to wit, impeachment by contradictory statements, the judge's failure to charge also upon the other modes of impeachment of disproving facts testified to by the witness, and also on the method of impeachment when a witness's testimony shall be disregarded entirely, is not revers-

Instructions (Cont'd)

ible error in the absence of a request. *Milwaukee Mechanics Ins. Co. v. Davis*, 79 Ga. App. 70, 52 S.E.2d 643 (1949).

Charging parts of sections. — Charge of the court was not error when part of the charge contained former Civil Code 1910, § 5880 (see O.C.G.A. § 24-9-82) and a part of former Civil Code 1910, § 5881 (see O.C.G.A. § 24-9-83) and the parts of both of those sections charged which were excepted to were applicable to the case. *Hall v. Burpee*, 176 Ga. 270, 168 S.E. 39 (1933).

Contradiction of witness. — When no attempt is made during the trial of a case to impeach a witness by disproving the facts testified to by the witness, except insofar as different witnesses testify in a conflicting manner to their impression of a given state of facts, a charge of the court in the language of former Code 1933, § 38-1806 (see O.C.G.A. § 24-9-85) that when a witness shall be successfully contradicted as to a material matter the witness's credit as to other matters was for the jury, included the substance of former Code 1933, § 38-1802 (see O.C.G.A. § 24-9-82). *Aiken v. Glass*, 95 Ga. App. 849, 99 S.E.2d 426 (1957).

No evidence of bad character. — In charging upon the law of impeachment of witnesses, when the court charges as to impeachment by disproving facts testified to, and by contradictory statements, it is not error to omit to charge the law of impeachment by proof of general bad character, when there is no evidence seeking to impeach any witness upon that ground. *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, *Milton v. State*, 245 Ga. 20, 262 S.E.2d 789 (1980).

No evidence of good character. — When it was sought to impeach the sole witness for

the defendant charged with murder, and no evidence of the good character of such witness was offered by the defendant, it was reversible error to state in the charge to the jury that when it is sought to impeach a witness, the witness may be sustained by proof of good character. *Jones v. State*, 193 Ga. 449, 18 S.E.2d 844 (1942).

Instruction proper. — Charge of court was not subject to exceptions because of verbal inaccuracies. *Bart v. Scheider*, 39 Ga. App. 467, 147 S.E. 430 (1929).

Improper instruction not reversible error. — Charge on impeachment by proof of conviction was not reversible error even though defendant had not placed defendant's character in issue because of the overwhelming evidence of the defendant's guilt. *Peterson v. State*, 212 Ga. App. 147, 441 S.E.2d 481 (1994).

In a married couple's personal injury case, the trial court did not err in not giving parts of the pattern charge on impeachment requested by an insurance carrier on the ground that the couple's trial testimony contradicted their previous statements or actions. Because the carrier did not offer evidence that disproved the facts to which the couple testified, the portion of the charge that pertained to impeachment by disproving facts was not applicable, and the trial court was thus authorized to refuse the entire charge; furthermore, the trial court's charge to the jury that the jury could consider the witnesses' manner of testifying and demeanor as well as the probability or improbability of their testimony and their personal credibility adequately covered the necessary principles. *Ga. Farm Bureau Mut. Ins. Co. v. Turpin*, 294 Ga. App. 63, 668 S.E.2d 518 (2008).

RESEARCH REFERENCES

ALR. — Admissibility of affidavit to impeach witness, 14 ALR4th 828.

What constitutes crime involving "dishon-

esty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 ALR5th 277.

24-9-83. How witness impeached — Previous contradictory statements; foundation; proof of good character to sustain witness.

A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case. Before

contradictory statements may be proved against him, unless they are written statements made under oath in connection with some judicial proceedings, the time, place, person, and circumstances attending the former statements shall be called to his mind with as much certainty as possible. If the contradictory statements are in writing and in existence, they shall be shown to him or read in his hearing. To lay this foundation, the witness may be recalled at any time. When thus impeached, the witness may be sustained by proof of general good character, the effect of the evidence to be determined by the jury. (Orig. Code 1863, §§ 3795, 3796, 3799; Code 1868, §§ 3815, 3816, 3819; Code 1873, §§ 3871, 3872, 3875; Code 1882, §§ 3871, 3872, 3875; Civil Code 1895, § 5292; Penal Code 1895, § 1026; Civil Code 1910, § 5881; Penal Code 1910, § 1052; Code 1933, § 38-1803.)

Law reviews. — For article, “The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases,” see 21 Ga. St. B.J. 50 (1984). For annual survey article on

evidence law, see 52 Mercer L. Rev. 263 (2000). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ADMISSIBILITY OF STATEMENT

1. IN GENERAL

2. WHAT STATEMENTS ADMISSIBLE

FOUNDATION

SUSTAINING WITNESS

INSTRUCTIONS

FUNCTION OF JURY

General Consideration

Witness impeached by disproving facts. — Witness can be impeached as to matters relevant to the witness’s testimony and to the case, and by disproving facts testified to by the witness. *Morris v. State Farm Mut. Auto. Ins. Co.*, 203 Ga. App. 839, 418 S.E.2d 119 (1992).

Former Civil Code 1910, §§ 5881 and 5882 (see O.C.G.A. §§ 24-9-83 and 24-9-84) were not exhaustive as to the manner in which a witness may be impeached. *Yaryan Rosin & Turpentine Co. v. Haskins*, 29 Ga. App. 753, 116 S.E. 913 (1923); *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935), *rev’d on other grounds*, 182 Ga. 252, 185 S.E. 246 (1936).

Pretrial statement does not prohibit trial testimony inconsistent therewith. *Tommie v. State*, 158 Ga. App. 216, 279 S.E.2d 510 (1981).

Absence of prior statement at preliminary

hearing fails to amount to a contradiction. *Thomas v. State*, 168 Ga. App. 587, 309 S.E.2d 881 (1983).

Effect of inconsistent statement. — Inconsistency of statement does not render a witness’s testimony inadmissible; it merely lays the witness open to impeachment. *Carter v. State*, 2 Ga. App. 254, 58 S.E. 532 (1907).

Prior inconsistent statement of witness who takes stand and is subject to cross-examination is admissible as substantive evidence and is not limited to impeachment purposes. *Brown v. State*, 175 Ga. App. 246, 333 S.E.2d 124 (1985).

With regard to a defendant’s conviction for aggravated assault in a case that the defendant and the complainant reconciled and the complainant had recanted the allegations against the defendant by the time of trial, the defendant failed to prove that defense counsel was ineffective as a result of failing to object to attempted impeachment

General Consideration (Cont'd)

evidence of the complainant wherein the complainant was asked whether the officers the crime was reported to had lied at trial because the state's question was permissible as part of an attempt to impeach the complainant with the complainant's prior inconsistent statement. *Jacobs v. State*, 299 Ga. App. 368, 683 S.E.2d 64 (2009).

Previous statements not proof of truth. —

Evidence of previous contradictory statements made by a witness sought to be impeached is not affirmative proof of the truth of such previous statements. *Luke v. Cannon*, 4 Ga. App. 538, 62 S.E. 110 (1908); *Early v. Ramey*, 119 Ga. App. 621, 168 S.E.2d 629 (1969); *Morgan v. State*, 135 Ga. App. 139, 217 S.E.2d 175, rev'd on other grounds, 235 Ga. 632, 221 S.E.2d 47, overruled on other grounds, *Dent v. State*, 136 Ga. App. 366, 221 S.E.2d 228, overruled on other grounds, *Davis v. State*, 136 Ga. App. 749, 222 S.E.2d 188 (1975).

Knowing and willful swearing. — To constitute impeachment, the witness must have knowingly and willfully sworn differently on the present trial from the witness's testimony on the former trial. *Stanford v. State*, 153 Ga. 219, 112 S.E. 130 (1922).

Court determines materiality. — Party may be required to announce the statement the party seeks to contradict, that the court may judge of its materiality. *Williams v. Chapman*, 7 Ga. 467 (1849).

Cross-examination. — When it is sought to impeach a witness by a party in order to disparage the witness's testimony, this is properly done by cross-examination of the witness. *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Statement of a witness which does no more than show that the witness made a prior contradictory statement has its most effective use at trial in cross-examination. *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Recalling of witness for further examination at the instance of either party is always within the discretion of the trial judge. *Money v. State*, 137 Ga. App. 779, 224 S.E.2d 783, cert. denied, 429 U.S. 858, 97 S. Ct. 158, 50 L. Ed. 2d 136 (1976).

Defendant's request to recall state's witnesses for further cross-examination for impeachment purposes is properly denied if the court is not informed of what statements are intended to be contradicted. *Wehunt v. State*, 168 Ga. App. 353, 309 S.E.2d 143 (1983).

Alibi witnesses. — State was obligated to respond to defendants' notification of their intention to rely upon alibi as a defense; neither the state's general witness list nor the state's entitlement to rebut or impeach a witness's testimony with conflicting testimony or statements under O.C.G.A. §§ 24-9-82 and 24-9-83 was a substitute for compliance with O.C.G.A. § 17-16-5(b). *Hayes v. State*, 249 Ga. App. 857, 549 S.E.2d 813 (2001).

Impeaching memory. — It is not competent to impeach, by witnesses, the memory of the witness in order to disparage the witness's testimony. It must be done by cross-examination. *Goodwyn v. Goodwyn*, 20 Ga. 600 (1856).

Because the defendant could have impeached the witnesses who allegedly contradicted themselves as a result of faded memories without losing any right to open and conclude closing argument before the jury, the defendant could not show that an alleged loss of memory caused by any delay in the proceedings amounted to prejudice. *Parker v. State*, 283 Ga. App. 714, 642 S.E.2d 111 (2007), cert. denied, U.S. , 128 S. Ct. 496, 169 L.Ed.2d 347 (2007).

Criminal defendant, when a witness, stands before the court as any other witness. *Klug v. State*, 77 Ga. 734 (1886); *Coleman v. State*, 141 Ga. 731, 82 S.E. 228 (1914).

Prosecutor, when a witness, stands before the court as any other witness. *Womack v. State*, 72 Ga. 215 (1883).

When allegations that defendant impeached were not supported by evidence, summary judgment was not precluded. — See *Bonney Motor Express, Inc. v. Yates*, 171 Ga. App. 754, 320 S.E.2d 844 (1984).

Because admission of booking photograph did not suggest guilt of prior crime or enflame jury, it did not place defendant's character into evidence or deprive defendant of a fair trial. *Hunter v. State*, 273 Ga. App. 52, 614 S.E.2d 179 (2005).

Inconsistent statements. — While the trial court erred in holding that a witness's prior

inconsistent statement had to be admitted into evidence prior to the statement's use for impeachment, considering that the allegedly inconsistent statement concerned only a fine distinction whether, prior to the defendant's wife's arrival, the defendant and the murder victim argued with each other or the defendant alone yelled at the victim, the trial court's error did not contribute to the verdict and was, therefore, harmless. *Holley v. State*, 281 Ga. 177, 637 S.E.2d 32 (2006).

Trial court did not err in allowing a codefendant to play a 9-1-1 tape to impeach a witness's testimony with a prior inconsistent statement because the witness and the 9-1-1 operator could all be heard on the 9-1-1 tape, they testified at trial, and they were subject to cross-examination; on the 9-1-1 tape, the witness could be heard saying that the defendant told the witness that the defendant shot the victim, but at trial, the witness testified, "I don't believe that I said that she said she shot him," and the codefendant reminded the witness of the statement on the 9-1-1 call, but the witness did not change the witness' testimony. *Krause v. State*, 286 Ga. 745, 691 S.E.2d 211 (2010).

Evidence sufficient to impeach in the following cases. — See *Central of Ga. Ry. v. Pitts*, 38 Ga. App. 780, 145 S.E. 518 (1928); *Sands v. State*, 46 Ga. App. 730, 169 S.E. 58 (1933); *Felts v. State*, 244 Ga. 503, 260 S.E.2d 887 (1979); *Walker v. Bruno's, Inc.*, 228 Ga. App. 589, 492 S.E.2d 336 (1997).

Use of term "bad guys." — Defendant's motion for a mistrial was properly denied as a witness's use of the term "bad guys" in explaining undercover operations did not improperly inject defendant's character into evidence; even assuming the comment was improper, the error was harmless in light of the overwhelming evidence of defendant's guilt. *Salgado v. State*, 268 Ga. App. 18, 601 S.E.2d 417 (2004).

Contradictions were shown in the following cases. — See *Cox v. State*, 64 Ga. 374, 37 Am. R. 76 (1879) (stenographic notes of testimony at coroner's inquest); *Owens v. State*, 139 Ga. 92, 76 S.E. 860 (1912) (affidavit made previous to trial); *Frank v. State*, 141 Ga. 243, 80 S.E. 1016 (1914) (affidavit of witness plus testimony of another witness).

No showing of contradictory statements. — Trial court did not err by not disclosing a disciplinary report in a police officer's per-

sonnel file as: (1) no attempt was made to impeach the officer by disproving the facts testified to by the officer under O.C.G.A. § 24-9-82; (2) there was no showing that any of the documents disallowed contained any contradictory statements previously made by the officer as to matters relevant to the officer's testimony and the case under O.C.G.A. § 24-9-83; (3) there was no contention that the officer had been convicted of a crime involving moral turpitude; and (4) the evidence was, at best, related solely to specific bad acts and not to the general bad character of the officer, which was not admissible as impeachment material under O.C.G.A. § 24-9-84. *Lopez v. State*, 267 Ga. App. 178, 598 S.E.2d 898 (2004).

In a defendant's second trial for driving under the influence, it was not error to prevent the defendant from cross-examining a deputy under O.C.G.A. § 24-9-83 about a statement the deputy made at the first trial about the defendant's level of intoxication; at the second trial, the state did not ask the deputy about the defendant's level of intoxication or about field sobriety tests, and thus, there was no contradiction between the deputy's testimony at the second trial and the deputy's testimony at the first trial. *Davidson v. State*, 284 Ga. App. 333, 643 S.E.2d 848 (2007).

Waiver on appeal. — Although an injured driver contended on appeal that the trial court erred in allowing the opposing party to impeach the driver by use of the driver's chiropractic records, because the driver failed to object on that ground at trial and failed to raise the foundational requirements for impeaching a witness, the error was waived for purposes of appeal. *Lindsey v. Turner*, 279 Ga. App. 595, 631 S.E.2d 789 (2006).

Because the record showed that the defendant acquiesced in the trial court's decision to give curative instructions regarding testimony given by a state's witness which the defendant claimed reflected prior criminal conduct that improperly placed the defendant's character in issue, and did not again move for a mistrial after the instructions were given, the defendant waived the issue for purposes of appeal. *Northern v. State*, 285 Ga. App. 303, 645 S.E.2d 701 (2007).

Cited in *Reed v. State*, 81 Ga. 760, 8 S.E. 431 (1888); *Cook v. State*, 124 Ga. 653, 53

General Consideration (Cont'd)

S.E. 104 (1906); *Turner v. State*, 131 Ga. 761, 63 S.E. 294 (1909); *Kelly v. State*, 145 Ga. 210, 88 S.E. 822 (1916); *Edenfield v. State*, 40 Ga. App. 251, 149 S.E. 283 (1929); *Edenfield v. State*, 41 Ga. App. 252, 152 S.E. 615 (1930); *Corley v. State*, 171 Ga. 530, 156 S.E. 196 (1930); *Modern Order of Praetorians v. Blackburn*, 42 Ga. App. 690, 157 S.E. 331 (1931); *Baker v. Wyatt*, 49 Ga. App. 410, 175 S.E. 678 (1934); *Tammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315 (1935); *Woodall v. State*, 54 Ga. App. 283, 187 S.E. 671 (1936); *Beckworth v. State*, 183 Ga. 871, 190 S.E. 184 (1937); *Duncan v. State*, 58 Ga. App. 551, 199 S.E. 319 (1938); *Wilharbla Realty Co. v. Carrington*, 62 Ga. App. 778, 9 S.E.2d 842 (1940); *Black & White Cab Co. v. Cowden*, 64 Ga. App. 477, 13 S.E.2d 724 (1941); *Sisk v. Landers*, 67 Ga. App. 538, 21 S.E.2d 449 (1942); *Quinton v. Peck*, 195 Ga. 299, 24 S.E.2d 36 (1943); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263 (1943); *Cady v. State*, 198 Ga. 99, 31 S.E.2d 38 (1944); *Hardware Mut. Cas. Co. v. Mullis*, 75 Ga. App. 233, 43 S.E.2d 122 (1947); *Daniel v. State*, 82 Ga. App. 535, 61 S.E.2d 561 (1950); *Beardsley v. Suburban Coach Co.*, 83 Ga. App. 381, 63 S.E.2d 911 (1951); *Stembridge v. State*, 84 Ga. App. 413, 65 S.E.2d 819 (1951); *Reece v. State*, 208 Ga. 165, 66 S.E.2d 133 (1951); *Young v. Kendrick*, 89 Ga. App. 547, 80 S.E.2d 201 (1954); *Robertson v. Robertson*, 90 Ga. App. 576, 83 S.E.2d 619 (1954); *Griffin v. Kelley*, 227 F.2d 258 (5th Cir. 1955); *Swift & Co. v. Lawson*, 95 Ga. App. 35, 97 S.E.2d 168 (1957); *McTyre v. King*, 215 Ga. 417, 110 S.E.2d 651 (1959); *California Ins. Co. v. Blumburg*, 101 Ga. App. 587, 115 S.E.2d 266 (1960); *Bennett v. George*, 105 Ga. App. 527, 125 S.E.2d 122 (1962); *George v. Riley*, 106 Ga. App. 550, 127 S.E.2d 821 (1962); *Higdon Grocery Co. v. Faircloth*, 107 Ga. App. 558, 130 S.E.2d 760 (1963); *Leverette v. State*, 107 Ga. App. 712, 131 S.E.2d 782 (1963); *J.J. Woodside Storage Co. v. Carr*, 108 Ga. App. 34, 132 S.E.2d 241 (1963); *Seay v. State*, 108 Ga. App. 724, 134 S.E.2d 422 (1963); *Kapplin v. Seiden*, 109 Ga. App. 586, 137 S.E.2d 55 (1964); *McKinney v. Pitts*, 109 Ga. App. 866, 137 S.E.2d 571 (1964); *Stubbs v. Daughtry*, 115 Ga. App. 22, 153 S.E.2d 633 (1967); *Smith v. Smith*, 223 Ga. 560, 156

S.E.2d 901 (1967); *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969); *Norman v. State*, 121 Ga. App. 753, 175 S.E.2d 119 (1970); *Mustang Transp., Inc. v. W.W. Lowe & Sons*, 123 Ga. App. 350, 181 S.E.2d 85 (1971); *Parker v. Weekes*, 125 Ga. App. 275, 187 S.E.2d 335 (1972); *Smith v. Smith*, 228 Ga. 820, 188 S.E.2d 507 (1972); *Whiteway Laundry & Dry Cleaners, Inc. v. Childs*, 126 Ga. App. 617, 191 S.E.2d 454 (1972); *Gregson v. Jefferson Mills, Inc.*, 128 Ga. App. 534, 197 S.E.2d 407 (1973); *Krasner v. Lester*, 130 Ga. App. 234, 202 S.E.2d 693 (1973); *Welborn v. State*, 132 Ga. App. 207, 207 S.E.2d 688 (1974); *Henderson v. State*, 134 Ga. App. 166, 213 S.E.2d 543 (1975); *Bethay v. State*, 235 Ga. 371, 219 S.E.2d 743 (1975); *Cross v. State*, 136 Ga. App. 400, 221 S.E.2d 615 (1975); *Holloway v. State*, 137 Ga. App. 124, 222 S.E.2d 898 (1975); *Bradley v. State*, 137 Ga. App. 670, 224 S.E.2d 778 (1976); *Gale v. State*, 138 Ga. App. 261, 226 S.E.2d 264 (1976); *Crosby v. Greene*, 237 Ga. 56, 226 S.E.2d 739 (1976); *Popham v. State*, 138 Ga. App. 876, 227 S.E.2d 825 (1976); *McCarty v. State*, 139 Ga. App. 101, 227 S.E.2d 898 (1976); *Hughes v. State*, 141 Ga. App. 506, 233 S.E.2d 872 (1977); *St. Paul Ins. Co. v. Henley*, 141 Ga. App. 581, 234 S.E.2d 159 (1977); *Ransom v. State*, 142 Ga. App. 325, 235 S.E.2d 748 (1977); *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977); *Jackson v. State*, 144 Ga. App. 696, 242 S.E.2d 349 (1978); *Cale v. Cale*, 242 Ga. 600, 250 S.E.2d 467 (1978); *Barraza v. State*, 149 Ga. App. 738, 256 S.E.2d 48 (1979); *Martin v. State*, 149 Ga. App. 705, 256 S.E.2d 101 (1979); *Martin v. State*, 151 Ga. App. 9, 258 S.E.2d 711 (1979); *Thomason v. Genuine Parts Co.*, 156 Ga. App. 599, 275 S.E.2d 159 (1980); *Lord v. State*, 157 Ga. App. 104, 276 S.E.2d 153 (1981); *Shaw v. Stone*, 506 F. Supp. 571 (M.D. Ga. 1981); *Palmer v. State*, 158 Ga. App. 743, 282 S.E.2d 201 (1981); *Jackson v. State*, 159 Ga. App. 287, 283 S.E.2d 353 (1981); *Tookes v. State*, 159 Ga. App. 423, 283 S.E.2d 642 (1981); *McDaniel v. State*, 248 Ga. 494, 283 S.E.2d 862 (1981); *Foster v. State*, 248 Ga. 409, 283 S.E.2d 873 (1981); *Ayers v. Carter*, 159 Ga. App. 680, 285 S.E.2d 55 (1981); *Apgar v. State*, 159 Ga. App. 752, 285 S.E.2d 89 (1981); *McBryde v. Roberts*, 160 Ga. App. 416, 287 S.E.2d 349 (1981); *Williams v. State*, 249 Ga. 6, 287

S.E.2d 31 (1982); *Coleman v. State*, 162 Ga. App. 340, 291 S.E.2d 402 (1982); *Conyers v. State*, 249 Ga. 438, 291 S.E.2d 709 (1982); *Martin v. State*, 162 Ga. App. 703, 292 S.E.2d 864 (1982); *Witt v. Robbins*, 163 Ga. App. 182, 292 S.E.2d 894 (1982); *Bradshaw v. State*, 163 Ga. App. 819, 296 S.E.2d 119 (1982); *Humphrey v. State*, 167 Ga. App. 30, 306 S.E.2d 36 (1983); *Whitlock v. State*, 170 Ga. App. 679, 318 S.E.2d 63 (1984); *Jones v. State*, 171 Ga. App. 184, 319 S.E.2d 18 (1984); *Bowens v. State*, 171 Ga. App. 364, 320 S.E.2d 189 (1984); *Buffington v. State*, 171 Ga. App. 919, 321 S.E.2d 418 (1984); *Jackson v. State*, 173 Ga. App. 851, 328 S.E.2d 741 (1985); *Georgia Farm Bureau Mut. Ins. Co. v. Hill*, 174 Ga. App. 645, 331 S.E.2d 12 (1985); *Johnson v. State*, 255 Ga. 552, 341 S.E.2d 220 (1986); *Dimick v. State*, 178 Ga. App. 60, 341 S.E.2d 914 (1986); *Georgia Power Co. v. Hinson*, 179 Ga. App. 263, 346 S.E.2d 73 (1986); *In re M.E.H.*, 180 Ga. App. 591, 349 S.E.2d 814 (1986); *Sanders v. State*, 181 Ga. App. 117, 351 S.E.2d 666 (1986); *Johnson v. State*, 181 Ga. App. 620, 353 S.E.2d 100 (1987); *Conway v. State*, 183 Ga. App. 573, 359 S.E.2d 438 (1987); *Reynolds v. State*, 257 Ga. 725, 363 S.E.2d 249 (1988); *Terry v. State*, 190 Ga. App. 570, 379 S.E.2d 604 (1989); *Barrett v. State*, 192 Ga. App. 705, 385 S.E.2d 785 (1989); *Warren v. State*, 197 Ga. App. 23, 397 S.E.2d 484 (1990); *Campbell v. Cozad*, 207 Ga. App. 175, 427 S.E.2d 515 (1993); *Vincent v. State*, 264 Ga. 234, 442 S.E.2d 748 (1994); *McDaniel v. State*, 221 Ga. App. 43, 470 S.E.2d 719 (1996); *Waszczak v. City of Warner Robins*, 221 Ga. App. 528, 471 S.E.2d 572 (1996); *Nichols v. State*, 221 Ga. App. 600, 473 S.E.2d 491 (1996); *Casillas v. State*, 233 Ga. App. 752, 505 S.E.2d 251 (1998); *Felix v. State*, 234 Ga. App. 509, 507 S.E.2d 172 (1998); *Crosby v. Cooper Tire & Rubber Co.*, 240 Ga. App. 857, 524 S.E.2d 313 (1999); *Brown v. State*, 242 Ga. App. 858, 531 S.E.2d 409 (2000); *McDonald v. State*, 249 Ga. App. 1, 548 S.E.2d 361 (2001); *Porter v. State*, 264 Ga. App. 526, 591 S.E.2d 436 (2003); *Scott v. State*, 261 Ga. App. 341, 582 S.E.2d 510 (2003); *Opio v. State*, 283 Ga. App. 894, 642 S.E.2d 906 (2007); *Capp v. Carlito's Mexican Bar & Grill #1, Inc.*, 288 Ga. App. 779, 655 S.E.2d 232 (2007); *Mullins v. State*, 298 Ga. App. 368, 680 S.E.2d 474 (2009).

Admissibility of Statement

1. In General

General rule. — Prior inconsistent statements are in general admissible to impeach a witness. *Andrews v. State*, 118 Ga. 1, 43 S.E. 852 (1903); *Bates v. State*, 4 Ga. App. 486, 61 S.E. 888 (1908); *Tommie v. State*, 158 Ga. App. 216, 279 S.E.2d 510 (1981).

Rule that declarations to third persons against the declarant's penal interest to the effect that the declarant and not the accused was the actual perpetrator of the offense, are not admissible in favor of the accused at the trial and does not apply when the declarant is present, testifies, and is subject to cross-examination; accused should have been permitted to produce testimony of declarant's prior inconsistent statements as substantive evidence of the facts contained therein. *Guess v. State*, 262 Ga. 487, 422 S.E.2d 178 (1992).

Bolstering. — Although the state prematurely bolstered a child victim's testimony, the parties knew that the victim's credibility would be immediately undermined; evidence that defendant told the victim that a relative had been imprisoned for improper "touching" and that defendant masturbated with the victim's underwear were admissible as relevant. *Robinson v. State*, 275 Ga. App. 537, 621 S.E.2d 770 (2005).

One method of impeaching a witness is by showing that the witness made statements out of court at variance with the witness's testimony on the witness stand. *Ricks v. State*, 70 Ga. App. 395, 28 S.E.2d 303 (1943).

Evidence of other crime inadmissible because defendant offered no evidence in support of entrapment defense. — Trial court erred in admitting evidence of prior conviction and defendant's involvement in other drug deals because defendant offered no evidence in support of the entrapment defense and the state had no basis on which to admit the character evidence; however, the denial of defendant's motion for mistrial was not an abuse of discretion in light of the overwhelming evidence of defendant's guilt and a detailed curative instruction advising the jury not to consider the improperly-admitted evidence. *Nettles v. State*, 276 Ga. App. 259, 623 S.E.2d 140 (2005).

Admissibility of Statement (Cont'd)**1. In General (Cont'd)****Prior statement of fact or of opinion. —**

Prior inconsistent statement is admissible to impeach a witness whether the statement was one of fact or one of opinion when it is different from the facts testified to or from the conclusion which the testimony tends to establish. *Bates v. State*, 4 Ga. App. 486, 61 S.E. 888 (1908).

Rape victim's statement to an investigator was not impeaching since it was neither contradictory nor inconsistent with her trial testimony, but merely stated facts that corroborated the trial testimony. *Hightower v. State*, 227 Ga. App. 74, 487 S.E.2d 646 (1997).

Contradictory statements were immaterial. — In a trial for statutory rape and child molestation, the trial court did not err in not allowing the defendant to use contradictory statements about the victim's age to impeach the victim under O.C.G.A. § 24-9-83 as the victim's age was not contested at trial and the defendant's knowledge of the victim's age was irrelevant; thus, the contradictory statements were immaterial. *Haywood v. State*, 283 Ga. App. 568, 642 S.E.2d 203 (2007).

Relevant matters. — Contradictory statements must relate to matters relevant to the testimony of the witness and to the case. *Green v. State*, 43 Ga. 368 (1871); *Whitaker v. State*, 79 Ga. 87, 3 S.E. 403 (1887); *Futch v. State*, 90 Ga. 472, 16 S.E. 102 (1892); *Watts v. State*, 120 Ga. 496, 48 S.E. 142 (1904); *Mann v. State*, 124 Ga. 760, 53 S.E. 324, 4 L.R.A. (n.s.) 934 (1906); *Tanner v. State*, 163 Ga. 121, 135 S.E. 917 (1926); *Cooper v. State*, 66 Ga. App. 594, 18 S.E.2d 644 (1942); *Green v. State*, 138 Ga. App. 48, 225 S.E.2d 495 (1976); *Wakily v. State*, 225 Ga. App. 56, 483 S.E.2d 313 (1997).

Since the declarant's testimony was relevant to the case and contradictory statements attributed to the declarant were relevant to the declarant's testimony, testimony proffered by the accused should have been admitted under "the prior inconsistent statement exception to the hearsay rule." *Guess v. State*, 262 Ga. 487, 422 S.E.2d 178 (1992).

"Material matters" are matters competent to prove on one side or other of the issue, and admissible for that purpose. *Kennedy v. State*, 9 Ga. App. 219, 70 S.E. 986 (1911);

Stockton v. State, 20 Ga. App. 186, 92 S.E. 1019 (1917).

Pre-trial statements. — For a party's credibility to be impeached by prior inconsistent statements, such statement must be relevant and material to the issues on trial; a factual stipulation presented by the parties to the trial court did not conflict with the pre-trial statement, and did not cause a prior inconsistent statement for purposes of impeachment. *Redfearn v. Huntcliff Homes Assoc.*, 260 Ga. App. 150, 579 S.E.2d 37 (2003).

Purpose of testimony limited. — Testimony offered avowedly to impeach the credit of a witness by showing contradictory statements cannot, in the argument before the jury, be used for a wholly different purpose. *Williams v. Chapman*, 7 Ga. 467 (1849).

Witness could not be impeached by a memorandum that was not written by the witness and that did not record any statement made by the witness. *Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1995).

Witness could not be cross-examined regarding a document the witness did not prepare and did not know about since the purpose of the cross-examination was to impeach the witness, not refresh the witness's recollection. *Fleming v. State*, 269 Ga. 245, 497 S.E.2d 211 (1998).

Email could not be used for impeachment. — In a child molestation prosecution, an email that the defendant claimed the victim sent, in which the writer apologized for lying about the defendant, was not admissible to impeach the victim, as no testimony elicited from the victim would have been contradicted by the email. Had the victim been asked about telling anyone that the victim had lied about the defendant, and denied doing so, the email might have been admitted for impeachment. *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009).

Inadmissible testimony. — When the testimony of the former trial is inadmissible in evidence, that testimony may not be resorted to for purposes of impeachment. *Mitchum v. State*, 11 Ga. 615 (1852).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse, would have been

proper as prior inconsistent statements under O.C.G.A. §§ 24-9-81 and 24-9-83, but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. *Moxley v. Moxley*, 281 Ga. 326, 638 S.E.2d 284 (2006).

Proving testimony by notes or memoranda. — For the purpose of impeaching witnesses, their testimony of the committing trial may be proved as well by one who heard it as by the notes or memoranda of the evidence taken by the court. *Chambers v. State*, 88 Ga. App. 57, 76 S.E.2d 84 (1953).

Document introduced in absence of witness. — If the foundation for impeaching documentary evidence was properly laid, it is immaterial that the witness had concluded the witness's testimony and was absent from the courthouse at the time the document was finally introduced in evidence. *Hartley v. Sanders*, 45 Ga. App. 273, 164 S.E. 232 (1932).

Admission by witness of previous statement. — Once a witness has unequivocally admitted having previously made inconsistent statements in a written report, the written report becomes inadmissible as proof of the inconsistency is no longer necessary or material. *Choate v. Carter*, 98 Ga. App. 375, 105 S.E.2d 909 (1958); *Pethel v. Waters*, 220 Ga. 543, 140 S.E.2d 252 (1965); *Dickey v. State*, 240 Ga. 634, 242 S.E.2d 55 (1978), overruled on other grounds, *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

When a witness admits making prior inconsistent statements, the witness has impeached oneself and it is not error to exclude the statements themselves from evidence. *Daniels v. State*, 203 Ga. App. 873, 418 S.E.2d 137 (1992).

Whether the witness admits or denies making the prior inconsistent statement in writing, the written statement may be admissible and considered as substantive evidence. Language in cases that prior inconsistent statements are not admissible solely because the witness admits he or she made the statements is disapproved. *Duckworth v. State*, 268 Ga. 566, 492 S.E.2d 201 (1997).

Denial of prior statement. — Witness's prior statement which is inconsistent on a material matter with the witness's trial testi-

mony is properly admitted into evidence to impeach the witness's trial testimony in cases where the witness denies having made such a statement. *Dickey v. State*, 240 Ga. 634, 242 S.E.2d 55 (1978), overruled on other grounds, *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

Inconsistent statement admissible only after witness's denial. — Prior inconsistent statement becomes admissible only if the witness denies having made the statement. *Harden v. State*, 166 Ga. App. 536, 304 S.E.2d 748 (1983).

Fact that O.C.G.A. § 24-9-83 does not mandate that a prior inconsistent statement be admitted into evidence before it is used for impeachment did not render erroneous a trial court's admission of such a statement after cross-examination. *Williams v. State*, 236 Ga. App. 351, 511 S.E.2d 910 (1999).

Witness failing to deny former statement. — Trial court erred in refusing to allow appellant to impeach witness's testimony simply because the witness failed to deny making the witness's former statements. *Sprouse v. State*, 250 Ga. 174, 296 S.E.2d 584 (1982).

Admissible as substantive evidence. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence, and is not limited in value only to impeachment purposes. *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982); *Sprouse v. State*, 250 Ga. 174, 296 S.E.2d 584 (1982); *Belcher v. State*, 188 Ga. App. 244, 372 S.E.2d 650 (1988).

Witness's prior statement which is inconsistent on a material matter with the witness's trial testimony is proper evidence to impeach the witness's trial testimony. Such an inconsistent statement of a witness is not limited in value only to impeachment purposes but is likewise admissible as substantive evidence. *Truitt v. State*, 168 Ga. App. 616, 309 S.E.2d 895 (1983).

Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence. *Lumpkin v. State*, 255 Ga. 363, 338 S.E.2d 431 (1986), overruled on other grounds, *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896, (1998).

It was proper to allow the state to introduce prior inconsistent statements as sub-

Admissibility of Statement (Cont'd)**1. In General (Cont'd)**

stantive evidence with regard to three witnesses who claimed to have suffered memory loss, as well as three other witnesses who equivocated regarding their statements. *Spann v. State*, 248 Ga. App. 419, 546 S.E.2d 368 (2001).

Evidence which is admissible for impeachment purposes only cannot serve as evidence in support of an essential factual contention. *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

Prior incriminatory statement is admissible for impeachment purposes even if Miranda warnings have not been given. *Graham v. State*, 175 Ga. App. 411, 333 S.E.2d 664 (1985).

First offender plea. — Whether or not a first offender plea is admissible to prove conviction of a felony, it is admissible to disprove facts testified to by the witness and as a prior statement contradicting that same testimony. *Hightower v. GMC*, 255 Ga. 349, 338 S.E.2d 426 (1986).

Valuation made two years prior to condemnation not admissible. — In a condemnation proceeding, statements concerning the value of the subject property on a date approximately two years prior to the taking may be excluded as impeaching evidence since the value of the property two years prior is not shown to be relevant to the issue of the value of the property at the time of the property's subsequent taking. *DOT v. Wright*, 169 Ga. App. 332, 312 S.E.2d 824 (1983).

Any testimony as to what the witness may have heard on the day of the shooting would not be independently admissible as non-impeachable evidence. *Jones v. State*, 265 Ga. 138, 454 S.E.2d 482 (1995).

Falsity partially conceded. — Written document previously made and signed by a witness, which is contrary to the witness's testimony, may be introduced in evidence for the purpose of impeachment on the ground of contradictory statements; and this may be done even though witness admits signing the document, and testifies that most of the statements contained therein are false, since the document contains other statements whose falsity is not admitted. *Manley v. Combs*, 197 Ga. 768, 30 S.E.2d 485

(1944); *Hodges v. Haverty*, 115 Ga. App. 199, 154 S.E.2d 276 (1967).

Best evidence rule inapplicable. — Since a defendant's admission of a prior inconsistent statement included defendant's admission of being an inmate of a penitentiary, the state's failure to prove the prior conviction by the record thereof did not violate the best evidence rule and was harmless error. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

Testimony held material in the following cases. — See *Evans v. State*, 95 Ga. 468, 22 S.E. 298 (1894) (conversation between suborner and perjurer after false swearing); *Jordan v. State*, 120 Ga. 864, 48 S.E. 352 (1904) (statement in presence of accused of chastity of prosecutor in seduction case); *Fountain v. State*, 7 Ga. App. 559, 67 S.E. 218 (1910) (statement by prosecutor before commissioner of friendliness for accused in trial of accused for using profane language).

Testimony held immaterial in the following cases. — See *Howard v. State*, 73 Ga. 83 (1884), overruled on other grounds, *Chattanooga, R. & C.R.R. v. Owen*, 90 Ga. 265, 15 S.E. 853 (1892) (effort to stop prosecution on payment of money when witness not a party to transaction); *Allgood v. State*, 87 Ga. 668, 13 S.E. 569 (1891) (difficulty caused by deceased); *Kennedy v. State*, 9 Ga. App. 219, 70 S.E. 986 (1911) (prosecutor induced by another to bring prosecution); *Jones v. State*, 137 Ga. 21, 72 S.E. 410 (1911) (circumstances under which child begotten in bastardy proceeding); *Haywood v. State*, 12 Ga. App. 240, 76 S.E. 1077 (1913) (offer of money for producing convicting evidence).

Statement not admissible as prior inconsistent statement. — See *Garrett v. State*, 169 Ga. App. 327, 312 S.E.2d 621 (1983).

Refusal to admit prior statement harmless error. — Even if the trial court erred in refusing to permit defendant to read aloud part of defendant's prior statement, since defendant's entire custodial statement was admitted into evidence and the jury was free to determine what meaning, weight, and credibility to accord that statement, any error was harmless. *O'Hara v. State*, 241 Ga. App. 855, 528 S.E.2d 296 (2000).

2. What Statements Admissible

Writing admissible. — Any writing previously made by a witness, which is in conflict

with the witness's testimony, is admissible for the purpose of impeachment. *State Hwy. Dep't v. Raines*, 129 Ga. App. 123, 199 S.E.2d 96 (1973); *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Depositions. — Words "written statements made under oath in connection with some judicial proceedings" include previously taken depositions of a witness in a case. *Williams v. Chapman*, 7 Ga. 467 (1849); *Georgia R.R. & Banking Co. v. Smith*, 85 Ga. 530, 11 S.E. 859 (1890); *Raleigh & G.R.R. v. Bradshaw*, 113 Ga. 862, 39 S.E. 555 (1901); *Estill v. Citizens & S. Bank*, 153 Ga. 618, 113 S.E. 522 (1922); *Phillips v. Howard*, 109 Ga. App. 404, 136 S.E.2d 473 (1964).

Deposition concerning same issues. — Witness may be contradicted and thus discredited by the witness's depositions previously taken in the same case or in a different case involving the same issues. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 145 Ga. App. 309, 243 S.E.2d 577 (1978).

Certified copy of witness's plea. — State's use of a certified copy of witness's plea of guilty to a charge of possession of cocaine was a permissible method of impeachment. *Gardner v. State*, 263 Ga. 197, 429 S.E.2d 657 (1993).

Testimony concerning lost deposition. — When depositions were never properly transmitted to the court and were lost, the court properly allowed oral testimony as to what the interrogated persons said before the court commissioner, not for the purpose of establishing their previous testimony given in the case, but merely for the purpose of proving alleged previous contradictory statements, and properly permitted counsel for the defendants to refer to what purported to be a carbon copy of the previous questions and answers, in questioning the witnesses in order to lay a foundation for their impeachment and in testifying personally as to what answers were previously given, counsel at last testifying from counsel's own recollection after having counsel's memory thus refreshed. *Lazar v. Black & White Cab Co.*, 50 Ga. App. 567, 179 S.E. 250 (1935).

Testimony at former trial. — When properly authenticated and proper preliminary proof for its introduction has been made, testimony given in a previous trial of the case is admissible for the purpose of impeaching

a witness. *Butler v. State*, 142 Ga. 286, 82 S.E. 654 (1914).

Statement made in different case. — Rule stated is not restricted to contradictory statements made in the same case and is applicable to contradictory statements made in different cases. *Jones v. State*, 70 Ga. App. 431, 28 S.E.2d 373 (1943).

Prior testimony from committing trial may be used. *Brown v. State*, 76 Ga. 623 (1886).

Transcript of earlier trial. — It is not error to allow the state to use a transcript of an earlier trial for impeachment purposes, when there is no reference at trial to the fact that a previous jury had found the appellant guilty of the offense for which the appellant had been tried since, even if the use of the transcript indicated to the jurors that there had been a previous trial, it could just as easily lead them to the conclusion that the previous trial had resulted in a mistrial as that it had resulted in a conviction. *Carroll v. State*, 147 Ga. App. 332, 248 S.E.2d 702 (1978).

Unauthenticated transcript. — Court did not err in refusing to allow criminal defendant's counsel to read to the jury selected portions of a tape-recorded interview counsel had conducted with one of the state's witnesses approximately a year before trial in which the witness had assertedly made statements which were inconsistent with the witness's testimony at trial. The transcript clearly was not self-authenticating and thus was not admissible in the absence of at least some semblance of a showing that it was accurate. *Dyous v. State*, 195 Ga. App. 99, 392 S.E.2d 730 (1990).

Testimony as to other offenses may be admitted in rebuttal to testimony of a witness put up by the defendant. *Casey v. State*, 133 Ga. App. 161, 210 S.E.2d 375 (1974).

Testimony from Jackson v. Denno hearing. — Defendant's testimony given during a Jackson v. Denno hearing was admissible at trial for the jury's consideration both as incriminatory testimony and as prior contradictory, inconsistent statements. *Brown v. State*, 226 Ga. App. 140, 486 S.E.2d 370 (1997).

Prior statements implicating accused. — Trial court did not err in allowing prosecution to cross-examine two state witnesses after their testimony differed from their prior statements implicating the appellant in

Admissibility of Statement (Cont'd)**2. What Statements Admissible (Cont'd)**

a murder and after they had repudiated the prior statements as having been made under duress. *Burney v. State*, 252 Ga. 25, 310 S.E.2d 899 (1984).

Prior inconsistent statement. — Hospital intake record was admissible to impeach a defense witness by proof of a prior inconsistent statement regarding the identity of the driver in a DUI prosecution. *Gee v. State*, 210 Ga. App. 60, 435 S.E.2d 275 (1993).

In a prosecution for child molestation and related offenses, the prior inconsistent statement of a witness that the witness thought defendant “done it” was admissible to impeach the witness’s direct testimony that the witness didn’t believe the victim when the victim first reported the sexual assaults. *Shropshire v. State*, 226 Ga. App. 669, 487 S.E.2d 384 (1997).

Trial court erred when the court prohibited defendant from questioning a witness regarding a prior inconsistent statement contained in a document not admitted into evidence. *Whitehead v. State*, 232 Ga. App. 140, 499 S.E.2d 922 (1998).

Trial court did not err in permitting defendant’s counsel to cross-examine plaintiff using plaintiff’s medical records without first allowing counsel to view the documents. *Fulton-Fritchlee v. Douglas*, 240 Ga. App. 413, 240 S.E.2d 413 (1999).

State was entitled to impeach the testimony of defendant’s cousin denying that defendant participated in a theft as it was entitled to do so using a contradictory statement previously made by the cousin as to matters relevant to the cousin’s testimony and to the case. *Wilson v. State*, 258 Ga. App. 166, 573 S.E.2d 432 (2002).

Hearsay testimony of a detective regarding statements made by a co-conspirator after the co-conspirator denied remembering the crime or giving the police any information was admissible as substance evidence under the prior inconsistent statement exception to the hearsay rule. *Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004).

In a personal injury action filed by a couple, including an injured wife, against a tractor-trailer’s owner and its driver, the trial court did not err in admitting doctors’ reports outlining that the wife “passed out”

before the collision: (1) as substantive evidence, given that the wife was present at trial and subject to cross-examination; and (2) as prior inconsistent statements to impeach the wife based upon earlier testimony that the wife never lost consciousness. *Collins v. Mitchell*, 282 Ga. App. 860, 640 S.E.2d 364 (2006).

When a witness at the defendant’s trial contradicted statements the witness had made to others about the defendant’s involvement in a murder, the trial court properly admitted testimony about the earlier statements as prior inconsistent statements. *Paige v. State*, 281 Ga. 504, 639 S.E.2d 478 (2007).

Witness’s testimony that the brother of a juvenile defendant told the witness, “My brother just shot someone,” was not inadmissible hearsay; the brother testified that the brother had not made such a statement, the testimony was admissible as an inconsistent statement, and it was also admissible as an excited utterance, as it was made by the brother after receiving a startling text message. In the Interest of B.S., 284 Ga. App. 680, 644 S.E.2d 527 (2007).

Trial court properly admitted a witness’s pretrial statements to police in which the witness stated that the witness had observed another person have sex with the defendant in exchange for drugs, and that the defendant had been cutting and packaging the drugs into small bags. At trial, the witness denied the facts set forth in these statements and further denied making these statements to the police; thus, the prior inconsistent statements were properly admitted over the defendant’s hearsay objection as impeachment evidence and as substantive evidence of the defendant’s guilt. *Gassett v. State*, 289 Ga. App. 792, 658 S.E.2d 366 (2008).

Whether or not the trial court erred by refusing to allow the admission of an assault victim’s prior inconsistent statement, any error was harmless as defense counsel thoroughly cross-examined the victim about inconsistencies between the victim’s written statement and trial testimony, and elicited testimony from a responding officer concerning a statement that the victim made to the officer shortly after the incident occurred, which likewise was inconsistent with the victim’s trial testimony. *Cash v. State*, 293 Ga. App. 702, 667 S.E.2d 691 (2008).

Prior consistent statement. — Victim's statement to a doctor was properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant asserted in opening statement, that the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex with the parent's old significant other, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. *Smith v. State*, 282 Ga. App. 339, 638 S.E.2d 791 (2006).

Failure of other jury to return guilty verdict. — O.C.G.A. § 24-9-83 does not allow the impeachment of a witness by the mere showing that a jury which has previously heard the same testimony in another context in another trial failed to return a verdict of guilty. An acquittal merely exempts a defendant from punishment and from another prosecution. It does not necessarily show that defendant was innocent and that, therefore, the state's witnesses did not testify truthfully. *Jones v. State*, 159 Ga. App. 634, 284 S.E.2d 651 (1981).

Testimony of police officers as to prior statements of a witness is admissible as substantive evidence of guilt of the accused in the nature of an admission. *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

Testimony of sheriff's department investigator admitted. — Sheriff's department investigator's explanation of the nature of the interview was highly relevant to whether the statement defendant gave was voluntary. Therefore, the trial court did not abuse the court's discretion in admitting the waiver certificate, even if the admission incidentally placed the defendant's character in issue under O.C.G.A. § 24-9-83. *Bynum v. State*, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Confession of codefendant. — In prosecution for assault with intent to rape, when, on cross-examination, it was brought out that codefendant had made a signed confession, and state then placed codefendant on stand and, after codefendant had denied the

codefendant's and defendant's guilt, confronted the codefendant with sworn confession for purposes of impeachment, such confession was admissible, in view of conflicting evidence as to whether or not it was voluntarily made and was made without fear of injury or hope of reward. *Elliott v. State*, 87 Ga. App. 456, 74 S.E.2d 366 (1953).

Confession of coconspirator. — Admission into evidence of the alleged confession of a coconspirator was not error since the coconspirator had been called by the defense and the district attorney stated that the testimony would be for the sole purpose of impeachment. *Hodge v. State*, 149 Ga. App. 326, 254 S.E.2d 478 (1979).

While dying declaration of the person slain may be subject to impeachment, where under the facts of the case the evidence that deceased "brought" a witness some liquor on the day of the killing was not relevant for that purpose; nor was it admissible to show the violent character of the deceased. *Green v. State*, 195 Ga. 759, 25 S.E.2d 502 (1943).

Hearsay statements inadmissible. — Statements made by defendant in the course of an earlier recorded meeting with the witness were hearsay and could not be used to impeach the witness. *Willett v. State*, 223 Ga. App. 866, 479 S.E.2d 132 (1996).

A victim advocate's testimony that a domestic abuse victim had told the advocate that the defendant was drunk when the defendant hit the victim was hearsay and not admissible as a prior inconsistent statement of the victim, because the victim did not testify as to whether or not the defendant was drunk. However, counsel's failure to object was not ineffective assistance because there was no showing of a reasonable probability that the result would have been different if the jury thought defendant was drunk or not at the time of the incident. *Miller v. State*, 300 Ga. App. 652, 686 S.E.2d 302 (2009).

Hearsay admissible for impeachment. — Testimony which consisted of declarations by one who was not a party to the case is ordinarily classed as hearsay but is admissible for the sole purpose of impeachment. *Wiggins v. Lord*, 87 Ga. App. 486, 74 S.E.2d 389 (1953); *Simmons v. State*, 139 Ga. App. 180, 228 S.E.2d 185 (1976).

Letters not inconsistent. — Letters defendant wrote to other inmates were improperly

Admissibility of Statement (Cont'd)**2. What Statements Admissible (Cont'd)**

admitted as impeachment evidence because the state claimed that the letters were admissible to impeach defendant's testimony that defendant did not have an extramarital affair and that because the husband had raped defendant, defendant did not enjoy sexual intercourse; the letters did not contain any statements regarding the alleged affair or rape, were not inconsistent with defendant's testimony, and did not address issues in the trial. *Sammons v. State*, 279 Ga. 386, 612 S.E.2d 785 (2005).

Silence as previous statement. — It is error to permit cross-examination of a defendant for impeachment purposes regarding defendant's silence or failure to offer an exculpatory statement, at the time of defendant's arrest, including a defendant who was not apprised of defendant's Miranda rights. *Harrison v. State*, 154 Ga. App. 343, 268 S.E.2d 396 (1980).

Evidence of gang membership admissible. — Because evidence of defendant's gang membership was admissible both as part of the *res gestae* of the crime and to show motive, the trial court properly denied defendant's motions in limine and for a new trial, even though the evidence implicated defendant's character. *Garibay v. State*, 275 Ga. App. 170, 620 S.E.2d 424 (2005).

Effect of counteraffidavit, see *Gardner v. Grannis*, 57 Ga. 539 (1876); *Brantley v. State*, 16 Ga. App. 6, 84 S.E. 131 (1915).

Foundation

Purpose of foundation. — Foundation that statute requires be laid before contradictory statements may be proved to impeach a witness is for the purpose of giving the witness the opportunity to correct and explain the witness's evidence. *Estill v. Citizens & S. Bank*, 153 Ga. 618, 113 S.E. 552 (1922); *State Farm Mut. Auto. Ins. Co. v. Rogers*, 105 Ga. App. 778, 125 S.E.2d 893 (1962).

Laying foundation required. — Witness cannot be impeached by proof of contradictory statements without laying a foundation with the particularity prescribed by statute. *Williams v. Turner*, 7 Ga. 348 (1849); *Floyd v. Wallace*, 31 Ga. 688 (1861); *Taylor v. State*, 110 Ga. 150, 35 S.E. 61 (1900); *Raleigh &*

G.R.R. v. Bradshaw, 113 Ga. 862, 39 S.E. 555 (1901); *Georgia, Fla. & Ala. Ry. v. Sasser*, 4 Ga. App. 276, 61 S.E. 505 (1908); *Luke v. Cannon*, 4 Ga. App. 538, 62 S.E. 110 (1908); *Glover v. State*, 137 Ga. 82, 92 S.E. 926 (1911); *White v. Knapp*, 31 Ga. App. 344, 120 S.E. 796 (1923); *Stewart v. Avery*, 38 Ga. App. 431, 144 S.E. 218 (1928); *Johnson v. Roberson*, 88 Ga. App. 548, 77 S.E.2d 232 (1953); *Morris v. State*, 228 Ga. 39, 184 S.E.2d 82 (1971), cert. denied, 405 U.S. 1050, 92 S. Ct. 1511, 31 L. Ed. 2d 786 (1972).

Trial court did not err in failing to allow the defendant to testify as to a prior inconsistent statement made by the victim during a preliminary inquiry hearing where the foundation requirement of O.C.G.A. § 24-9-83 was not met, since the victim was not questioned about the victim's prior inconsistent statement, and thus was afforded no opportunity to explain or deny the statement before it was offered at trial to impeach the victim. *Horne v. State*, 204 Ga. App. 81, 418 S.E.2d 441 (1992); *Searcy v. State*, 214 Ga. App. 620, 448 S.E.2d 468 (1994).

Impeachment with recorded statement not permitted. — Trial court did not err in refusing to allow impeachment of plaintiff with a statement made in a tape recorded interview after the investigator who conducted the interview was not available to testify, the transcript contained many indications of omissions and indecipherable speech, and the tape itself was barely audible. *Georgia Ports Auth. v. Harris*, 243 Ga. App. 508, 533 S.E.2d 404 (2000).

Police report of an investigating officer, which allegedly contained prior inconsistent statements of witnesses, was not allowed into evidence because defense counsel failed to lay the proper foundation for the admission of the report. *Armour v. State*, 265 Ga. App. 569, 594 S.E.2d 765 (2004).

Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under O.C.G.A. § 24-9-83, was properly admitted as part of the *res gestae* under O.C.G.A. § 24-3-3 because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence. *Stubbs v. State*, 293 Ga. App. 692, 667 S.E.2d 905 (2008).

Foundation for impeachment by prior inconsistent statements is as follows: the cross-examiner will ask the witness whether the witness made the alleged statement, giving its substance, and naming the time, the place, and the person to whom made; if the witness denies the making of the statement, or fails to admit the statement, then the requirement of “laying the foundation” is satisfied and the cross-examiner, at the next stage of giving evidence, may prove the making of the alleged statement. *Carter v. State*, 244 Ga. 803, 262 S.E.2d 109 (1979); *Sell v. State*, 156 Ga. App. 333, 274 S.E.2d 723 (1980).

When prior inconsistent statement becomes admissible. — Prior inconsistent statement of a witness becomes admissible when the witness denies having made the statement. *Pembroke Mgt., Inc. v. Cossaboon*, 157 Ga. App. 675, 278 S.E.2d 100 (1981).

Prior contradictory statement of a witness does not become contradictory or exculpatory until the witness testifies. *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

State properly questioned defendant’s mother as to whether the mother believed that the crimes defendant was on trial for were gang-related as the question was asked for the purpose of laying a foundation to introduce the mother’s prior inconsistent statement after the mother had testified in response to a defense question that the mother did not believe that defendant was involved in gang activity, pursuant to O.C.G.A. §§ 24-9-81 and 24-9-83. *Garrett v. State*, 280 Ga. 30, 622 S.E.2d 323 (2005).

There was no requirement under O.C.G.A. § 24-9-83 that the witness deny making any statement at all, and a trial court properly allowed the state to introduce a videotape of a pretrial statement given by the state’s own witness who admitted during the witness’s testimony that the witness made the statement, but testified that the witness lied to the police when doing so; the prior inconsistent statement was admissible as substantive evidence, and no instruction that the statement was admitted solely for purposes of impeachment, but not as substantive evidence, would have been appropriate. *Cummings v. State*, 280 Ga. 831, 632 S.E.2d 152 (2006).

Trial court did not err in allowing hearsay testimony from the defendant’s siblings regarding their father’s prior inconsistent statements about the incidents leading up to the charges filed, and the state laid the proper foundation for this testimony as: (1) the statements at issue contradicted the victim’s in-court testimony and were certainly relevant; (2) the victim denied making these statements; and (3) the victim’s explanation of the incident as an accident was elicited on cross-examination, and hence, such was sufficient to provide the foundational requirement that the witness be given the opportunity to admit, explain, or deny the prior statements. Therefore, the three requirements for admissibility were met. *Buchanan v. State*, 282 Ga. App. 298, 638 S.E.2d 436 (2006).

With regard to a defendant’s convictions for murder, felony murder, aggravated assault, and armed robbery, the trial court did not err by admitting certain prior inconsistent statements made by a witness with regard to seeing the defendant with a gun as both impeachment and substantive evidence because the witness was presented with the witness’s prior contradictory statement and was allowed to fully review it after being reminded of the time, place, person, and circumstance of the statement. After that review, the witness testified that the witness was both familiar with the statement and that the statement was fair and accurate, although the witness continued to question the statement’s contents; therefore, under those circumstances, an adequate foundation was laid for the statement to be used as impeachment evidence, and, since the witness was available at trial for cross-examination, the statement was also properly admitted as substantive evidence for the jury’s consideration. *McKnight v. State*, 283 Ga. 56, 656 S.E.2d 830 (2008).

Statement need not be introduced prior to questioning. — It is not necessary to admit the alleged inconsistent statement into evidence before questioning the witness about the statement. *Harden v. State*, 166 Ga. App. 536, 304 S.E.2d 748 (1983).

Trial court erred by limiting defendant’s cross-examination of a witness by not allowing the use of an alleged prior inconsistent statement contained in a document which defendant refused to tender into evidence.

Foundation (Cont'd)

Duckworth v. State, 268 Ga. 566, 492 S.E.2d 201 (1997).

Trial court's error in requiring defendant to tender statements of victims into evidence before using prior inconsistencies allegedly contained therein for impeachment purposes was harmless since the subsequently tendered statements were used in cross-examination of the victims. Maxwell v. State, 233 Ga. App. 419, 503 S.E.2d 668 (1998).

In order to lay the foundation for impeaching a witness with a prior inconsistent statement, the cross-examiner must show the written contradictory statement to the witness or read the statement in his or her hearing; the attorney need not introduce the prior written statement into evidence before using the statement to impeach the witness. Robinson v. State, 265 Ga. App. 481, 594 S.E.2d 696 (2004).

Requirements as to laying of foundation fulfilled. — See Peterson v. State, 166 Ga. App. 719, 305 S.E.2d 447 (1983); Meschino v. State, 259 Ga. 611, 385 S.E.2d 281 (1989); Ward v. State, 271 Ga. 648, 520 S.E.2d 205 (1999).

Proper foundation was laid before evidence impeaching defendant admitted. Eller v. State, 183 Ga. App. 724, 360 S.E.2d 53 (1987).

Trial court properly admitted a portion of a witness's written statement as a prior inconsistent statement under O.C.G.A. § 24-9-83 because the state laid the appropriate foundation for the admission of the statement and the witness attempted to explain the inconsistency. Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398 (2006).

Foundation for the use of a prior videotaped statement by a defendant's accomplice to impeach the accomplice's trial testimony was established by the accomplice when the accomplice testified that the accomplice had in fact given a videotaped statement in which the accomplice stated that the defendant was the one who shot and killed a community service officer, and there was no requirement that the accomplice actually reviewed the videotape before the videotape was used to impeach the accomplice. Byrum v. State, 282 Ga. 608, 652 S.E.2d 557 (2007).

Trial court's admission of the victim's

prior inconsistent statement to a police investigator regarding the events surrounding the crime charged was proper as the prosecutor questioned the victim at considerable length regarding the statement, a tape recording of the victim's 9-1-1 call was played, and then, the prosecutor questioned the victim in detail regarding the contents of the earlier statement which the victim denied making. Gooch v. State, 289 Ga. App. 74, 656 S.E.2d 214 (2007).

No proper foundation was laid for proof of contradictory statement. Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth., 168 Ga. App. 202, 308 S.E.2d 547 (1983).

Although witness one, who made a prior inconsistent statement was present and available for cross-examination, introduction of the prior inconsistent statement through witness two was improper because witness one testified before the issue of the alleged statement to witness two had been raised, and witness one was never questioned with the specificity necessary to establish the foundation for admission of the alleged prior inconsistent statement. Edmond v. State, 283 Ga. 507, 661 S.E.2d 520 (2008).

Defendant failed to properly impeach defendant's witness by proof of previous contradictory statement, for while defendant put another witness on the stand who professed that the witness overheard the allegedly inconsistent statement, the defendant never, on direct examination, asked the original witness questions concerning the time, place, or circumstances attending the former statement, nor did the defendant bring the witness back to the witness stand for further questioning along this line. Smith v. State, 171 Ga. App. 758, 321 S.E.2d 213 (1984).

Failure to lay proper foundation to impeach witnesses not ineffective assistance of counsel because different outcome would not result. — Although a trial counsel's attempts to impeach two witnesses revealed a clear misunderstanding as to the steps necessary for proper impeachment, pursuant to O.C.G.A. § 24-9-83, such that the impeachment evidence was not allowed by the trial court, that did not establish ineffective assistance of counsel as defendant failed to show that the outcome of the trial would have been different. Lemming v. State, 272 Ga.

App. 122, 612 S.E.2d 495 (2005), overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Failure to challenge evidence of non-adjudicated crime was ineffective assistance of counsel. — Defendant's convictions for armed robbery, aggravated assault, and kidnapping of a couple in a residence were reversed on appeal as evidence that one victim was ordered from a standing to a lying position and that another was dragged around the home was insufficient to establish asportation to support the kidnapping counts since the movement was short in duration and incidental to the crimes of armed robbery and aggravated assault. The defendant's convictions for armed robbery and aggravated assault were reversed, however, as the defendant established that the defendant was rendered ineffective assistance of counsel based on trial counsel's failure to object to the inadmissible hearsay statements of two witnesses, and the admission of improper impeachment evidence against the defendant regarding a crime for which the defendant was never adjudicated guilty for as a result of being a first offender at the time. *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008).

It is not error to exclude a preliminary hearing transcript offered to impeach a witness where a proper foundation is not laid. *Sosebee v. State*, 169 Ga. App. 370, 312 S.E.2d 853 (1983).

Circumstances attending statement. — If the witness had made a contradictory statement, it was proper for counsel for defendants to call to the witness's attention the name of the person or company to whom made, and the circumstances attending the statement. *Sweet v. Awtrey*, 70 Ga. App. 334, 28 S.E.2d 154 (1943).

Personal opinions of witnesses. — Because the personal opinions of three potential witnesses were based on the defendant's work, and the limited interactions attendant thereto, and the witnesses could not offer any opinion and had no personal knowledge of the defendant's general reputation in the community, the failure to call the witnesses at trial for that purpose did not prejudice defendant's case. *Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

Recall of witness to lay foundation. — Trial court erred in refusing to allow the

defense to recall a prosecution witness to lay a foundation for admission of prior contradictory statements; the court's ruling forced defendant to choose between testifying personally or foregoing the admission of relevant evidence. *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996).

Submitting writing to witness. — Statute was violated after counsel questioned the witness concerning contents of a letter prior to the letter's exhibition to the witness. *Stamper v. Griffin*, 12 Ga. 450 (1853).

Reading statement to witness. — Though a written statement not under oath must be read in the hearing of the witness, one under oath and made in connection with some judicial proceeding need not be read to the witness. *Wilkerson v. State*, 73 Ga. 799 (1884); *Washington v. State*, 124 Ga. 423, 52 S.E. 910 (1905).

To lay the proper foundation for the admission of a prior written inconsistent statement, it must be shown to the witness, or read in the witness's hearing. *Davis v. State*, 235 Ga. App. 256, 510 S.E.2d 537 (1998).

After counsel read five sentences from a police officer's report during cross-examination of that witness, it was held not to be evidence, but foundational language as contemplated by O.C.G.A. § 24-9-83. *Davis v. State*, 235 Ga. App. 256, 510 S.E.2d 537 (1998).

Court would reject the contention that the defendant had two deputies read paragraphs from their police reports into evidence simply to lay the required evidentiary foundation for impeaching the deputies with their prior inconsistent statements since defense counsel went beyond "mere cross-examination" and did more than recall a contradiction to the deputies by reading their prior inconsistent statements to them where counsel had each deputy read into evidence paragraphs taken from police reports that had been marked and handled before the jury as defense exhibits and, further, those paragraphs contained information addressing matters other than the challenged contradictory statements. *Aldridge v. State*, 237 Ga. App. 209, 515 S.E.2d 397 (1999).

Technical variance in the name stated by the witness as that of the person to whom a statement had been made and the witness's name when introduced for purposes of im-

Foundation (Cont'd)

peachment will not prevent the laying of a proper foundation when there is no real doubt that the two names belong to the same person. *Taylor v. State*, 135 Ga. 622, 70 S.E. 237 (1911).

Witness failing to recall previous statements. — Proof that a witness made previous statements contradictory to the statements the witness made while testifying is admissible, though the witness testifies the witness does not remember whether or not the witness made such previous contradictory statements. *Waycaster v. State*, 136 Ga. 95, 70 S.E. 883 (1911); *Estill v. Citizens & S. Bank*, 153 Ga. 618, 113 S.E. 552 (1922); *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 145 Ga. App. 309, 243 S.E.2d 577 (1978).

Impeaching evidence not called to witness's mind. — When a written statement of a witness is introduced in evidence by agreement of counsel, admitting not that the statement is true, but that the writing shows what the witness would testify at the trial if present, the statement is subject to impeachment even though the impeaching evidence cannot be called to the witness's mind on cross-examination in the manner provided by statute. *Travelers Ins. Co. v. Miller*, 104 Ga. App. 554, 122 S.E.2d 268 (1961).

No contradictory statement. — When no statement was made by the witness which could be contradicted, no foundation could be laid for impeachment purposes. *Casey v. State*, 133 Ga. App. 161, 210 S.E.2d 375 (1974); *Hardeman v. Metropolitan Atlanta Rapid Transit Auth.*, 157 Ga. App. 271, 277 S.E.2d 65 (1981).

Since the police officer made no statement on an audiotape that differed materially from the officer's in-court testimony, and the officer did not deny any statement made earlier, the foundation for the admission of the audiotape was not made, and it was properly excluded. *Ow v. State*, 255 Ga. App. 98, 564 S.E.2d 512 (2002).

Inaccessibility of witness at the time it is sought to lay this foundation does not justify a departure from statute. *Georgia, Fla. & Ala. Ry. v. Sasser*, 4 Ga. App. 276, 61 S.E. 505 (1908).

Testimony only by deposition. — When the plaintiff testified only by deposition, and

plaintiff had not been examined in respect to the statements contained in document, and plaintiff had not been confronted with the document by which it was sought to impeach plaintiff's testimony, or apprised of the contention that its effect was to contradict plaintiff's statements, the rule forbidding use of contradictory statements to impeach evidence taken by deposition is applicable. *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939).

Inconsistency established via medical records. — In a personal injury action, if defendant is able to demonstrate that plaintiff, in fact, was the source of the statements in plaintiff's medical records, so that the statements constitute prior inconsistent statements, the medical records would be admissible to attack plaintiff's credibility as prior inconsistent statements under O.C.G.A. § 24-9-83. *Barone v. Law*, 242 Ga. App. 102, 527 S.E.2d 898 (2000).

Time. — When the foundation has been laid for impeaching a witness, the witness called to prove the different statements will not be confined to any particular time. *Thomasson v. Driskell*, 13 Ga. 253 (1853).

Jury should be sent out. — If it is necessary to read the statement in order to determine whether the witness signed the statement, the jury should be sent out while the reading takes place. *Robinson v. State*, 120 Ga. 311, 47 S.E. 968 (1904).

Harmless error. — When the time, place, person, and circumstances attending a former contradictory statement made by a witness is not called to the witness's mind with as much certainty as possible, the subsequent statement cannot be impeached; however, when this evidence was admissible as a matter of substantive law, though the procedure through which it was admitted was not correct, its improper admission was harmless error. *Felts v. State*, 244 Ga. 503, 260 S.E.2d 887 (1979).

Reversible error not found. — Even though defendant failed to lay a foundation prior to using contradictory statements to impeach plaintiff's expert witness, it was not reversible error because the questioning complained of was elicited by plaintiff during cross-examination of the witness. *Spearman v. Georgia Bldg. Auth.*, 224 Ga. App. 801, 482 S.E.2d 463 (1997).

Sustaining Witness

Introduction of entire former statement.

— When it is sought to impeach a witness by proving contradictory statements made by the witness under oath, it is competent to bring out all the testimony given by the witness on the former hearing, upon the point in question, in order to show that on the whole it is not inconsistent with the testimony of the witness given at the trial in progress. *Lowe v. State*, 97 Ga. 792, 25 S.E. 676 (1896); *Wynes v. State*, 182 Ga. 434, 185 S.E. 711 (1936).

No variance in testimony. — It is a defense to the witness to show there is no variance in the testimony. *Brantley v. State*, 133 Ga. 264, 65 S.E. 426 (1909), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

Prior consistent statements. — Witness sought to be impeached by proof of contradictory statements cannot be supported by proof that the witness made elsewhere other statements consistent with the witness's testimony on the stand. *Fussell v. State*, 93 Ga. 450, 21 S.E. 97 (1893); *Cook v. State*, 124 Ga. 653, 53 S.E. 104 (1906); *Smith v. State*, 7 Ga. App. 252, 66 S.E. 556 (1909), later appeal, 7 Ga. App. 802, 68 S.E. 334 (1910); *Cobb v. State*, 11 Ga. App. 52, 74 S.E. 702 (1912); *Douglas v. Herringdine*, 117 Ga. 72, 159 S.E.2d 711 (1967).

Admission of testimony by an officer who spoke with a child molestation victim was proper to show that the victim's prior statement of what occurred that was made to the officer was consistent with the dates the victim testified to on direct examination and which were directly challenged during cross-examination; the officer's testimony was limited to the credibility issue raised in the victim's cross-examination and was not a bolstering of the victim's general credibility. *Joines v. State*, 264 Ga. App. 558, 591 S.E.2d 454 (2003).

Testimony by one officer regarding what a witness told another officer was admissible under the prior consistent statement exception to the hearsay rule since the witness's veracity was placed in issue and the witness was subject to cross-examination. *Johnson v. State*, 265 Ga. App. 777, 595 S.E.2d 625 (2004).

When evidence of good character admissible. — When it is sought to impeach a

witness by proof of contradictory statements, this renders admissible in the witness's favor testimony as to the witness's general good character. *Bell Bros. v. Aiken*, 1 Ga. App. 36, 57 S.E. 1001 (1907); *Georgia Life Ins. Co. v. McCranie*, 12 Ga. App. 855, 78 S.E. 1115 (1913); *Ricks v. State*, 70 Ga. App. 395, 28 S.E.2d 303 (1943).

Reputation for truth and veracity.

— When evidence of contradictory statements by a witness is offered by way of impeaching the witness's veracity, general evidence that the witness is a man of truth and veracity may be admitted, controverted, and denied. *Stamper v. Griffin*, 12 Ga. 450 (1853).

Evidence of veracity where credibility not attacked.

— Until the adverse party attacks the credibility of a witness, either for bad character or because of contradictory statements, the party calling the witness cannot introduce evidence in support of the witness's character for veracity. *P.D. v. State*, 151 Ga. App. 662, 261 S.E.2d 413 (1979).

Proof of good character. — See *Price v. State*, 72 Ga. 441 (1884); *Clark v. State*, 117 Ga. 254, 43 S.E. 853 (1903); *Gordon v. State*, 10 Ga. App. 35, 72 S.E. 544 (1911); *Haywood v. State*, 12 Ga. App. 240, 76 S.E. 1077 (1913).

Testimony under oath from witness who accepted plea bargain.

— With regard to defendant's conviction for trafficking in methamphetamine, the trial court properly denied defendant's motion for a new trial, and did not err by allowing the testimony of a defense witness taken under oath when that witness entered into a plea agreement as, although the trial court initially determined that some of the defense witness's statements were inadmissible, the statements regarding prior drug dealings between the defense witness and defendant became admissible for impeachment purposes since the defense witness personally contradicted the witness's own testimony. *Corn v. State*, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

Instructions

Charging statute not required. — There is no error in failing to charge this statute in the absence of an appropriate written request. *Western & Atl. R.R. v. Holt*, 22 Ga. App. 187, 95 S.E. 758 (1918); *Carson v. State*, 22 Ga. App. 743, 97 S.E. 202 (1918); *Lee v. State*, 37 Ga. App. 632, 141 S.E. 317 (1928);

Instructions (Cont'd)

Smith v. State, 79 Ga. App. 595, 54 S.E.2d 378 (1949); Hinton v. State, 85 Ga. App. 249, 69 S.E.2d 116 (1952); Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276 (1954) (see O.C.G.A. § 24-9-83).

Failure to charge all modes of impeachment. — When the judge having charged correctly upon one of the modes or methods of impeachment, to wit, impeachment by contradictory statements, the judge's failure to charge also upon the other modes of impeachment of disproving facts testified to by the witness, and also on the method of impeachment when a witness's testimony shall be disregarded entirely, is not reversible error in the absence of a request. Hall v. Burpee, 176 Ga. 270, 168 S.E. 39 (1933); Milwaukee Mechanics Ins. Co. v. Davis, 79 Ga. App. 70, 52 S.E.2d 643 (1949).

Failure to give pattern instruction on impeachment proper. — In a married couple's personal injury case, the trial court did not err in not giving parts of the pattern charge on impeachment requested by an insurance carrier on the ground that the couple's trial testimony contradicted their previous statements or actions. Because the carrier did not offer evidence that disproved the facts to which the couple testified, the portion of the charge that pertained to impeachment by disproving facts was not applicable, and the trial court was thus authorized to refuse the entire charge; furthermore, the trial court's charge to the jury that the jury could consider the witnesses' manner of testifying and demeanor as well as the probability or improbability of their testimony and their personal credibility adequately covered the necessary principles. Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518 (2008).

No evidence of good character. — Charge may omit the part of this statute which relates to sustaining the witness by proof of general good character, since there was no such evidence of general good character of a witness thus attacked. Reeves v. State, 22 Ga. App. 628, 97 S.E. 115 (1918); Geer v. State, 184 Ga. 805, 193 S.E. 776 (1937); Jones v. State, 193 Ga. 449, 18 S.E.2d 844 (1942); Knight v. State, 92 Ga. App. 785, 90 S.E.2d 46 (1955).

No evidence of bad character. — In charging upon the law of impeachment of wit-

nesses, where the court charges as to impeachment by disproving facts testified to, and by contradictory statements, it is not error, but is proper, to omit to charge the law of impeachment by proof of general bad character, since there is no evidence seeking to impeach any witness upon that ground. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, Milton v. State, 245 Ga. 20, 262 S.E.2d 789 (1980).

Charge on relevant testimony not required. — Charge need not be qualified by a statement that only relevant testimony could be contradicted where impeachment of irrelevant evidence was not attempted. Tucker v. Central of Ga. Ry., 122 Ga. 387, 50 S.E. 128 (1905); Goldberg v. State, 22 Ga. App. 122, 95 S.E. 541 (1918).

Lack of convictions insufficient for charge. — Merely having no convictions or a clean record was insufficient for defendant to invoke good character; consequently, the trial court did not err by refusing to give defendant's requested charge. Godsey v. State, 271 Ga. App. 663, 610 S.E.2d 634 (2005).

Corroboration unnecessary. — When instructing the jury on the method of impeachment provided for by statute it is error for the court to instruct the jury that, if the jury believes a witness has made previous statements contradictory to the witness's testimony delivered on the trial, such testimony should be disregarded, unless the testimony is corroborated by other credible evidence, or is corroborated by the proven circumstances in the case. Ricks v. State, 70 Ga. App. 395, 28 S.E.2d 303 (1943).

Former trial. — In criminal prosecution, court's charge to the effect that jury should not consider anything said or done in former trial of case was not an infringement and invasion of the province of the jury trying the case, notwithstanding contention that had the jury been allowed to consider testimony from former trial, jury could have concluded that the evidence in the present trial was inconsistent and contradictory to evidence and statements made by prosecution witness previously and thus could have believed the statement of the defendant. Crosby v. State, 92 Ga. App. 335, 88 S.E.2d 523 (1955).

Charge alluding to particular witness. — When there exists a difference between op-

posing counsel as to whether there is a discrepancy between the testimony of a witness and a previous statement alleged to be contradictory of the testimony, the court in the charge may allude to the particular witness. *Walker v. State*, 137 Ga. 398, 73 S.E. 368 (1912).

Curative instruction. — Trial court properly denied the defendant's motion for a mistrial based on a claim that a friend's testimony improperly interjected character evidence as a curative instruction given by the trial court was an adequate remedy. *Reid v. State*, 281 Ga. App. 640, 637 S.E.2d 62 (2006).

Trial court erred in denying the defendant's motion for a mistrial after a state's witness impermissibly interjected the defendant's character into evidence by referring to the defendant's prior arrest record. Although the trial court gave the jury a curative instruction informing them that the testimony regarding the defendant's prior arrest history was improper, could not be considered in determining guilt or innocence in the case, and was required to be disregarded; the trial court further polled the jury to determine whether they could abide by the curative instructions and render a verdict based upon the competent evidence duly admitted, and all of the jurors indicated that they could follow the curative instructions. *Kohler v. State*, 300 Ga. App. 692, 686 S.E.2d 328 (2009).

Limiting instruction required for Miranda-violating prior statements. — When prior inconsistent statements are used to impeach trial statements, a limiting instruction is required even absent a request. The significance of not so limiting the jury's consideration would be to allow a Miranda-violating statement to be used as substantive evidence. However, if the statement is found by the trial court not to have been obtained in violation of the defendant's rights against self-incrimination, the court need not give a limiting instruction absent defendant's request. *Fussell v. State*, 187 Ga. App. 134, 369 S.E.2d 511 (1988).

Function of Jury

Impeachment and credibility are questions for jury when a witness is sought to be impeached by reason of having previously

made contradictory statements out of court as to matters relevant to the witness's testimony and to the case. *King v. State*, 163 Ga. 313, 136 S.E. 154 (1926); *United Motor Freight Term Co. v. Hixon*, 78 Ga. App. 638, 51 S.E.2d 679 (1949); *Champion v. State*, 84 Ga. App. 163, 65 S.E.2d 280 (1951); *Wynn v. Johns*, 97 Ga. App. 605, 104 S.E.2d 150 (1958); *Travelers Ins. Co. v. Miller*, 104 Ga. App. 554, 122 S.E.2d 268 (1961).

Question for jury or court. — When contradictory statements are established as having been made by a witness, it then becomes a question for the jury as to whether or not such witness has been successfully impeached; if such contradiction is not on matters relevant to the witness's testimony and to the case, or if the prior statement fails to amount to a contradiction at all, the question of whether or not the witness has been successfully impeached is then one of law for the court. *Travelers Ins. Co. v. Bailey*, 76 Ga. App. 698, 47 S.E.2d 103 (1948).

Testimony need not be excluded. — When a state's witness is impeached, the effect of the impeaching evidence is to be determined by the jury, and the testimony of the witness need not be excluded. *Henrich v. McCouley*, 151 Ga. 138, 106 S.E. 94 (1921); *Griffin v. State*, 123 Ga. App. 820, 182 S.E.2d 498 (1971).

Jury may believe witness. — Question of credibility is always for the jury, and though a witness swore falsely on the other trial, the witness's contention that it was under duress may cause the jury to believe the witness. *Williams v. State*, 69 Ga. 11 (1882).

Accepting part of testimony. — Jury may believe part of the testimony and disbelieve other parts. *Atlantic Coast Line R.R. v. Heyward*, 82 Ga. App. 337, 60 S.E.2d 641 (1950).

When testimony is disregarded, the jury must place that testimony in the same category as if the witness had not testified at all. *Harper v. State*, 85 Ga. App. 252, 69 S.E.2d 102 (1952).

When prior statement fails to amount to contradiction, the fact-finding tribunal cannot disregard the testimony of the witness, and when facts sufficient to support an issue have thus been testified to, such issue has, prima facie, been established. *Travelers Ins. Co. v. Bailey*, 76 Ga. App. 698, 47 S.E.2d 103 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 362, 365 et seq., 663. 81 Am. Jur. 2d, Witnesses, §§ 218, 423 et seq., 458 et seq., 501, 505.

ALR. — May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him, 66 ALR 289; 158 ALR 820.

Instruction regarding good or bad character of witnesses as affecting their credibility, 120 ALR 1442.

Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, 133 ALR 1454.

Right to show in civil case that party or witness refused to testify on same matter under claim of privilege in previous criminal proceeding, 2 ALR2d 1297.

Binding effect, upon party litigant, of testimony of his witnesses at a former trial, 74 ALR2d 521.

Impeachment of accused as witness by use of involuntary or not properly qualified confession, 89 ALR2d 478.

Admissibility of testimony as to general reputation at place of employment, 82 ALR3d 525.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 ALR3d 934.

Admissibility of evidence of character of or reputation of party to civil action for sexual assault on issues other than impeachment, 100 ALR3d 569.

Admissibility of affidavit to impeach witness, 14 ALR4th 828.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case — modern state cases, 30 ALR4th 414.

Admissibility of impeached witness's prior consistent statement — modern state criminal cases, 58 ALR4th 985; 59 ALR4th 1000.

Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of a witness's prior consistent statement, 47 ALR Fed 639.

24-9-84. How witness impeached — Reputation as bad character; limitations; procedure; how witness sustained; when particular transactions or individual opinions may be inquired of.

Any party may impeach the credibility of a witness by offering evidence of the witness's bad character in the form of reputation, but subject to the following limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness;

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise;

(3) In a criminal case, the character for untruthfulness of the defendant may be introduced in evidence only if the defendant testifies and offers evidence of his or her truthful character; and

(4) The character witness should first be questioned as to his or her knowledge of the general character of the witness, next as to what that character is, and lastly the character witness may be asked if from that character he or she would believe him or her on his or her oath. The witness may be sustained by similar proof of character. The particular transactions or the opinions of single individuals shall not be inquired of on either side, except upon cross-examination in seeking for the extent

and foundation of the witness's knowledge. (Orig. Code 1863, §§ 3795, 3797, 3798; Code 1868, §§ 3815, 3817, 3818; Code 1873, §§ 3871, 3873, 3874; Code 1882, §§ 3871, 3873, 3874; Civil Code 1895, § 5293; Penal Code 1895, § 1027; Civil Code 1910, § 5882; Penal Code 1910, § 1053; Code 1933, § 38-1804; Ga. L. 2005, p. 20, § 16/HB 170.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2005, subsections (a) through (d) were redesignated as paragraphs (1) through (4).

Editor's notes. — Ga. L. 2005, p. 20, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all trials which commence on or after July 1, 2005.

Law reviews. — For article on the effect of a conviction that is based on a nolo

contendere plea, see 13 Ga. L. Rev. 723 (1979). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For survey article on evidence law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 249 (2003). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007).

For comment on *Lynn v. State*, 231 Ga. 559, 203 S.E.2d 221 (1974), see 8 Ga. L. Rev. 973 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PROOF OF BAD CHARACTER

PROOF OF GOOD CHARACTER

General Consideration

In general. — General character of a witness, when that character is put in issue, is a proper mode of ascertaining that weight that should be attached to the witness's testimony. *Simpson v. State*, 78 Ga. 91 (1886).

Any witness, other than an accused, may be discredited by evidence of bad character and by convictions involving moral turpitude. *Beasley v. State*, 168 Ga. App. 255, 308 S.E.2d 560 (1983); *Nelson v. State*, 190 Ga. App. 142, 378 S.E.2d 186 (1989).

Scope of section. — Statute specifies the questions to be propounded and "impliedly excludes all others." *Barnwell v. Hannegan*, 105 Ga. 396, 31 S.E. 116 (1898); *Gordon v. Gilmer*, 141 Ga. 347, 80 S.E. 1007 (1914); *Rudolph v. State*, 16 Ga. App. 353, 85 S.E. 365 (1915); *Taylor v. State*, 17 Ga. App. 787, 88 S.E. 696 (1916); *Cameron v. State*, 66 Ga. App. 414, 18 S.E.2d 16 (1941) (see O.C.G.A. § 24-9-84).

O.C.G.A. § 24-9-84 prescribes a specific

progression of questions to be asked when inquiring into the general reputation of a witness for impeachment purposes. *Harper v. State*, 157 Ga. App. 480, 278 S.E.2d 28 (1981).

O.C.G.A. § 24-9-84 requires that the impeaching witness should be first asked as to the impeaching witness's knowledge of the general character of the witness, and next as to what that character is, and lastly the impeaching witness may be asked if, from that character, the impeaching witness would believe the witness on the witness's oath. *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

Character means reputation. — Person's character is not to be proved by asking a witness what kind of a man that person is but the person's "character," as used in legal parlance, is to be proved by asking about the person's "reputation." *P.D. v. State*, 151 Ga. App. 662, 261 S.E.2d 413 (1979).

Evidence as to character is irrelevant and inadmissible unless it is used to show the

General Consideration (Cont'd)

character of the witness for veracity or intended specifically to be used in the impeachment of witnesses for bad character, or equally to rebut an attempt at impeachment by a showing of good character. *Edwards v. Simpson*, 123 Ga. App. 44, 179 S.E.2d 266 (1970).

Contradictory statements as to reputation as affecting witness's credibility. — When witness testified as to defendant's reputation in community, any subsequent contradiction simply went to the witness's credibility with the jury, and it was error for the court to strike such witness's testimony in toto. *Hudson v. State*, 163 Ga. App. 845, 295 S.E.2d 123 (1982).

Limitation of question. — Direct examination to prove the character of the accused must be limited to questions concerning the accused's general reputation in the community in which the accused lives. *Overby v. State*, 125 Ga. App. 759, 188 S.E.2d 910 (1972).

Fact that the witness's "neighborhood" was the penal institution in which the witness was incarcerated and which was composed of the witness's fellow inmates did not negate the fact that the penal institution was the place where people had the best opportunity to form a correct estimate of the witness's character. *Martinez v. State*, 189 Ga. App. 69, 375 S.E.2d 123 (1988).

Nothing in O.C.G.A. § 24-9-84 indicates that the impeaching testimony is limited solely to the reputation of the challenged witness in a neighborhood composed of law abiding citizens. *Martinez v. State*, 189 Ga. App. 69, 375 S.E.2d 123 (1988).

Community was not community at large. — "Classroom community" comprised of students who were removed from the general school population because of special educational needs may not be the "community at large" contemplated by O.C.G.A. § 24-9-84. *Clark v. State*, 225 Ga. App. 851, 485 S.E.2d 543 (1997).

Testimony based on personal opinion. — If, under the entire testimony of a witness, it had appeared that the witness's testimony as to the character and reputation of a party was based entirely on the witness's personal opinion, the trial judge could properly have excluded the witness's testimony. *Gravitt v.*

State, 220 Ga. 781, 141 S.E.2d 893 (1965).

Admission for jury to consider conflicts in evidence. — Expired decal authorizing defendant's use of the wrecker's emergency rotational lights was relevant as going to the likelihood of defendant's pre-collision activation of those lights, as claimed; thus, the evidence was admissible for whatever weight the jury wished to give it in resolving conflicts in the evidence. *Crowe v. State*, 259 Ga. App. 780, 578 S.E.2d 134 (2003).

Character witness gives nonexpert opinion testimony and on cross-examination has the right of all such witnesses to give reasons for the witnesses's opinions. *Banks v. State*, 113 Ga. App. 661, 149 S.E.2d 415 (1966).

Instructions. — When plaintiff introduced evidence as to the bad character of a witness for the defendant to show the witness unworthy of belief and when the court charged the jury that a witness could be impeached by bad character, it was error for the court to fail to charge without request that a witness could be sustained by proof of good character, there being evidence of the witness's good character. *Haynes v. Phillips*, 69 Ga. App. 524, 26 S.E.2d 186 (1943).

If a defendant wishes to have the jury charged that the defendant would not be subject to impeachment pursuant to O.C.G.A. § 24-9-84, the defendant should request such a charge. Absent such a request, the appellate court need not decide whether the defendant was entitled to a jury charge on that issue. *King v. State*, 195 Ga. App. 865, 395 S.E.2d 1 (1990).

Trial court's inclusion in the court's general charge on the various methods of impeachment of a reference to impeachment by proof of a witness's conviction of an offense involving moral turpitude was erroneous since defendant had not put defendant's own character in issue; however, the charge was harmless where, immediately following the reference to impeachment pursuant to O.C.G.A. § 24-9-84, the jury was given extensive instructions as to impeachment by other methods. *Francis v. State*, 266 Ga. 69, 463 S.E.2d 859 (1995).

Trial court did not err in refusing to instruct the jury regarding impeachment by general bad character pursuant to O.C.G.A. § 24-9-84 since neither side relied on that method of impeachment at defendant's trial. *Stinson v. State*, 256 Ga. App. 902, 569 S.E.2d 858 (2002).

Failure to charge statute. — It is not reversible error to fail to charge the law of credibility of witnesses without a written request. *Summerour v. State*, 85 Ga. App. 94, 68 S.E.2d 158 (1951) (see O.C.G.A. § 24-9-84).

Failure to impeach not grounds for reversal. — Even assuming defense counsel's failure to impeach prison rape victim with proof of general bad character as evinced by prior felony convictions fell below a presumed level of competence, the omission did not require reversal and a new trial. *Scott v. State*, 223 Ga. App. 479, 477 S.E.2d 901 (1996).

Alternate objection raised first on appeal. — When defendant contended that the testimony exceeded the proper scope of good character evidence permissible under O.C.G.A. § 24-9-84, but at trial defendant objected to the testimony only on the ground that the testimony was irrelevant, the testimony was not excluded because an alternate objection may not be raised for the first time on appeal. *Reed v. State*, 248 Ga. App. 107, 545 S.E.2d 655 (2001).

Cited in *Gullatt v. State*, 14 Ga. App. 53, 80 S.E. 340 (1913); *George v. McCurdy*, 42 Ga. App. 614, 157 S.E. 219 (1931); *Fanning v. State*, 52 Ga. App. 66, 182 S.E. 410 (1935); *Jefferson Std. Life Ins. Co. v. Bentley*, 55 Ga. App. 272, 190 S.E. 50 (1937); *Simmons v. State*, 58 Ga. App. 413, 198 S.E. 816 (1938); *Whitley v. State*, 188 Ga. 177, 3 S.E.2d 588 (1939); *Brown v. State*, 201 Ga. 313, 39 S.E.2d 693 (1946); *Pan-American Wall Paper & Paint Co. v. Tudor*, 81 Ga. App. 417, 59 S.E.2d 12 (1950); *Reece v. State*, 208 Ga. 165, 66 S.E.2d 133 (1951); *McTyre v. King*, 215 Ga. 417, 110 S.E.2d 651 (1959); *Leverette v. State*, 107 Ga. App. 712, 131 S.E.2d 782 (1963); *Kapplin v. Seiden*, 109 Ga. App. 586, 137 S.E.2d 55 (1964); *Norman v. State*, 121 Ga. App. 753, 175 S.E.2d 119 (1970); *Morris v. State*, 228 Ga. 39, 184 S.E.2d 82 (1971); *Smith v. Federated Mut. Implement & Hdwe. Ins. Co.*, 185 S.E.2d 588 (1971); *Shannon v. Kaylor*, 133 Ga. App. 514, 211 S.E.2d 368 (1974); *Cross v. State*, 136 Ga. App. 400, 221 S.E.2d 615 (1975); *Parks v. State*, 147 Ga. App. 617, 249 S.E.2d 672 (1978); *Brown v. State*, 150 Ga. App. 289, 257 S.E.2d 359 (1979); *Bryan v. Norton*, 245 Ga. 347, 265 S.E.2d 282 (1980); *Singleton v. State*, 158 Ga. App. 383, 280 S.E.2d 407

(1981); *Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983); *Whitlock v. State*, 170 Ga. App. 679, 318 S.E.2d 63 (1984); *Geter v. State*, 174 Ga. App. 694, 331 S.E.2d 68 (1985); *Wood v. State*, 255 Ga. 697, 341 S.E.2d 442 (1986); *Evans v. State*, 180 Ga. App. 1, 348 S.E.2d 561 (1986); *Evans v. State*, 188 Ga. App. 379, 373 S.E.2d 70 (1988); *Baker v. State*, 193 Ga. App. 498, 388 S.E.2d 402 (1989); *Wells v. State*, 261 Ga. 282, 404 S.E.2d 106 (1991); *Shaw v. Hughes*, 199 Ga. App. 212, 404 S.E.2d 309 (1991); *Hicks v. Doe*, 206 Ga. App. 596, 426 S.E.2d 174 (1992); *McDaniel v. State*, 221 Ga. App. 43, 470 S.E.2d 719 (1996); *Haney v. State*, 234 Ga. App. 214, 507 S.E.2d 18 (1998); *Maddox v. State*, 238 Ga. App. 598, 521 S.E.2d 581 (1999); *Long v. State*, 241 Ga. App. 370, 526 S.E.2d 85 (1999); *Porter v. State*, 243 Ga. App. 498, 532 S.E.2d 407 (2000); *Sewell v. State*, 244 Ga. App. 449, 536 S.E.2d 173 (2000); *Gordillo v. State*, 255 Ga. App. 73, 564 S.E.2d 486 (2002); *Madison v. State*, 281 Ga. 640, 641 S.E.2d 789 (2007); *Chandler v. State*, 281 Ga. 712, 642 S.E.2d 646 (2007).

Proof of Bad Character

Bad character means bad moral character.

— General bad character, as a ground of impeachment, refers to general bad moral character, the word “moral” being used in the word’s broadest sense. *Sparks v. Bedford*, 4 Ga. App. 13, 60 S.E. 809 (1908). See also *Allred v. State*, 126 Ga. 537, 55 S.E. 178 (1906).

Bad character does not render a witness incompetent; but the witness’s credibility is for the jury, who may find a verdict on the sole testimony of such witness, unless the Code expressly requires corroboration. *Stone v. State*, 118 Ga. 705, 45 S.E. 630, 98 Am. St. R. 145 (1903). See also *Franklin v. State*, 69 Ga. 36 (1882).

Bad character evidence properly excluded when witness had not yet testified. — Trial court did not err in not allowing a defendant to impeach an inmate witness by showing the inmate’s bad character for truthfulness when the inmate had not yet testified; furthermore, the jail shift supervisor through whom the defendant sought to introduce the impeachment testimony had testified that the supervisor did not know about the inmate’s general character or reputation within the jail community. *Felder v. State*,

Proof of Bad Character (Cont'd)

286 Ga. App. 271, 648 S.E.2d 753 (2007).

How state may prove bad character. — When defendant, in the trial of a criminal case, puts defendant's character in issue, the state (a) may cross-examine the witnesses offered by the defendant in order to test the witness's knowledge of the defendant's character; (b) may also offer witnesses to prove defendant's general bad character; and (c) the state may, when the defendant has been previously convicted of a crime involving moral turpitude, introduce the record of such conviction in the manner provided by law. *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981); *Cunningham v. State*, 182 Ga. App. 591, 356 S.E.2d 542 (1987).

Conviction of an offense involving moral turpitude or a felony is a proper method of showing bad character and tends to impeach the credibility of that witness. *McNeely v. Wal-Mart Stores, Inc.*, 246 Ga. App. 852, 542 S.E.2d 575 (2000).

Specific acts may not be shown. — General bad character of a witness may be shown for the purpose of impeachment, but specific acts cannot be shown for that purpose. *Andrews v. State*, 118 Ga. 1, 43 S.E. 852 (1903); *Haynes v. Phillips*, 67 Ga. App. 574, 21 S.E.2d 261 (1942); *Security Life Ins. Co. v. Newsome*, 122 Ga. App. 137, 176 S.E.2d 463 (1970); *McCarty v. State*, 139 Ga. App. 101, 227 S.E.2d 898 (1976); *Colvin v. State*, 155 Ga. App. 736, 272 S.E.2d 516 (1980). See also *Johnson v. State*, 61 Ga. 305 (1878); *Black v. State*, 119 Ga. 746, 47 S.E. 370 (1904); *Rudolph v. State*, 16 Ga. App. 353, 85 S.E. 365 (1915); *Taylor v. State*, 17 Ga. App. 787, 88 S.E. 696 (1916); *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981); *Heaton v. State*, 214 Ga. App. 460, 448 S.E.2d 49 (1994); *Wetta v. State*, 217 Ga. App. 128, 456 S.E.2d 696 (1995); *Venson v. Georgia*, 74 F.3d 1140 (11th Cir. 1996); *Jones v. State*, 226 Ga. App. 420, 487 S.E.2d 56 (1997); *Johnson v. State*, 244 Ga. App. 128, 534 S.E.2d 480 (2000).

Trial court did not err by not disclosing a disciplinary report in a police officer's personnel file as: (1) no attempt was made to impeach the officer by disproving the facts testified to by the officer under O.C.G.A. § 24-9-82; (2) there was no showing that any of the documents disallowed contained any

contradictory statements previously made by the officer as to matters relevant to the officer's testimony and the case under O.C.G.A. § 24-9-83; (3) there was no contention that the officer had been convicted of a crime involving moral turpitude; and (4) the evidence was, at best, related solely to specific bad acts and not to the general bad character of the officer, which was not admissible as impeachment material under O.C.G.A. § 24-9-84. *Lopez v. State*, 267 Ga. App. 178, 598 S.E.2d 898 (2004).

In response to defendant's claim of self-defense, although evidence of one victim's prior violent acts were excluded because the victim was not the aggressor, the other victim's general reputation for violence was admitted in accordance with O.C.G.A. § 24-9-84. *Quillian v. State*, 279 Ga. 698, 620 S.E.2d 376 (2005).

Precluding defendant's wife from testifying as to specific instances of a child victim's dishonesty was proper since the wife attempted to testify regarding the child's specific problems at school and with discipline, as well as instances of the child's lying and stealing. *Frazier v. State*, 278 Ga. App. 685, 629 S.E.2d 568 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Trial court did not commit reversible error under O.C.G.A. § 24-9-84 in prohibiting defense counsel from asking the state's witness specifically about a prior drug offense when the witness had testified that the witness had not previously been in trouble; generally, questioning a witness about a crime unrelated to the case was impermissible, and the defendant was afforded ample avenues for portraying the witness as biased and motivated to lie. *Curtis v. State*, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, 2007 Ga. LEXIS 203 (Ga. 2007).

Foundation. — References to the impeaching witness's "personal knowledge" of or "association" with the witness that is being impeached serve only to develop a foundation upon which to base the witness's statement as to reputation. Such a foundational line of questioning is not only permitted, but is mandated by statute. *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980).

Knowledge of impeaching witness. — It is error to exclude testimony of a witness intro-

duced for the purpose of impeaching another witness when the impeaching witness testifies that the impeaching witness knows that the witness's general reputation, and that that reputation is not good, and, from the impeaching witness's knowledge of the witness's reputation, the impeaching witness would not believe the witness upon the witness's oath. *Dent v. State*, 14 Ga. App. 269, 80 S.E. 548 (1914).

Opinion based on personal observation inadmissible. — Witness's opinion of a party's character which is based solely upon the witness's personal observation of the party is not an approved mode of character evidence and is subject to being struck. *Gresham v. State*, 169 Ga. App. 525, 314 S.E.2d 111 (1984).

Trial court properly excluded testimony of probation officer's personal opinion as to victim's reputation for general character based upon personal observation coupled with unspecified reports received from unidentified law enforcement officials rendered under undisclosed circumstances. *Bogan v. State*, 206 Ga. App. 696, 426 S.E.2d 392 (1992).

Opinion of single individuals not sufficient. — Person's general bad character and reputation cannot be proved on the opinions of single individuals. *Haynes v. Phillips*, 67 Ga. App. 574, 21 S.E.2d 261 (1942).

Trial court did not err in striking the testimony of a character witness in an assistant professor's action against the Board of Regents (BOR) of the University System of Georgia for breach of an employment contract because there was no abuse of discretion in determining that the testimony that the witness did not know whether the witness would believe the professor under oath did not meet the requirements of O.C.G.A. § 24-9-84; the BOR's counsel acquiesced in the trial court's final ruling on the matter. *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010).

Ill feeling will not impeach. — Witness can be impeached only by proof of general bad character, such as would cause the impeaching witness to disbelieve the witness on oath. A witness cannot be impeached on the ground that the impeaching witness has ill feeling toward the witness it is sought to

impeach because the latter owes the former money and will not pay the impeaching witness. *Haynes v. Phillips*, 67 Ga. App. 574, 21 S.E.2d 261 (1942).

Reputation at place of employment. — When it is sought to impeach a witness by proof of bad character by means of the statutory questions as set forth in statute, a witness who is familiar with the witness's reputation in the place where the witness pursues the witness's regular daily vocation or work may testify as to the witness's reputation in such place, although not familiar with the community in which the witness lives. *Pethel v. State*, 89 Ga. App. 8, 78 S.E.2d 428 (1953); *Bennett v. George*, 105 Ga. App. 527, 125 S.E.2d 122 (1962).

Even though a rebuttal witness had stopped working at the General Motors plant ten years before the trial took place, the trial court did not abuse the court's discretion in allowing the witness to testify regarding a party's reputation at that plant because the witness worked there for 42 years, and kept in touch with the General Motors community since the witness retired by continuing to attend union meetings. *MacGibbon v. Akins*, 245 Ga. App. 871, 538 S.E.2d 793 (2000).

No evidence of bad character. — When there was no evidence before the court which attacked the witness for defendant either for bad character or for contradictory statements, it was not error for the court to refuse to allow the defendant's witness to testify as to the witness's own character for veracity. *P.D. v. State*, 151 Ga. App. 662, 261 S.E.2d 413 (1979).

Admission of first offender record. — In both civil and criminal cases, unless there is an adjudication of guilt, a witness may not be impeached on general credibility grounds by evidence of a first offender record. *Matthews v. State*, 268 Ga. 798, 493 S.E.2d 136 (1997).

Copy of record of conviction must be introduced. — Witness cannot be discredited even by the witness's own testimony that the witness was convicted of a crime involving moral turpitude, rather, it is necessary that a copy of the record of conviction be introduced; accordingly, the testimony of a witness that the witness has done some act that the law makes a crime is not a legal method of impeachment. *Richards v. State*, 157 Ga. App. 601, 278 S.E.2d 63 (1981).

Proof of Bad Character (Cont'd)

Testimony by investigating officer. — When defendant placed defendant's character in issue, the investigating police officer, though not a member of the defendant's community, could be an impeaching witness since the officer testified that the officer possessed personal knowledge of the defendant's character and reputation in the community. *Catchings v. State*, 256 Ga. 241, 347 S.E.2d 572 (1986).

Conviction may be introduced even though appeal pending. — Prior conviction of a witness for a crime involving moral turpitude is admissible for impeachment purposes when, at the time of the proffer thereof, the judgment of conviction is the subject of a pending appeal. *James v. State*, 160 Ga. App. 185, 286 S.E.2d 506 (1981).

Defendant's testimony regarding never being in trouble. — It was not error to admit evidence of defendant's prior assault conviction because the conviction was offered as impeachment evidence rather than evidence of bad character since defendant testified, and defendant's counsel emphasized, that defendant had "never been in trouble." *Walker v. State*, 260 Ga. App. 241, 581 S.E.2d 295 (2003).

Conviction of misdemeanor. — Proof of conviction of a misdemeanor, if it is a crime of moral turpitude, is a proper method of showing "bad character." *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

Misdemeanor crime not involving moral turpitude. — Witnesses could not be impeached by proof of convictions for simple battery and for misdemeanor possession of marijuana which are not crimes involving moral turpitude. *Ely v. State*, 272 Ga. 418, 529 S.E.2d 886 (2000).

Misdemeanor issuance of bad checks is crime of moral turpitude as a matter of law. *Carruth v. Brown*, 202 Ga. App. 656, 415 S.E.2d 470 (1992).

Offense of simple assault is not crime involving moral turpitude. *Polk v. State*, 202 Ga. App. 738, 415 S.E.2d 506 (1992).

Conviction for giving false name admissible to negate good character. — Certified copy of an accusation which shows that the defendant pled guilty to having given a false name to a law enforcement officer is admissible as impeachment evidence against the

defendant when the defendant places the defendant's character in issue by presentation of evidence of good character. *Hicks v. State*, 169 Ga. App. 542, 314 S.E.2d 113 (1984).

Crime of moral turpitude. — Misdemeanor of issuing a bad check in violation of O.C.G.A. § 16-9-20(a) is a crime of moral turpitude and the jury may consider evidence of a witness's guilty plea to such a crime as proof of general bad moral character which tends to impeach the credibility of that witness within the meaning of O.C.G.A. § 24-9-84. *Paradise v. State*, 212 Ga. App. 166, 441 S.E.2d 497 (1994).

When a codefendant is not a witness in the case, the codefendant is not subject to impeachment, and the trial court does not err in refusing to permit another codefendant to impeach the codefendant by a previous conviction of a crime involving moral turpitude. *Moss v. State*, 275 Ga. 96, 561 S.E.2d 382 (2002).

Prior interest in drug trafficking admissible. — When a defendant was charged with marijuana trafficking, testimony that, two years prior to the subject sale of marijuana, the defendant expressed an interest in trafficking in illegal drugs logically tended to disprove the defendant's defense, and thus was clearly relevant as rebuttal, even though the testimony did not allege participation in the crime at bar and was inadmissible as impeachment testimony. *Kraus v. State*, 169 Ga. App. 54, 311 S.E.2d 493 (1983).

Juvenile arrest records are not admissible to show general bad character, but may be used to impeach defendant's testimony that the defendant had never been in trouble before. *Williams v. State*, 171 Ga. App. 927, 321 S.E.2d 423 (1984).

Whether victim is a "bad" person is irrelevant because it is as unlawful to commit a crime against a "bad" person as against a "good" one. *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

In a prosecution for aggravated assault, to the extent that the defendant sought to attack the victim's character through testimony about the victim's use of alcohol during pregnancy, whether the victim hid the defendant from the police, and the victim's alleged jealousy over the defendant's new relationship, the trial court did not abuse the court's discretion in limiting the scope of

cross-examination to the issues directly related to the incidents. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

Impeachment of the victim. — Jury instruction on impeachment of the victim by evidence of bad character was properly refused under O.C.G.A. § 24-9-84 because there was no testimony as to the victim's general reputation for truthfulness in the community or whether the witness would believe the victim under oath, so the victim's credibility was not impeached. *Callahan v. State*, 256 Ga. App. 482, 568 S.E.2d 780 (2002).

Trial court properly denied defendant's motion to introduce evidence of defendant's victim's reputation for violence; defendant failed to make a prima facie showing that shooting the victim, defendant's supervisor, was justified or in self-defense; the evidence revealed that the initial altercation had been over for at least ten minutes before defendant initiated the chase which ended with the victim's shooting. *Bryant v. State*, 283 Ga. App. 295, 641 S.E.2d 277 (2007).

Defense counsel's failure to redact bad character evidence from a defense exhibit was deficient performance and based on the evidence against the defendant, as well as the prejudice caused by the unredacted defense exhibit, there was a reasonable probability that the outcome of the defendant's trial would have been different but for counsel's deficiency, and therefore the conviction was reversed. *Whitaker v. State*, 276 Ga. App. 226, 622 S.E.2d 916 (2005).

Sexual offenses. — Impeachment evidence of prior bad acts of victims in a child abuse prosecution was properly excluded. *Duncan v. State*, 232 Ga. App. 157, 500 S.E.2d 603 (1998).

Victim need not be shown to be assailant before victim can be impeached. — O.C.G.A. § 24-9-84 does not require that before a victim-witness in a battery case may be impeached by evidence of the victim's bad character there must be a prima-facie showing that the victim was the assailant. *Ailstock v. State*, 159 Ga. App. 482, 283 S.E.2d 698 (1981).

Cross-examination scope limited. — Witness who has been impeached by the introduction of a certified copy of a previous felony conviction, but who has not attempted to rehabilitate the witness's charac-

ter by explaining the circumstances of the conviction, cannot be cross-examined concerning the facts surrounding the conviction. *Vincent v. State*, 264 Ga. 234, 442 S.E.2d 748 (1994).

State was properly held not to be entitled to question an expert witness about matters that bore no relation to the scientific issues about which the witness testified at trial in order to show that the witness's professional credentials were in jeopardy. *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002).

Cross-examination concerning specific facts. — It is not permissible to prove specific facts, except on cross-examination for the purposes of testing the knowledge of the witness and of impeaching knowingly false statements. *Mimbs v. State*, 189 Ga. 189, 5 S.E.2d 770 (1939); *Haynes v. Phillips*, 67 Ga. App. 574, 21 S.E.2d 261 (1942); *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944).

Cross-examination as to agreement between witness and state. — When defendant failed to prove either that there had been a deal or that the witness had any expectation of a deal, the trial court did not impermissibly abridge defendant's sixth amendment rights by limiting defendant's cross-examination concerning charges against the witness. *Wright v. State*, 266 Ga. 887, 471 S.E.2d 883 (1996).

Redirect examination. — When on cross-examination the impeaching witness is questioned as to the impeaching witness's feeling toward the witness it is sought to impeach and testifies that the impeaching witness entertains ill feeling toward the witness, the impeaching witness may be questioned on redirect examination as to why the impeaching witness entertains such feeling toward the other witness. *Haynes v. Phillips*, 67 Ga. App. 574, 21 S.E.2d 261 (1942).

Indictment against witness. — After a witness has testified, an indictment charging the witness with embezzlement is inadmissible in evidence for the purpose of impeaching the witness. *Gardner v. State*, 81 Ga. 144, 7 S.E. 144 (1888); *McCray v. State*, 134 Ga. 416, 68 S.E. 62, 20 Ann. Cas. 101 (1910); *Beach v. State*, 138 Ga. 265, 75 S.E. 139 (1912), overruled on other grounds, *Wilson v. State*, 235 Ga. 470, 219 S.E.2d 756 (1975).

While a witness may be discredited by

Proof of Bad Character (Cont'd)

proof of general bad character or conviction of a crime involving moral turpitude, it is not competent to discredit the witness by showing that the witness has committed, been arrested for, confined for, or even indicted for such an offense, and neither may general bad character be proved by individual acts. *Richards v. State*, 157 Ga. App. 601, 278 S.E.2d 63 (1981).

Error to consider testimony of witness as to conviction of crime in sentencing defendant. — Although it was harmless error to admit, erroneously, a witness's own testimony that the witness was convicted of a crime involving moral turpitude, it was error for the trial court to consider such testimony in determining an appropriate sentence for defendant. *Richards v. State*, 157 Ga. App. 601, 278 S.E.2d 63 (1981).

Secondary evidence admitted without objection. — When two witnesses testified that the witnesses pled guilty to the larceny for which defendant was on trial, and while, over proper objection, this would not have been sufficient proof of bad character of itself to impeach the witnesses since there was no objection on the ground that the record of conviction would be the highest and best evidence of this fact, the secondary evidence admitted without objection could be considered by the jury, which would, under the circumstances, have a right to disbelieve that part of the testimony tending to exonerate the defendant from complicity in the theft. *Roach v. State*, 90 Ga. App. 44, 81 S.E.2d 886 (1954).

Failure to object to prior conviction waived. — Defendant's failure to object to proof of a prior conviction introduced by defendant's testimony in response to a prosecutorial cross-examination waived any "best evidence rule" objections to this testimony on appeal. *Howard v. State*, 206 Ga. App. 610, 426 S.E.2d 181 (1992).

Attacked witness may be believed. — Witness who is attacked for general bad character may be believed by the jury regardless of whether there is any evidence to sustain the witness's good character or any corroborating evidence. *Rowe v. State*, 68 Ga. App. 161, 22 S.E.2d 210 (1942).

Charge when no evidence of bad character. — In charging upon the law of impeach-

ment of witnesses, when the court charges as to impeachment by disproving facts testified to, and by contradictory statements, it is not error, but is proper, to omit to charge the law of impeachment by proof of general bad character since there is no evidence seeking to impeach any witness upon that ground. *Smithwick v. State*, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, *Milton v. State*, 245 Ga. 20, 262 S.E.2d 789 (1980).

Charge in connection with conviction of crime. — Charge of the trial court was not error requiring reversal because of the use of the term "general bad character" in connection with the charge of impeachment of certain witnesses because of convictions of crimes involving moral turpitude. *Tyler v. State*, 91 Ga. App. 87, 84 S.E.2d 843 (1954).

Questioning of witness about nolle prossed crime. — Trial court did not commit reversible error under O.C.G.A. § 24-9-84 in declining to allow defense counsel to question the state's witness about the specific crime that was nolle prossed in exchange for the witness's testimony against the defendant; defense counsel was permitted to bring out that a charge against the witness had been dismissed and that the witness had faced 10 years in prison on the charge. *Curtis v. State*, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, 2007 Ga. LEXIS 203 (Ga. 2007).

Proof of witness's reputation for violence is not a proper method of impeachment. *Peters v. State*, 55 Ga. App. 870, 192 S.E. 84 (1937).

Character evidence inadmissible in the following cases: *Long v. State*, 22 Ga. 40 (1857) (gambling); *Smithwick v. Evans*, 24 Ga. 461 (1858) (prostitution); *McDowell v. Preston*, 26 Ga. 528 (1858) (drug addiction); *Weathers v. Barksdale*, 30 Ga. 888 (1860) (bastardy); *Pulliam v. Cantrell*, 77 Ga. 563, 3 S.E. 280 (1886) (embezzlement); *Gordon v. Gilmer*, 141 Ga. 347, 80 S.E. 1007 (1914) (character as to truthfulness).

Proof of Good Character

Evidence of good character admissible when the general character of a witness is impeached. *Stamper v. Griffin*, 12 Ga. 450 (1853).

Evidence of good character inadmissible. — When not impeached otherwise than by disproving the truth of the witness's evi-

dence, or by testimony tending to disprove the evidence, the witness cannot be supported by proof of the witness's general good character. *Miller v. Western & Atl. R.R.*, 93 Ga. 480, 21 S.E. 52 (1893).

Rebuttal by proof of good character. — When, in order to discredit a witness, the witness's reputation has been assailed, the party by whom the witness was introduced has the right to introduce rebutting evidence to show that the witness's character and reputation are good, even though the attempt to discredit was made on examination of the witness personally. *Gazaway v. State*, 15 Ga. App. 467, 83 S.E. 857 (1914). See also *Suddeth v. State*, 112 Ga. 407, 37 S.E. 747 (1900).

Character for veracity irrelevant. — When the statutory questions are asked to sustain the character of a witness sought to be impeached by evidence of general bad character, other questions, such as the character of the witness for veracity, may not be asked. *Edwards v. Simpson*, 123 Ga. App. 44, 179 S.E.2d 266 (1970).

Direct and cross-examination. — Witness, in testifying as to the defendant's good character, must categorically answer the questions impliedly included in statute and no others. On cross-examination, the solicitor (now district attorney) may bring out specific facts for the purpose of testing the witness's knowledge, and may ask as a hypothetical question whether, if the witness knew certain facts, the witness's opinion would still be that the defendant's character was good. *Banks v. State*, 113 Ga. App. 661, 149 S.E.2d 415 (1966).

Cross-examination of defendant's character witness in child molestation case, that consisted of questions inquiring whether witness was aware defendant had pled guilty to practicing law without a license, was admissible for the purpose of testing the witness's familiarity with the defendant. *Davidson v. State*, 231 Ga. App. 605, 499 S.E.2d 697 (1998).

Evidence not in compliance with statute. — When the only evidence in any way tending to sustain a witness is the testimony of another witness that the impeaching witness knew the witness to be honest, industrious, and well-liked by the customers of the latter witness, such evidence is not a compliance with the requirement that an impeached witness may be sustained by proof of general good character. *Jackson v. Middlebrooks*, 86 Ga. App. 259, 71 S.E.2d 462 (1952).

Evidence in mitigation of capital punishment. — Constitution requires that evidence which would be inadmissible under an evidentiary rule must not automatically be excluded if tendered in a capital case in mitigation of punishment, rather, the potentially mitigating influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule, and in close cases the doubt should be resolved in favor of admissibility. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Failure to charge concerning character. — Proper instruction should be given in every case when the accused puts the accused's character in issue; but, in the absence of a timely request, an omission to give a specific charge on the subject will not require a new trial. It is only in exceptional cases where the court fails to charge relative to the good character of the accused that a new trial should be granted. *Taylor v. State*, 83 Ga. App. 735, 64 S.E.2d 598 (1951).

Character witnesses excluded. — Trial court did not err by refusing to allow two of defendant's character witnesses to explain their answers since the transcript showed that the testimony sought exceeded the permissible scope of O.C.G.A. § 24-9-84. *Collar v. State*, 206 Ga. App. 448, 426 S.E.2d 43 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 362, 365 et seq., 663. 81 Am. Jur. 2d, Witnesses, §§ 215, 216, 272 et seq., 278, 280 et seq., 286, 287, 406 et seq., 487.

ALR. — Right to inquire of witness as to his or her occupation for purposes of impeachment, 1 ALR 1402.

Right to impeach accused as a witness by

proof of general bad moral character or reputation, 90 ALR 870.

Instructions regarding good or bad character of witnesses as affecting their credibility, 120 ALR 1442.

Cross-examination to dispel favorable inference which jury might draw from appearance of witness on witness stand, 159 ALR 201.

Cross-examination of character witness for accused with reference to particular acts or crimes, 47 ALR2d 1258.

Impeachment of witness with respect to intoxication, 8 ALR3d 749.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility of testimony as to general reputation at place of employment, 82 ALR3d 525.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for chastity, 95 ALR3d 1181.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than the accused, 97 ALR3d 967.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 ALR4th 468.

Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules, 13 ALR4th 796.

Admissibility of affidavit to impeach witness, 14 ALR4th 828.

Right to impeach witness in criminal case by inquiry or evidence as to witness's criminal activity not having resulted in arrest or charge — modern state cases, 24 ALR4th 333.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Admissibility of impeached witness's prior consistent statement — modern state criminal cases, 58 ALR4th 1014.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness — state cases, 58 ALR4th 1229.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 ALR5th 319.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 ALR5th 277.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule—nonviolent crimes, 84 ALR5th 487.

Admissibility in rape case of evidence that accused raped or attempted to rape person other than prosecutrix — prior offenses, 86 ALR5th 59.

Admissibility in rape case of evidence that accused raped or attempted to rape person other than prosecutrix — subsequent acts, 87 ALR5th 181.

Admissibility in rape case of evidence that accused raped or attempted to rape person other than prosecutrix — offenses unspecified as to time, 88 ALR5th 429.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of the Federal Rules of Evidence, in civil cases, 171 ALR Fed. 483.

Impeachment of federal trial witness with respect to intoxication, 106 ALR Fed. 371.

24-9-84.1. How witness impeached — Prior convictions.

(a) *General rule.* For the purpose of attacking the credibility of a witness, or of the defendant, if the defendant testifies:

(1) Evidence that a witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the witness was convicted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the witness;

(2) Evidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if

the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant; and

(3) Evidence that any witness or the defendant has been convicted of a crime shall be admitted if it involved dishonesty or making a false statement, regardless of the punishment that could be imposed for such offense.

(b) *Time limit.* Evidence of a conviction under subsection (a) of this Code section is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness or the defendant from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon or annulment.* Evidence of a conviction is not admissible under this Code section if:

(1) The conviction has been the subject of a pardon or annulment based on a finding of the rehabilitation of the person convicted and such person has not been convicted of a subsequent crime that was punishable by death or imprisonment for one year or more; or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* An adjudication of delinquency in juvenile court shall be inadmissible against a defendant in a criminal case. An adjudication of delinquency in juvenile court shall be presumed to be inadmissible against a witness in a criminal case; however, this presumption may be rebutted only if it is shown that:

(1) The factual basis for the proven allegations of delinquency would have constituted a crime under the laws of the state of the juvenile court if committed by an adult at the time they were committed by the juvenile;

(2) The probative value of the evidence substantially outweighs the prejudicial effect of its admission; and

(3) The court finds that admission of the adjudication into evidence is necessary for a fair determination of the issue of guilt or innocence of the defendant.

(e) *Pendency of appeal.* The pendency of an appeal from a conviction does not render evidence of a conviction inadmissible. Evidence of the pendency

of an appeal shall be admissible. (Code 1981, § 24-9-84.1, enacted by Ga. L. 2005, p. 20, § 16/HB 170; Ga. L. 2006, p. 72, § 24/SB 465.)

Editor's notes. — Ga. L. 2005, p. 20, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17, not codified by the General Assembly, provides that this Code section shall apply to all trials which commence on or after July 1, 2005.

Law reviews. — For annual survey of criminal law, see 57 Mercer L. Rev. 113

(2005); and 58 Mercer L. Rev. 83 (2006). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009).

JUDICIAL DECISIONS

Constitutionality. — Based on the slight probative value of over-age convictions, the fact that O.C.G.A. § 24-9-84.1(b) permits use of such convictions on a showing of specific facts and circumstances establishing the probative value of the particular conviction, and the fact that § 24-9-84.1 does not preclude all inquiry on a subject with respect to which a defendant is entitled to a reasonable cross examination, § 24-9-84.1 is not unconstitutional as a violation of the confrontation clause. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

Redaction not required. — Neither case law nor O.C.G.A. § 24-9-84.1(a)(2) requires redaction of portions of a validly admitted felony conviction. *Wilkes v. State*, 293 Ga. App. 724, 667 S.E.2d 705 (2008).

Obstructing or hindering law enforcement officers. — In a parent's tort action arising from an accusation by store employees that the parent's child stole from the store, the trial court properly refused to strike evidence of an employee's conviction for violating O.C.G.A. § 16-10-24 by obstructing or hindering law enforcement officers submitted in the parent's motion for summary judgment response even though the conviction was not used to impeach the employee at the employee's deposition. The conviction could be used for impeachment at trial under O.C.G.A. § 24-9-84.1(a)(1) because the violation was a felony punishable by imprisonment for not less than one nor more than five years and similarly may be submitted in the summary judgment motion even though it was not presented to the

witness at the deposition. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Crimes involving dishonesty. — For impeachment purposes, crimes of "dishonesty" are limited to those crimes that bear upon a witness's propensity to testify truthfully; accordingly, misdemeanor theft by receiving stolen property is not a crime involving dishonesty within the meaning of O.C.G.A. § 24-9-84.1(a)(3). *Adams v. State*, 284 Ga. App. 534, 644 S.E.2d 426 (2007).

Impeachment for conviction in civil tort action. — In an intentional tort action against a retailer and one of the retailer's employees, the employee could be impeached with a conviction under O.C.G.A. § 16-10-24 which occurred after that employee gave a deposition as the length of punishment that could be imposed thereunder satisfied the requirements of O.C.G.A. § 24-9-84.1(a)(1) for impeachment with a conviction, and no other evidence was presented which prohibited the employee's impeachment. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d. 7 (2008); *Chandler v. State*, 281 Ga. 712, 642 S.E.2d 646 (2007).

In a personal injury suit filed by a car driver against a truck driver, because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's

treating emergency room physician, a new trial was ordered. *Laukaitis v. Basadre*, 287 Ga. App. 144, 650 S.E.2d 724 (2007).

Convictions did not show dishonesty. — In a trial for aggravated assault, the trial court did not err in barring the defendant from introducing evidence about a third person's misdemeanor convictions for criminal trespass and family violence battery; the convictions did not involve dishonesty and did not support the defendant's self-defense theory as the third person remained behind as the defendant advanced on the victim. *Fields v. State*, 285 Ga. App. 345, 646 S.E.2d 326 (2007).

Because defendant made no effort to show that the conviction defendant intended to use to impeach an accomplice who testified involved fraud or deceit, the trial court did not err in excluding that conviction for use for impeachment purposes under O.C.G.A. § 24-9-84.1(a)(3). *Clements v. State*, 299 Ga. App. 561, 683 S.E.2d 127 (2009).

Conviction did not show fraud and deceit. — Because the defendant did not show that a misdemeanor shoplifting conviction involved fraud and deceit, the trial court properly refused to allow the defendant to use the conviction to impeach a witness under O.C.G.A. § 24-9-84.1(a)(3). *Martin v. State*, 300 Ga. App. 39, 684 S.E.2d 111 (2009).

Trial court must establish that it balanced use of defendant's prior conviction against risk of prejudice. — With regard to defendant's conviction for aggravated assault, which was reversed on appeal as a result of the trial court erring in recharging the jury on a question it asked, the appellate court was unable to determine whether the trial court engaged in any meaningful analysis of the relevant factors of the evidence of defendant's prior felony conviction for possession of cocaine or whether the trial court balanced the probative value against the prejudicial effect to the accused. In the event of retrial, the trial court was directed to balance the probative value of defendant's prior felony conviction against its prejudicial effect and to make a finding on the record as to whether the former substantially outweighed the latter, subject to appellate review for an abuse of discretion. *Quiroz v. State*, 291 Ga. App. 423, 662 S.E.2d 235 (2008).

Defendant's conviction for possession of

methamphetamine was reversed on appeal as the trial court erred by failing to perform the required balancing test, pursuant to O.C.G.A. § 24-9-84.1(a)(2), prior to permitting the state to impeach the defendant with a prior conviction for entering an automobile. The trial court also failed to consider the prejudicial effect of the impeachment evidence after only finding that the evidence did not have probative value. *Abercrombie v. State*, 297 Ga. App. 522, 677 S.E.2d 719 (2009).

Balancing test applied during motion for new trial sufficient. — The trial court engaged in the required balancing test and made express findings in accordance with O.C.G.A. § 24-9-84.1(a)(2), which supported the admission of a defendant's prior conviction for enticing a child for indecent purposes in an aggravated assault trial. The statute was satisfied even though these findings were not made until the hearing on the defendant's motion for new trial. *Carter v. State*, No. A10A0426, 2010 Ga. App. LEXIS 302 (Mar. 25, 2010).

Remand required to address admissibility of prior convictions. — There was sufficient evidence to support a defendant's conviction for manufacturing methamphetamine as it was for the jury to reject the defendant's defense that others had equal access to the contraband found in the defendant's home and vehicle. However, the conviction was conditionally affirmed and the case was remanded to the trial court for the court to set forth an express ruling on the record as to whether the probative value of the evidence of the defendant's prior conviction substantially outweighed the prejudicial effect of the evidence as the record failed to contain any such findings. *Miller v. State*, 298 Ga. App. 792, 681 S.E.2d 225 (2009).

Prior convictions properly admitted for both impeachment and sentencing purposes. — Trial court properly admitted certified copies of the defendant's two prior convictions of aggravated assault and possession of a firearm during the commission of a felony as: (1) it carefully balanced the competing interests; (2) the prior offenses had a substantial probative value which outweighed their prejudicial effect; and (3) nothing prevented the use of a defendant's convictions for both impeachment and sentencing purposes. Moreover, the court rejected the

defendant's claim that by adding the word "substantially" to the balancing test, the Georgia legislature meant to incorporate the standard for admissibility embodied in Fed. R. Evid. 609(b). *Newsome v. State*, 289 Ga. App. 590, 657 S.E.2d 540 (2008), cert. denied, 2008 Ga. LEXIS 494 (Ga. 2008).

Prior conviction properly admitted to impeach defendant's credibility. — Trial court did not err in admitting evidence of the defendant's 1993 interference with government property conviction; a new trial was properly denied because the evidence was properly admitted, not as substantive evidence of the offense at issue, but only as to the issue of credibility, providing support for the admission of the evidence. *Tate v. State*, 289 Ga. App. 479, 657 S.E.2d 531 (2008), cert. denied, 2008 Ga. LEXIS 386 (Ga. 2008).

In a prosecution for entering an automobile with the intent to commit theft, the trial court allowed the state to impeach the defendant's testimony with evidence of a burglary conviction that was over 10 years old. Admission of this evidence did not violate O.C.G.A. § 24-9-84.1 as the defendant testified on direct examination about the sentence the defendant served for that crime. *Love v. State*, 293 Ga. App. 499, 667 S.E.2d 656 (2008).

In convictions of felony murder and robbery in connection with a fatal assault upon an elderly man, pursuant to O.C.G.A. § 24-9-84.1(b), a trial court properly admitted evidence of defendant's prior manslaughter conviction in order to impeach defendant on the issue of defendant's veracity. *Treadwell v. State*, 285 Ga. 736, 684 S.E.2d 244 (2009).

Given that a defendant's defense to charges of burglary and criminal trespass was that the defendant believed the defendant had permission to remove a television and DVD player from an apartment, the trial court did not abuse its discretion in admitting two prior convictions for burglary and attempted burglary, which indicated a probable lack of veracity by the defendant. *Love v. State*, 302 Ga. App. 106, 690 S.E.2d 246 (2010).

Trial court did not err in admitting the defendant's prior felony conviction because the court did not abuse its discretion in concluding that the probative value of ad-

mitting the evidence substantially outweighed its prejudicial effect since the prior conviction's probative value went to the defendant's credibility and the likelihood or not that someone convicted of a felony would disregard the duty to testify truthfully; the trial court instructed the jury that the prior felony conviction was to be considered only for impeachment purposes, and, because the defendant testified and denied knowledge that the co-defendant had a gun, the defendant's credibility was highly relevant to the jury's decision. *Cobb v. State*, 302 Ga. App. 821, 692 S.E.2d 65 (2010).

Prior convictions admitted when defendant placed character in evidence. — Trial court properly admitted impeachment evidence of the defendant's convictions of vehicular homicide that were over 10 years old. Defendant's testimony regarding the defendant's charitable activities resulted in the defendant's placing the defendant's character into issue. *McNabb v. State*, 292 Ga. App. 395, 664 S.E.2d 800 (2008), cert. denied, 2008 Ga. LEXIS 927 (Ga. 2008).

Prior conviction properly admitted. — Trial court did not err in admitting evidence of a defendant's prior felony conviction under O.C.G.A. § 24-9-84.1. Neither case law nor the statute required redaction of the conviction to remove a reference to misdemeanor charges arising out of the same transaction; furthermore, the trial court determined that the probative value of the conviction outweighed the conviction's prejudicial effect. *Wilkes v. State*, 293 Ga. App. 724, 667 S.E.2d 705 (2008).

Prior convictions properly excluded. — Trial court did not err when the court declined to permit the defendant to impeach a witness under O.C.G.A. § 24-9-84.1 with prior convictions because more than ten years had elapsed since the witness was released from the confinement resulting from the convictions, and defense counsel had not provided specific facts and circumstances demonstrating that the probative value of the convictions outweighed their prejudicial effect; probation does not qualify as confinement under § 24-9-84.1(b), and the legislature has distinguished "confinement" from release on parole and suspended and probated sentences. *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Failure to apply balancing test was harmless error. — During a defendant's trial for

obstruction of a police officer and other related crimes, a trial court erred by failing to consider the balancing test required under O.C.G.A. § 24-9-84.1(a)(1) with regard to allowing the state to impeach all of the defendant's defense witnesses with prior convictions. However, the error was harmless since the convictions involved moral turpitude and were admissible regardless. *Whitley v. State*, 296 Ga. App. 72, 673 S.E.2d 510 (2009).

No duty to conduct balancing test absent objection. — Absent an objection by the defendant, the trial court had no duty to conduct the balancing test of O.C.G.A. § 24-9-84.1(a)(1) *sua sponte*. Moreover, since the jury was authorized to believe the testimony of officers over that of the witnesses in question, there was no reasonable probability that the verdict would have been different had the trial court conducted the balancing test. *Thomas v. State*, 291 Ga. App. 795, 662 S.E.2d 849 (2008).

Questioning defendant about convictions allowed. — Trial court did not err by denying defendant's motion in limine, which sought to prevent the state, for the purpose of impeachment, from questioning defendant, if defendant testified at trial, regarding defendant's prior convictions for burglary, statutory rape, and failure to register as a sex offender as O.C.G.A. § 24-9-84.1 specifically applied to the situation and permitted the questioning regarding defendant's prior convictions. *Whitaker v. State*, 283 Ga. 521, 661 S.E.2d 557 (2008).

Effective assistance of counsel. — Defense counsel did not perform deficiently when defense counsel failed to make a meritless objection to the evidence of defendant's conviction for giving false information that was less than 10 years old because O.C.G.A. § 24-9-84.1(a)(3) and (b) authorized the admission of convictions 10 years old or less for crimes involving dishonesty or making a false statement, and the trial court did not have to weigh the probative value of the old conviction against the prejudicial effect since the conviction at issue was less than 10 years old. *Habersham v. State*, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction

was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pursuit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the defendant by showing the minor nature of one of the violations, were objectively reasonable. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

With regard to a defendant's conviction for aggravated assault, although the prosecutor was impermissibly permitted to impeach a defense witness by asking the witness about a recent guilty plea to two counts of theft by taking, which was not a felony or a crime which involved dishonesty or making a false statement, the defendant failed to establish that defense counsel's failure to object rendered defense counsel ineffective. At the hearing on the defendant's motion for a new trial, defense counsel was not questioned on whether the failure to object was strategic and, given the overwhelming evidence of the defendant's guilt, the defendant failed to show that there was a reasonable probability that the verdict would have been different if defense counsel had objected. *Jacobs v. State*, 299 Ga. App. 368, 683 S.E.2d 64 (2009).

Counsel not ineffective. — While trial counsel might have been deficient by failing to contend that the probative value of admitting the defendant's prior convictions for impeachment purposes did not substantially outweigh the prejudicial effect of the evidence, given that the defendant failed to show prejudice, this claim failed. *Miller v. State*, 283 Ga. 412, 658 S.E.2d 765 (2008).

Defense counsel properly advised a defendant in the defendant's prosecution for, *inter alia*, malice murder that, if the defendant testified at trial, the state could attempt to introduce prior convictions into evidence as the state was permitted to do so under O.C.G.A. § 24-9-84.1(a)(2), even if the defendant's character was not placed in issue, so long as the probative value of admitting the evidence substantially outweighed the prejudicial effect of the evidence. *Brooks v. State*, 285 Ga. 246, 674 S.E.2d 871 (2009).

Defendant failed to demonstrate ineffective assistance of counsel in the defendant's

prosecution for, inter alia, robbery by force because it was a reasonable strategy to agree to the admission under O.C.G.A. § 24-9-84.1(b) of a prior 1992 Texas conviction for possession of cocaine, even though the conviction was over 10 years old, as the defendant testified on the defendant's own behalf and wanted to put it all out there. *Everett v. State*, 297 Ga. App. 351, 677 S.E.2d 394 (2009).

Limiting instruction on prior convictions not required. — In a defendant's prosecution for malice murder and armed robbery, the trial court did not err in failing to instruct the jury without request that the jurors limit their consideration of the defendant's prior convictions to the purpose of impeachment only under O.C.G.A. § 24-9-84.1(a) as information regarding the defendant's prior convictions was not obtained in violation of the defendant's constitutional rights against self-incrimination under U.S. Const., amend. 5. *Phillips v. State*, 285 Ga. 213, 675 S.E.2d 1 (2009).

Jury charge not required if impeached witness was not primary witness. — A trial court did not err in refusing a defendant's requested charge on impeachment of an accomplice witness by proof of a crime of moral turpitude pursuant to O.C.G.A. § 24-9-84.1(a)(1), although an instruction on impeachment by proof of a prior conviction was warranted. Any failure to give such an instruction was harmless because the witnesses were not "primary" witnesses; the defendant was the primary witness. *Stewart v. State*, 286 Ga. 669, 690 S.E.2d 811 (2010).

Cited in *Madison v. State*, 281 Ga. 640, 641 S.E.2d 789 (2007); *Heath v. State*, 291 Ga. App. 594, 662 S.E.2d 362 (2008); *Freeman v. State*, 291 Ga. App. 651, 662 S.E.2d 750 (2008); *Daniel v. State*, 292 Ga. App. 560, 665 S.E.2d 696 (2008); *Bell v. State*, 294 Ga. App. 779, 670 S.E.2d 476 (2008); *Smallwood v. State*, 296 Ga. App. 16, 673 S.E.2d 537 (2009).

24-9-85. Credit of impeached witness for jury generally; when testimony of impeached witness must be corroborated.

(a) When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the jury. The credit to be given a witness's testimony where impeached for general bad character or for contradictory statements out of court shall be for the jury to determine.

(b) If a witness shall willfully and knowingly swear falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. (Civil Code 1895, § 5295; Civil Code 1910, § 5884; Code 1933, § 38-1806.)

History of Code section. — This Code section is derived from the decisions in *Skipper v. State*, 59 Ga. 63 (1877); *Saul v. Buck*, *Hefflebower & Neer*, 72 Ga. 254 (1884); and *Central R.R. & Banking Co. v. Phinazee*, 93 Ga. 488, 215 S.E. 66 (1894).

Cross references. — Criminal penalty for false swearing, § 16-10-71.

Law reviews. — For annual survey of trial practice and procedure, see 38 *Mercer L. Rev.* 383 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONTRADICTION OR BAD CHARACTER

1. IN GENERAL
2. FUNCTION OF JURY
3. INSTRUCTIONS

FALSE SWEARING

1. IN GENERAL
2. FUNCTION OF JURY
3. INSTRUCTIONS

General Consideration

Statute is applicable to criminal as well as civil cases. Waycaster v. State, 136 Ga. 95, 70 S.E. 883 (1911); Rouse v. State, 136 Ga. 356, 71 S.E. 667 (1911).

Word "impeached" is synonymous with "attacked" or "assailed" and has the same effect. Smith v. State, 109 Ga. 479, 35 S.E. 59 (1900); Ector v. State, 120 Ga. 543, 48 S.E. 315 (1904).

Expression "successfully impeached" is inappropriate because it is confusing to use it in place of the words "successfully contradicted," as used in the statute. Reed v. State, 163 Ga. 206, 135 S.E. 748 (1926).

Impeachment and attempt to impeach distinguished in Powell v. State, 101 Ga. 9, 29 S.E. 309, 65 Am. St. R. 277 (1897).

Cited in Reed v. State, 163 Ga. 206, 135 S.E. 748 (1926); Luke v. Ashburn Bank, 40 Ga. App. 802, 151 S.E. 562 (1930); Pope v. State, 171 Ga. 655, 156 S.E. 599 (1930); Modern Order of Praetorians v. Blackburn, 42 Ga. App. 690, 157 S.E. 331 (1931); Newsom v. Reynolds Chevrolet Co., 43 Ga. App. 376, 158 S.E. 763 (1931); Peebles v. State, 178 Ga. 675, 173 S.E. 850 (1934); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935); Bailey v. Newberry, 52 Ga. App. 693, 184 S.E. 357 (1935); Jefferson Std. Life Ins. Co. v. Bentley, 55 Ga. App. 272, 190 S.E. 50 (1937); Pacific Mut. Life Ins. Co. v. Barfield, 57 Ga. App. 43, 194 S.E. 258 (1937); Overman v. State, 187 Ga. 396, 1 S.E.2d 20 (1939); Bowen v. State, 188 Ga. 28, 2 S.E.2d 637 (1939); Gaither v. State, 63 Ga. App. 414, 11 S.E.2d 254 (1940); Mishoe v. Davis, 64 Ga. App. 700, 14 S.E.2d 187 (1941); Patterson v. State, 199 Ga. 773, 35 S.E.2d 504 (1945); Sutton v. Perdue, 75 Ga. App. 720, 44 S.E.2d 405 (1947); Lee v. Queen, 76 Ga. App. 513, 46 S.E.2d 509 (1948); Ludwig v. J.J. Newberry Co., 78 Ga. App. 871, 52 S.E.2d 485 (1949); Gibson v. State, 81 Ga. App. 27, 57 S.E.2d 706 (1950); Cotton v. State, 81 Ga. App. 753, 59 S.E.2d 741 (1950); Minor v. Lillie Rubin, Inc., 84 Ga. App. 112, 65 S.E.2d 691 (1951); Atlantic Coast Line R.R. v. Hodges, 90 Ga. App. 870, 84 S.E.2d 711

(1954); Goldstein v. Drexler, 102 Ga. App. 90, 115 S.E.2d 744 (1960); State Farm Mut. Auto. Ins. Co. v. Kendall, 104 Ga. App. 481, 122 S.E.2d 139 (1961); State Hwy. Dep't v. King, 107 Ga. App. 220, 129 S.E.2d 577 (1963); Higdon Grocery Co. v. Faircloth, 107 Ga. App. 558, 130 S.E.2d 760 (1963); Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770 (1963); Life Ins. Co. v. Williams, 109 Ga. App. 264, 135 S.E.2d 925 (1964); Thurmond v. State, 220 Ga. 277, 138 S.E.2d 372 (1964); Butts v. Curtis Publishing Co., 225 F. Supp. 916 (N.D. Ga. 1964); Simmons v. State, 220 Ga. 881, 142 S.E.2d 798 (1965); Magyer v. Brown, 116 Ga. App. 498, 157 S.E.2d 825 (1967); Douglas v. Herringdine, 117 Ga. App. 72, 159 S.E.2d 711 (1967); McLarty v. Emhart Corp., 227 Ga. 104, 179 S.E.2d 46 (1970); Utilities of Augusta, Inc. v. Jackson, 123 Ga. App. 78, 179 S.E.2d 563 (1970); Wheeler v. State, 228 Ga. 402, 185 S.E.2d 900 (1971); Yeomans v. State, 229 Ga. 488, 192 S.E.2d 362 (1972); Lawrence v. Edwards, 128 Ga. App. 1, 195 S.E.2d 244 (1973); Wooster v. Boles, 130 Ga. App. 542, 203 S.E.2d 745 (1974); Shannon v. Kaylor, 133 Ga. App. 514, 211 S.E.2d 368 (1974); Mote v. Mote, 134 Ga. App. 668, 215 S.E.2d 487 (1975); Collier v. Sinkoe, 135 Ga. App. 732, 218 S.E.2d 910 (1975); Burns v. State, 135 Ga. App. 842, 219 S.E.2d 487 (1975); Ivey v. State, 140 Ga. App. 713, 231 S.E.2d 384 (1976); Parker v. State, 145 Ga. App. 205, 243 S.E.2d 580 (1978); Hubbard v. State, 145 Ga. App. 714, 244 S.E.2d 639 (1978); Moore v. State, 146 Ga. App. 457, 246 S.E.2d 353 (1978); Bennett v. State, 148 Ga. App. 409, 251 S.E.2d 324 (1978); Patterson v. State, 149 Ga. App. 438, 254 S.E.2d 445 (1979); Hughes v. Newell, 152 Ga. App. 618, 263 S.E.2d 505 (1979); Griffin v. Bremen Steel Co., 161 Ga. App. 768, 288 S.E.2d 874 (1982); Griner v. State, 162 Ga. App. 207, 291 S.E.2d 76 (1982); Ed Sherwood Chevrolet, Inc. v. McAuley, 164 Ga. App. 798, 298 S.E.2d 565 (1982); Pattillo v. State, 250 Ga. 510, 299 S.E.2d 710 (1983); Caldwell v. State, 166 Ga. App. 657, 305 S.E.2d 407 (1983); LaPan v. State, 167 Ga. App. 250, 305 S.E.2d 858 (1983); Dyer v. State, 167 Ga. App. 310, 306 S.E.2d 313

General Consideration (Cont'd)

(1983); *Blalock v. Central Bank*, 170 Ga. App. 140, 316 S.E.2d 474 (1984); *Stubbs v. Tri-State Culvert Corp.*, 177 Ga. App. 113, 338 S.E.2d 449 (1985); *Thomas v. State*, 177 Ga. App. 33, 338 S.E.2d 502 (1985); *Adams v. State*, 255 Ga. 356, 338 S.E.2d 860 (1986); *Hankinson v. Rackley*, 177 Ga. App. 734, 341 S.E.2d 231 (1986); *Smith v. State*, 178 Ga. App. 19, 341 S.E.2d 901 (1986); *Fugitt v. State*, 256 Ga. 292, 348 S.E.2d 451 (1986), cert. denied, *James v. State*, 180 Ga. App. 7, 348 S.E.2d 502 (1986); *Bob Lairsey Ins. Agency v. Allen*, 180 Ga. App. 11, 348 S.E.2d 658 (1986); *Handcrafted Furn., Inc. v. Black*, 182 Ga. App. 115, 354 S.E.2d 696 (1987); *Argo v. State*, 188 Ga. App. 102, 371 S.E.2d 922 (1988); *Hance v. Kemp*, 258 Ga. 649, 373 S.E.2d 184 (1988); *Johnson v. State*, 188 Ga. App. 499, 373 S.E.2d 284 (1988); *Harris v. State*, 259 Ga. 511, 384 S.E.2d 647 (1989); *Arnold v. State*, 198 Ga. App. 514, 402 S.E.2d 312 (1991); *Brown v. State*, 198 Ga. App. 590, 402 S.E.2d 341 (1991); *McLeroy Plumbing Serv., Inc. v. Starks*, 201 Ga. App. 270, 410 S.E.2d 756 (1991); *Chapman v. State*, 263 Ga. 393, 435 S.E.2d 202 (1993); *Cox v. Pic-N-Save B.F.L. Corp.*, 235 Ga. App. 12, 507 S.E.2d 849 (1998); *Battle v. State*, 244 Ga. App. 599, 536 S.E.2d 273 (2000); *Mathis v. State*, 273 Ga. 508, 543 S.E.2d 712 (2001); *Hayes v. State*, 249 Ga. App. 857, 549 S.E.2d 813 (2001); *Susan v. State*, 254 Ga. App. 276, 562 S.E.2d 233 (2002).

Contradiction or Bad Character**1. In General**

Immaterial matter. — Witness may not be impeached simply for the reason that the witness's testimony concerning a wholly immaterial matter may not be in accord with the truth. *Mann v. State*, 124 Ga. 760, 53 S.E. 324 (1906); *Waits v. Hardy*, 214 Ga. 495, 105 S.E.2d 719 (1958).

In a personal injury action, the trial court did not err in refusing to give the defendant's requested charge on impeachment when the request was based on an exchange during cross-examination of the plaintiff that did not relate to a material matter and other instructions on the credibility of witnesses adequately covered the necessary principles. *Sharp v. Fagan*, 215 Ga. App. 44,

449 S.E.2d 648 (1994).

Credibility of child's statement of sexual abuse. — Although a defendant presented evidence contradicting parts of a child's sexual abuse testimony, there was no showing that the child's testimony was willfully and knowingly false. Accordingly, trial counsel was not deficient for failing to request a charge on the principles contained in O.C.G.A. § 24-9-85(b). *Bruce v. State*, 268 Ga. App. 677, 603 S.E.2d 33 (2004).

Restoration of credibility. — Witness impeached for general bad character, or for contradictory statements out of court, may be restored to credit. *Watson v. State*, 13 Ga. App. 181, 78 S.E. 1014 (1913).

Summary judgment based on credibility. — When, on motion for summary judgment, the credibility of a witness or witnesses is at issue in the case, neither the trial court nor the Court of Appeals is concerned with the credibility but will leave this matter to the jury, rather than grant summary judgment based on the "uncontradicted" area of the testimony of the witness. *Raven v. Dodd's Auto Sales & Serv., Inc.*, 117 Ga. App. 416, 160 S.E.2d 633 (1968).

Test on appeal. — On appeal, the appellate tribunal does not determine the credibility of witnesses or the preponderance of the evidence, but rather uses the "any evidence test," which is not available to the trier of facts in deciding disputed factual issues. *Crawley v. Marta*, 147 Ga. App. 293, 248 S.E.2d 555 (1978).

2. Function of Jury

Question of impeachment. — Credibility of witnesses is a matter so entirely for the jury that the question as to whether a witness has or has not been successfully impeached is a matter for their exclusive determination. *Smith v. State*, 17 Ga. App. 298, 86 S.E. 660 (1915); *Hagin v. Rogers*, 17 Ga. App. 515, 87 S.E. 769 (1916); *Preston v. State*, 42 Ga. App. 280, 155 S.E. 774 (1930); *Jones v. State*, 52 Ga. App. 83, 182 S.E. 527 (1935); *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955); *Turner v. Hardy*, 198 Ga. 626, 32 S.E.2d 483 (1944); *Whitener v. Baly Tire Co.*, 98 Ga. App. 257, 105 S.E.2d 775 (1958); *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799

(1980); *Garner v. Driver*, 155 Ga. App. 322, 270 S.E.2d 863 (1980); *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Evidence provided by the victim that defendant was the man who threatened her with a knife and then raped her was sufficient to support both the rape and aggravated assault with intent to rape convictions; whether the victim was successfully impeached by proof of contradictory statements was also a question for the jury. *Wilson v. State*, 267 Ga. App. 491, 600 S.E.2d 440 (2004).

Credence to testimony. — It is the jury's prerogative to ascertain if a witness has been impeached and then determine what credence to give the witness's testimony. *Ussery v. Koch*, 115 Ga. App. 463, 154 S.E.2d 879 (1967); *Raven v. Dodd's Auto Sales & Serv., Inc.*, 117 Ga. App. 416, 160 S.E.2d 633 (1968), overruled on other grounds, *Raven v. Dodd's Auto Sales & Serv., Inc.*, 117 Ga. App. 416, 160 S.E.2d 633 (1968).

It is within the power and right of jury to believe any witness, no matter what effort may have been made to impeach the witness, or what testimony has been presented for that purpose, and even though the witness is not corroborated. *Hayes v. State*, 168 Ga. App. 710, 309 S.E.2d 843 (1983).

Jury may disregard testimony. — If a jury determines that a witness has been impeached as to a material fact in the case, the jury can disbelieve the witness's entire testimony. *Burke v. State*, 205 Ga. App. 520, 51 S.E.2d 693, rev'd on other grounds, 205 Ga. 520, 54 S.E.2d 348 (1949); *Gulf Life Ins. Co. v. Moore*, 90 Ga. App. 791, 84 S.E.2d 696 (1954); *Swift & Co. v. Lawson*, 95 Ga. App. 35, 97 S.E.2d 168 (1957); *Ritchie v. Dillon*, 103 Ga. App. 7, 118 S.E.2d 115 (1961) (judge as trier of fact); *St. Paul Ins. Co. v. Henley*, 141 Ga. App. 581, 234 S.E.2d 159 (1977).

Testimony which must be disregarded in its entirety is only that testimony which is willfully and knowingly false. *Fugitt v. State*, 251 Ga. 451, 307 S.E.2d 471 (1983), cert. denied, 479 U.S. 1070, 107 S. Ct. 963, 93 L. Ed. 2d 1011 (1987); *Jones v. State*, 265 Ga. 84, 453 S.E.2d 716 (1995).

If a witness has been successfully impeached by evidence of conviction of a

felony, then the credit to be accorded the witness's statement, if any, is for the jury to determine under proper instructions from the trial court. *McNeely v. Wal-Mart Stores, Inc.*, 246 Ga. App. 852, 542 S.E.2d 575 (2000).

Rejection of part of testimony. — Jury is the sole judge of the credibility of the witnesses and may believe part of the testimony of each witness and reject part of each witness's testimony. *Brown v. O'Neal*, 59 Ga. App. 560, 1 S.E.2d 601 (1939); *Davis v. State*, 205 Ga. 248, 53 S.E.2d 545 (1949); *Strickland Motors Inc. v. State*, 81 Ga. App. 824, 60 S.E.2d 254 (1950).

Jury may impute perjury. — When a witness is sought to be impeached by disproving facts testified to by other witnesses which results only in a conflict between their testimony and the witness, it is the province of the jury to determine which of the witnesses has spoken the truth, even if in order to do so it is necessary to impute perjury to one or the other. *Champion v. State*, 84 Ga. App. 163, 65 S.E.2d 280 (1951).

Jury may reject impeaching testimony. — Effort to impeach does not always result in impeachment; the jury may accept the testimony of a witness whom it is sought to impeach, rather than that of the impeaching witness. *Taylor v. State*, 5 Ga. App. 237, 62 S.E. 1048 (1908); *Jolly v. State*, 5 Ga. App. 454, 63 S.E. 520 (1909); *Smith v. State*, 7 Ga. App. 710, 67 S.E. 1048 (1910); *Hudgins v. State*, 7 Ga. App. 785, 68 S.E. 336 (1910); *Simmons v. State*, 9 Ga. App. 552, 71 S.E. 876 (1911); *Griggs v. State*, 17 Ga. App. 301, 86 S.E. 726 (1915).

Witness who is attacked for general bad character may be believed by the jury regardless of whether there is any evidence to sustain the witness's good character or any corroborating evidence. *Preston v. State*, 42 Ga. App. 280, 155 S.E. 774 (1930); *Rowe v. State*, 68 Ga. App. 161, 22 S.E.2d 210 (1942).

Witness's manner of testifying. — It is for the jury to observe the witness's manner of testifying to decide whether the witness swore positively falsely and ought not to be believed in any particular, or whether the witness was confused and the witness's testimony, though highly inconsistent, was worthy of credit and to be given weight in determining the issues to which it related. *Griffin v. Ross*, 93 Ga. App. 407, 91 S.E.2d 815 (1956).

Contradiction or Bad Character (Cont'd)

2. Function of Jury (Cont'd)

Interested witness may be disbelieved. — Interest of a witness in the result of the suit may always be considered in passing upon the witness's credibility, and, if there are circumstances inconsistent with the truth of the witness's testimony, the jury is not obliged to believe the witness, even though the witness is not contradicted by any other witness. *Hinchcliffe v. Pinson*, 87 Ga. App. 526, 74 S.E.2d 497 (1953).

Purchaser of stolen goods. — It was a jury question as to whether or not the defendant's explanation that the defendant was an innocent purchaser of stolen goods was credible, and the jury was authorized but not required to disbelieve the state's witness who denied selling the tires to the defendant, since the credit given the testimony of one impeached for general bad character is for the jury to determine. *Stephens v. State*, 94 Ga. App. 366, 93 S.E.2d 623 (1956).

Testimony by owner of stolen property as to value for purposes of restitution. — When an owner of stolen property is attempting to establish value for purposes of restitution by the thief, if there is any doubt as to whether the witness has shown a sufficient basis or foundation for the witness's opinion as to value, there are particularly sound reasons of justice why the evidence ought to be admitted and its weight and credibility, and indeed the question of whether the witness has given sufficient foundation, should be left to the trier of fact. *Maddox v. State*, 157 Ga. App. 696, 278 S.E.2d 480 (1981).

Contradictory statement given under coercion. — Because subsection (b) of O.C.G.A. § 24-9-85 requires that the false swearing be willful, evidence that a witness gave in to coercive threats at the time of giving a contradictory statement allowed the jury to find the witness did not act willfully, but involuntarily. *Gurr v. State*, 238 Ga. App. 1, 516 S.E.2d 553 (1999).

3. Instructions

Charge on impeachment is not required in the absence of a timely written request. *Spence v. State*, 52 Ga. App. 383, 183 S.E. 339 (1936); *Martin v. State*, 53 Ga. App. 213, 185 S.E. 387 (1936); *Aycock v. State*, 188 Ga.

551, 4 S.E.2d 221 (1939); *Georgia Power Co. v. Burger*, 63 Ga. App. 784, 11 S.E.2d 834 (1940); *Hyde v. State*, 196 Ga. 475, 26 S.E.2d 744 (1943); *Grier v. State*, 196 Ga. 515, 26 S.E.2d 889 (1943); *Fuller v. State*, 197 Ga. 714, 30 S.E.2d 608 (1944); *Cady v. State*, 198 Ga. 99, 31 S.E.2d 38, appeal dismissed and cert. denied, 323 U.S. 676, 65 S. Ct. 190, 89 L. Ed. 549 (1944); *Stone v. State*, 80 Ga. App. 557, 56 S.E.2d 835 (1949); *Summerour v. State*, 85 Ga. App. 94, 68 S.E.2d 158 (1951); *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954); *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974); *Duke v. State*, 147 Ga. App. 101, 248 S.E.2d 176 (1978); *Apgar v. State*, 159 Ga. App. 752, 285 S.E.2d 89 (1981).

Failure to charge statute not error in the absence of a timely request since the court charged the principles of law relating to credibility of witnesses generally. *Aycock v. State*, 188 Ga. 550, 4 S.E.2d 221 (1939); *Smaha v. George*, 195 Ga. 412, 24 S.E.2d 385 (1943); *Milwaukee Mechanics Ins. Co. v. Davis*, 79 Ga. App. 70, 52 S.E.2d 643 (1949); *McDonald v. State*, 89 Ga. App. 759, 81 S.E.2d 303 (1954); *Bentley v. State*, 131 Ga. App. 425, 205 S.E.2d 904 (1974).

Court did not err by failing to charge the jury on subsection (b) of O.C.G.A. § 24-9-85 since defense counsel made no written or oral request for such a charge. *Blackstock v. State*, 270 Ga. 117, 506 S.E.2d 130 (1998).

Trial court was not required to charge a jury on false swearing, under O.C.G.A. § 24-9-85(b), due to false statements made by a prosecution witness to investigators and the witness's signatures on false applications because none of the statements or signatures were made under oath, and the witness did not admit the witness swore falsely. *Brown v. State*, 268 Ga. App. 629, 602 S.E.2d 158 (2004).

Charge need not be in exact language of the statute. *Southern Ry. v. Peek*, 6 Ga. App. 43, 64 S.E. 308 (1909); *Jeffers v. State*, 145 Ga. 74, 88 S.E. 571 (1916); *Dean v. State*, 154 Ga. 533, 114 S.E. 809 (1922). See also *Powell v. State*, 101 Ga. 9, 29 S.E. 309, 65 Am. St. R. 277 (1897); *Harris v. State*, 1 Ga. App. 136, 57 S.E. 937 (1907). In addition see *Mitchell v. State*, 110 Ga. 272, 34 S.E. 576 (1899); *Elliot v. State*, 138 Ga. 23, 74 S.E. 691 (1912).

Charge must be complete. — While it is not incumbent upon the judge, in the ab-

sence of a timely and appropriate written request, to charge upon the subject of the impeachment of witnesses, yet, where that subject is referred to in the charge, all of it that is material and applicable to the facts of the case should be given. *Moore v. State*, 55 Ga. App. 157, 189 S.E. 551 (1937).

Charge includes substance of § 24-9-82.

— Charge of the court in the language of former Code 1933, § 38-1806 (see O.C.G.A. § 24-9-85) that when a witness shall be successfully contradicted as to a material matter the witness's credit as to other matters is for the jury, includes the substance of former Code 1933, § 38-1802 (see O.C.G.A. § 24-9-82) which provided that a witness may be impeached by disproving facts testified to by the witness. *Aiken v. Glass*, 95 Ga. App. 849, 99 S.E.2d 426 (1957).

Refusal of request for instruction. — It is error, in a case in which the determination of the issue depends almost entirely upon the credibility of a witness whom it is sought to impeach, to refuse a request that the statute be given in charge to the jury, the request being in the exact language of the statute. *Pelham & H.R.R. v. Elliott*, 11 Ga. App. 621, 75 S.E. 1062 (1912).

It is error for court to instruct jury that if the jury believes a witness has made previous statements contradictory to the witness's testimony delivered on the trial, such testimony should be disregarded unless it "is corroborated." *Waycaster v. State*, 136 Ga. 95, 70 S.E. 883 (1911); *Henrich v. McCauley*, 154 Ga. 855, 115 S.E. 655 (1923).

Contradictory statement in deposition. — It was not error to charge the provisions of the statute, including those on impeachment of witnesses for "general bad character or for contradictory statements out of court," when appellant made two statements under cross-examination which could be found to be contradictory of statements previously made in a deposition. *Savannah Ice Delivery Co. v. Ayers*, 127 Ga. App. 560, 194 S.E.2d 330 (1972).

Consideration of evidence in former trial.

— In criminal prosecution, court's charge that jury should not consider anything said or done in former trial of case was not an infringement and invasion of the province of the jury trying the case, notwithstanding contention that had the jury been allowed to consider testimony from former trial, it

would have concluded that the evidence in the present trial was inconsistent with evidence and statements made by prosecution witness previously and thus could have believed the statement of the defendant. *Crosby v. State*, 92 Ga. App. 335, 88 S.E.2d 523 (1955).

False Swearing

1. In General

General rule. — Before this rule of total rejection is applicable, the false swearing must be made in the identical case on trial, and not upon the trial of some other case no matter how closely related; it must be willfully and knowingly false; the witness must admit that the witness willfully and knowingly swore falsely, or the nature and character of the witness's own testimony must be such as to render the purpose to falsify "plainly manifest"; and also, the false testimony may relate to a matter which is merely "collateral" to the main issue, although it must be relevant and incidentally material thereto. *Jones v. State*, 70 Ga. App. 431, 28 S.E.2d 373 (1943).

Willful and knowing false swearing. — Before the principle of total rejection of a witness's testimony is applied, it must manifestly appear that not only has the witness on one or the other occasion sworn falsely to a material matter, but that the witness has done so willfully and knowingly. *McLendon v. Johnson*, 71 Ga. App. 424, 31 S.E.2d 89 (1944); *Teague v. Keith*, 214 Ga. 853, 108 S.E.2d 489 (1959); *Henderson v. State*, 146 Ga. App. 114, 245 S.E.2d 437 (1978); *Duke v. State*, 147 Ga. App. 101, 248 S.E.2d 176 (1978); *Burrell v. State*, 171 Ga. App. 648, 320 S.E.2d 810 (1984); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987); overruled on other grounds, *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007); *Yebra v. State*, 206 Ga. App. 12, 424 S.E.2d 318 (1992).

In order to make O.C.G.A. § 24-9-85 applicable, it must appear, among other things, that the witness admits, on the trial, that the witness willfully and knowingly swore falsely, or the testimony must be such as to render manifest the purpose to falsify. *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981).

Testimony which must be disregarded in

False Swearing (Cont'd)**1. In General (Cont'd)**

the testimony's entirety is only that testimony which is willfully and knowingly false. *Fugitt v. State*, 251 Ga. 451, 307 S.E.2d 471 (1983), cert. denied, 479 U.S. 1070, 107 S. Ct. 963, 93 L. Ed. 2d 1011 (1987); *Warnock v. State*, 195 Ga. App. 537, 394 S.E.2d 382 (1990).

As to subsection (b) of O.C.G.A. § 24-9-85, it must be understood that the testimony which must be disregarded in the testimony's entirety is only that testimony which is willfully and knowingly false. *Grant v. State*, 197 Ga. App. 878, 399 S.E.2d 743 (1990).

An inconsistency does not necessarily imply an intentional lie; thus, it did not necessarily follow that a deputy intentionally lied because the deputy added details of the arrest at trial that were not indicated in the police report. *Tri Huynh v. State*, 239 Ga. App. 62, 518 S.E.2d 920 (1999).

Inconsistencies did not rise to the level of "willfully and knowingly swearing falsely" so as to support a charge under O.C.G.A. § 24-9-85 since there was no showing that the victim's testimony was willfully and knowingly false or that the testimony was such as to render the purpose to falsify manifest. *Turner v. State*, 245 Ga. App. 294, 536 S.E.2d 814 (2000), overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Lying to police does not constitute false swearing and, therefore, the credibility of the testimony of an accomplice who admitted lying to the police is a matter for the jury to resolve. *Brown v. State*, 187 Ga. App. 557, 370 S.E.2d 818 (1988).

False swearing in same case. — Before application of the rule of total rejection of testimony by a witness who swears falsely, the false swearing must be made in the case on trial. *Jones v. State*, 70 Ga. App. 431, 28 S.E.2d 373 (1943); *Milwaukee Mechanics Ins. Co. v. Davis*, 79 Ga. App. 70, 52 S.E.2d 643 (1949); *Taylor v. State*, 83 Ga. App. 735, 64 S.E.2d 598 (1951); *Gellis v. B.L.I. Constr. Co.*, 148 Ga. App. 527, 251 S.E.2d 800 (1978).

Applicability. — When there is no evidence that a witness was ever confronted with or asked to explain certain evidence or

that false swearing was made on the trial of the case, this statute is not applicable. *Gellis v. B.L.I. Constr. Co.*, 148 Ga. App. 527, 251 S.E.2d 800 (1978).

Subsection (b) is not applicable when a witness is attacked for general bad character. *Rowe v. State*, 68 Ga. App. 161, 22 S.E.2d 210 (1942) (see O.C.G.A. § 24-9-85).

Inconsistencies in the testimony of witnesses do not in and of themselves authorize a conclusion that some of the testimony was perjured. It is for the jury to resolve the conflicts. *Howard v. State*, 200 Ga. App. 188, 407 S.E.2d 769, cert. denied, 200 Ga. App. 896, 407 S.E.2d 769 (1991).

Mistake or failure of memory. — Subsection (b) does not extend to situations where it is shown to be reasonably possible that the discrepancy was occasioned by mistake or the failure of memory. *Smaha v. George*, 195 Ga. 412, 24 S.E.2d 385 (1943); *McLendon v. Johnson*, 71 Ga. App. 424, 31 S.E.2d 89 (1944); *Roach v. Carroll*, 110 Ga. App. 636, 139 S.E.2d 523 (1964); *Yebra v. State*, 206 Ga. App. 12, 424 S.E.2d 318 (1992) (see O.C.G.A. § 24-9-85).

Testimony of child victim. — Credibility of the testimony of a child victim of sexual abuse who gave false or contradictory testimony was a question for the jury. *Perguson v. State*, 221 Ga. App. 212, 470 S.E.2d 909 (1996).

False statement must be material. — This stringent rule has been modified somewhat in that what is falsely sworn to must be material. *Holbrook v. Rodgers*, 105 Ga. App. 219, 124 S.E.2d 443 (1962).

With regard to a defendant's convictions for aggravated assault and other crimes, the trial court did not abuse the court's discretion by denying the defendant's motion for a new trial, which was based on the victim allegedly testifying falsely that the victim was leaving the defendant for personal reasons and not because of any alleged affair with another on the defendant's part as, assuming the reasons the victim was leaving the defendant was material to the case, no showing was made by the defendant that the testimony was false as compared to a divorce complaint the victim subsequently filed, which listed adultery as one of the reasons for seeking the divorce. *Hardy v. State*, 293 Ga. App. 265, 666 S.E.2d 730 (2008).

False testimony not found. — In finding that an incident was not a traffic violation,

the trial court did not find that an officer testified falsely about the incident under O.C.G.A. § 24-9-85(b); the court disagreed only with the officer's characterization of the incident. The trial court believed that an earlier incident occurred as the officer described the incident, and the court held that the first incident constituted a violation sufficient to justify the traffic stop. *Floyd v. State*, 297 Ga. App. 736, 678 S.E.2d 181 (2009).

Hearsay evidence as corroboration. — Hearsay evidence will not support a verdict, or afford corroboration of a witness who has testified willfully and knowingly falsely, but the language of the witness may indicate that it rested on actual facts. *Bull & Son v. Carpenter*, 32 Ga. App. 637, 124 S.E. 381 (1924).

2. Function of Jury

In general. — Credibility of a witness is exclusively for determination by the jury and, although a witness may have been successfully impeached, it is left to the discretion of the jury to decide whether the witness's testimony has been corroborated; and, while it would be their duty to disregard entirely the testimony of an impeached witness, unless corroborated, yet they have the right to believe the evidence of a witness, notwithstanding the impeachment, and in the absence of any corroboration. *Edwards v. State*, 55 Ga. App. 187, 189 S.E. 678 (1937); *Fulmer v. State*, 74 Ga. App. 298, 39 S.E.2d 732 (1946).

Statute not intended as abridgement of absolute right of jury to determine the credibility of witnesses. *Brown v. State*, 10 Ga. App. 50, 72 S.E. 537 (1911); *Solomon v. State*, 10 Ga. App. 469, 73 S.E. 623 (1912); *Edwards v. State*, 55 Ga. App. 187, 189 S.E. 678 (1937). See also *Rice v. City of Eatonton*, 15 Ga. App. 505, 83 S.E. 868 (1914); *Ware v. State*, 18 Ga. App. 107, 89 S.E. 155 (1916). In addition see *Bishop v. State*, 18 Ga. App. 714, 90 S.E. 369 (1916); *Hunter v. State*, 19 Ga. App. 615, 91 S.E. 927 (1917).

False swearing and contradictory statements distinguished. — Effect in the case of a prior contradictory statement is to leave the witness's credibility to the jury; in the case of willfully and knowingly swearing falsely, the testimony must be entirely disregarded unless there is corroboration from

other sources. *Hall v. Burpee*, 176 Ga. 270, 168 S.E. 39 (1933); *Eberhart v. State*, 121 Ga. App. 663, 175 S.E.2d 73 (1970).

When defendant contended that the victim's recitations of the events were so inconsistent and implausible as to require that the victim's testimony be rejected, but the record did not disclose that the victim swore willfully and knowingly falsely, the question of the victim's credibility was for the jury to determine. *Williams v. State*, 180 Ga. App. 365, 349 S.E.2d 253 (1986).

Whether testimony willfully false is jury question. — It is for the jury to determine whether any witness testifies willfully and knowingly falsely, and if so, to discredit entirely unless corroborated by circumstances or other unimpeached evidence. *Sutton v. State*, 18 Ga. App. 28, 88 S.E. 744 (1916); *Scoggins v. State*, 23 Ga. App. 366, 98 S.E. 240, cert. denied, 23 Ga. App. 813 (1919).

Corroboration is jury question. — Nature and extent of corroboration necessary to prove the perjury must in each case be determined by the jury. *Jones v. State*, 70 Ga. App. 431, 28 S.E.2d 373 (1943).

Amount of corroboration needed is that amount of corroborative evidence which will convince the jury that a certain state of facts is true. *Crowe v. State*, 83 Ga. App. 325, 63 S.E.2d 682 (1951).

Effect of corroboration. — Whenever a witness has been successfully impeached in any of the manners provided by law, the jury has the right to disregard the testimony of such witness, and exclude it entirely, provided the testimony of such witness is uncorroborated; on the other hand, if the testimony of such witness is corroborated by circumstances or other unimpeached evidence, the jury is authorized to consider the testimony of such witness. *Kicklighter v. State*, 76 Ga. App. 246, 45 S.E.2d 719 (1947).

Jury may believe corroborated witness. — If a witness had been impeached and thereby rendered totally unworthy of credit, the jury might still believe the witness, if the witness was corroborated by other witnesses. *Grant v. State*, 118 Ga. 804, 45 S.E. 603 (1903).

Jury may believe uncorroborated witness. — It is within the power and right of a jury to believe a witness, no matter what effort may have been made or testimony presented to impeach the witness, and even though the

False Swearing (Cont'd)**2. Function of Jury (Cont'd)**

witness was not corroborated. *Sutton v. State*, 18 Ga. App. 28, 88 S.E. 744 (1916); *Robinson v. State*, 52 Ga. App. 106, 182 S.E. 417 (1935).

Testimony disregarded when uncorroborated. — If a witness swears willfully and knowingly false, the witness's testimony is to be disregarded entirely when it is not corroborated by circumstances or other unimpeached evidence. *Humphreys v. Smith*, 133 Ga. 456, 66 S.E. 158 (1909); *Smaha v. George*, 195 Ga. 412, 24 S.E.2d 385 (1943); *Champion v. State*, 84 Ga. App. 163, 65 S.E.2d 280 (1951); *Roach v. Carroll*, 110 Ga. App. 636, 139 S.E.2d 523 (1964).

Explanation by witness. — On the question of the willfulness of false swearing, the witness is entitled to explain the witness's reasons for doing so, and the jury may consider this explanation in passing on the witness's credibility. *Montgomery v. State*, 224 Ga. 845, 165 S.E.2d 145 (1968).

Witness may be believed. — Even though a witness may admit having previously sworn falsely, the witness may still be believed by the jury if an explanation of the reasons for the false testimony is reasonable and satisfactory to the jury. *Jolly v. State*, 5 Ga. App. 454, 63 S.E. 520 (1909); *Chatman v. State*, 8 Ga. App. 842, 70 S.E. 188 (1911); *Brown v. State*, 17 Ga. App. 402, 87 S.E. 155 (1915).

Evidence that a witness gave in to coercive threats allowed the jury to find that the witness did not act willfully, but involuntarily. *Gurr v. State*, 238 Ga. App. 1, 516 S.E.2d 553 (1999).

Repudiation and reaffirmation of testimony. — After a witness repudiated the witness's earlier testimony and, in the course of being further interrogated, reaffirmed the witness's original version of the matter, and this testimony was contradicted by the positive and plausible evidence of several witnesses, the jury was thoroughly warranted in disbelieving the witness altogether. *Griffin v. Ross*, 93 Ga. App. 407, 91 S.E.2d 815 (1956).

3. Instructions

In general. — Rule that when the judge charges correctly on one or more of the methods of impeachment, the judge's fail-

ure to charge also upon another method raised by the evidence is not reversible error in the absence of a request to charge is subject to the single exception embraced in this statute in regard to false swearing. *Milwaukee Mechanics Ins. Co. v. Davis*, 79 Ga. App. 70, 52 S.E.2d 643 (1949); *Taylor v. State*, 83 Ga. App. 735, 64 S.E.2d 598 (1951).

Failure to charge statute not error. — There is authority for the proposition that under certain circumstances, a charge on subsection (b) of O.C.G.A. § 24-9-85 should be given even absent a request, but when the record shows that such circumstances did not exist in the instant case, there was no error in failing to give the charge. *Bouldin v. State*, 179 Ga. App. 394, 346 S.E.2d 871 (1986).

Trial court correctly denied the defendant's request to charge on false swearing because, while the witness made inconsistent statements to an investigator of a domestic abuse incident, they did not constitute an admission to false swearing nor lead to the conclusion that the witness subsequently willfully and knowingly lied under oath to a magistrate. *Grant v. State*, 245 Ga. App. 652, 538 S.E.2d 540 (2000).

Jury charge on false swearing under O.C.G.A. § 24-9-85(b) was properly refused because the victim did not admit to swearing falsely, and speculation that the victim had a motive to swear falsely did not render the victim's purpose to falsify testimony manifest. *Callahan v. State*, 256 Ga. App. 482, 568 S.E.2d 780 (2002).

During a defendant's trial for malice murder and other crimes, because the defendant never requested a jury charge on false swearing, the trial court did not err by failing to give the charge; further, a review of the jury instructions, which included instructions on the credibility of witnesses and impeachment, established that had there been any error in the trial court's failure to give such a charge, it would have been harmless. *Hunter v. State*, 281 Ga. 693, 642 S.E.2d 668 (2007).

Harmless error. — Considering the charge in the charge's entirety and the fact that the court charged the jury on impeachment and the credibility of witnesses, any error in failing to give a charge based on subsection (b) of O.C.G.A. § 24-9-85 was harmless. *Evans v. State*, 209 Ga. App. 340,

433 S.E.2d 426 (1993).

Instruction required. — Failure to charge the provisions of the statute is error, even in the absence of a request, if a witness swears at the trial to a certain state of facts in a material matter, and the witness has previously sworn to the contrary in the same case. *Payne v. Reese*, 28 Ga. App. 180, 110 S.E. 740 (1922); *Martin v. State*, 53 Ga. App. 213, 185 S.E. 387 (1936); *Smith v. State*, 74 Ga. App. 777, 41 S.E.2d 541, cert. denied, 332 U.S. 772, 68 S. Ct. 86, 92 L. Ed. 357 (1947); *Martin v. State*, 93 Ga. App. 580, 92 S.E.2d 233 (1956).

Under O.C.G.A. § 24-9-85, if a witness swears at the trial to a certain state of facts in a material matter, and the witness has previously sworn to the contrary in the same case, and when the witness admits that the witness's testimony was false, this constitutes a willful and knowing false swearing, and requires the jury to reject the witness's testimony entirely, unless the testimony be corroborated by circumstances or other unimpeached evidence. In such a case the judge should so charge the jury, even without a request. *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981).

Motive to testify falsely does not require charge. — An instruction to the jury under O.C.G.A. § 24-9-85(b) is not required by the existence of a motive to testify falsely. *Steele v. State*, 248 Ga. App. 441, 546 S.E.2d 547 (2001).

Charge unnecessary when false swearing denied. — It is not reversible error for a judge, in the absence of a request, to fail to charge to the jury the rule of impeachment, which provides that the testimony of a witness, who shall "swear willfully and knowingly falsely" as to a material matter, shall be "disregarded entirely, unless corroborated by circumstances or other unimpeached evidence," where witnesses, though admitting an inaccuracy in the witnesses' previous depositions with respect to an incidental question, denied any intentional falsity, and sought to explain the discrepancy as due to a failure to refresh the witnesses' recollection on a matter which was not impressed on the witnesses' minds, or due to the confusion caused by the circumstances of cross-examination in the witnesses' previous depositions, and since the nature and character of the testimony is not such as would

render the purpose to falsify plainly manifest. *Georgia R.R. & Banking Co. v. Flynt*, 93 Ga. App. 514, 92 S.E.2d 330 (1956).

When the witness's statement to the police was unsworn and the witness denied that the witness was lying both on direct and cross-examination, the trial court did not err in failing to charge the jury that the jury must disregard the testimony of a witness who knowingly and willfully swears falsely, and as the credibility of the witness was placed in issue, the trial court correctly charged the jury that the jury was the judge of the credibility of witnesses. *Abrams v. State*, 157 Ga. App. 609, 278 S.E.2d 37 (1981).

Trial counsel's decision not to request a charge under subsection (b) of O.C.G.A. § 24-9-85 was proper since the witness did not admit to swearing falsely and the evidence did not render the witness's purpose to falsify manifest; the witness's credibility was for the jury under proper instructions regarding credibility and impeachment. *Ney v. State*, 227 Ga. App. 496, 489 S.E.2d 509 (1997).

No duty to charge when possibility of mistake or failure of memory shown. — For a trial court to have a duty to charge O.C.G.A. § 24-9-85, it must manifestly appear not only that the witness has on another occasion sworn falsely to a material matter but the witness has done so willfully and knowingly, but this rule does not extend to situations where it is shown to be reasonably possible that the discrepancy was occasioned by mistake or the failure of memory. *Abrams v. State*, 157 Ga. App. 609, 278 S.E.2d 37 (1981); *Wozniuk v. Kitchin*, 229 Ga. App. 359, 494 S.E.2d 247 (1997).

When a discrepancy in testimony appears to have been caused by mistake or failure of memory due to the lapse of time, the trial court does not err in refusing to charge subsection (b) of O.C.G.A. § 24-9-85. *Mauldin v. State*, 167 Ga. App. 789, 307 S.E.2d 689 (1983); *Williams v. State*, 195 Ga. App. 376, 393 S.E.2d 506 (1990).

Failure to charge in exact language of statute not error. — When the language of O.C.G.A. § 24-9-85 is substantially given by the judge, wherein the judge instructs in detail about the believability of witnesses and disbelieving a discredited witness, and there is no exception made to the charge as given

False Swearing (Cont'd)**3. Instructions (Cont'd)**

in this regard, the failure to charge in the exact language of O.C.G.A. § 24-9-85 is not error. *Poteat v. State*, 251 Ga. 87, 303 S.E.2d 452 (1983).

Better practice is to include word "entirely" in an instruction on subsection (b). *Garland v. State*, 124 Ga. 832, 53 S.E. 314 (1906) (see O.C.G.A. § 24-9-85).

Statute must be charged. — When witness testified in a conflicting manner and assigned as a reason that the witness's testimony before the grand jury was false, that the witness was at that time a friend of the accused but was at the time of the trial an enemy of the accused, it was error for the court to fail to charge this statute. *Plummer v. State*, 111 Ga. 839, 36 S.E. 233 (1900) (see O.C.G.A. § 24-9-85).

Charge authorized. — When there are admitted discrepancies in the testimony of the plaintiff's witnesses on material matters in the interrogatories taken for use in the case, and in the verbal testimony delivered in the trial, as well as the discrepancies in the verbal testimony in the trial itself, the court was authorized to charge on total rejection which is provided for by statute. *Beardsley v. Suburban Coach Co.*, 83 Ga. App. 381, 63 S.E.2d 911 (1951).

Reversal due to prejudicial charge. — When the harm resulting from the inclusion of a wilful and false swearing instruction was exacerbated by an improper attack by plaintiff's counsel upon the character of defendant's sole witness, the trial court's failure to rebuke counsel or to endeavor to remove the improper impression left in the minds of the jurors was reversible error. *All Risk Ins. Agency, Inc. v. Southern Bell Tel. & Tel. Co.*, 182 Ga. App. 190, 355 S.E.2d 465 (1987).

Trial court's refusal to give requested charge on O.C.G.A. § 24-9-85 was reversible error after appellant produced a sworn affidavit by prosecutor that there had been no rape or other sexual contact between appellant and prosecutor, but prosecutor repudiated this evidence on the stand, because the credibility of the prosecutor, the only witness to the alleged assault, was so material that without it the conviction could not be sustained. *Blount v. State*, 172 Ga. App. 120, 322 S.E.2d 323 (1984).

Instruction proper when testimony irreconcilable with state's evidence. — Trial court did not err in instructing the jury on falsely sworn testimony since defendant's testimony was irreconcilable with the state's evidence, and thus the jury was authorized to conclude that defendant had sworn falsely to a material matter. *Hanvey v. State*, 186 Ga. App. 690, 368 S.E.2d 357, cert. denied, 186 Ga. App. 918, 368 S.E.2d 357 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 488.

ALR. — Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Modern view as to propriety and correctness of instructions referable to maxim

"falsus in uno, falsus in omnibus", 4 ALR2d 1077.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 ALR3d 617.

Admissibility of affidavit to impeach witness, 14 ALR4th 828.

ARTICLE 5

USE OF SIGN LANGUAGE AND INTERMEDIARY INTERPRETER IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Editor's notes. — Ga. L. 1983, p. 852, § 2, effective July 1, 1983, repealed the Code sections formerly codified at this article and

enacted the current article. The former article consisted of Code Sections 24-9-100 through 24-9-105 and was based on Ga. L.

1974, p. 484, Code Sections 1-6 and Ga. L.
1981, Ex. Sess., p. 8.

OPINIONS OF THE ATTORNEY GENERAL

O.C.G.A. Art. 5, Ch. 9, T. 24 applies to the state government, not the federal government. 1985 Op. Att'y Gen. No. 85-50.

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trial, § 18.
C.J.S. — 23 C.J.S., Criminal Law, § 1514 et seq.
ALR. — Deaf-mute as witness, 50 ALR4th 1188.

24-9-100. State policy.

It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commissions, departments, and boards of the state and its subdivisions unless qualified interpreters are available to assist them. (Code 1981, § 24-9-100, enacted by Ga. L. 1983, p. 852, § 2; Ga. L. 2010, p. 878, § 24/HB 1387.)

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, substituted “commissions” for “commission” near the end of this Code section.

JUDICIAL DECISIONS

Failing to object to presence of interpreters. — With regard to two defendants’ convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants’ respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters’ personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpret-

ers did otherwise. *Smith v. State*, 284 Ga. 599, 669 S.E.2d 98 (2008).

Adequate accommodation for defendant’s hearing loss. — Defendant’s claim of a due process violation because the defendant’s hearing impairment prevented the defendant from comprehending the witnesses’ testimony was properly rejected. The trial court accommodated the defendant by moving the defendant closer to the witness stand and obtaining a hearing device for the defendant to use, and the defendant’s conduct during the trial and statements to defense counsel indicated that the defendant was able to understand the testimony. *Neugent v. State*, 294 Ga. App. 284, 668 S.E.2d 888 (2008).

24-9-101. Definitions.

As used in this article, the term:

(1) “Agency” means any agency, authority, board, bureau, committee, commission, court, department, or jury of the legislative, judicial, or executive branch of government of the state or any political subdivision thereof.

(2) “Department” means the Department of Labor.

(3) “Hearing impaired person” means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone.

(4) “Intermediary interpreter” means any person, including any hearing impaired person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between the variance of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.

(5) “Proceeding” means any meeting, hearing, trial, investigation, or other proceeding of any nature conducted by an agency.

(6) “Qualified interpreter” means any person certified as an interpreter by the National Registry of Interpreters for the Deaf or approved as an interpreter by the Georgia Registry of Interpreters for the Deaf. (Code 1981, § 24-9-101, enacted by Ga. L. 1983, p. 852, § 2; Ga. L. 2009, p. 453, § 2-13/HB 228.)

The 2009 amendment, effective July 1, for “Department of Human Resources” in 2009, substituted “Department of Labor” paragraph (2).

JUDICIAL DECISIONS

Cited in *State v. Webb*, 212 Ga. App. 872, 443 S.E.2d 630 (1994); *Bright v. State*, 238 Ga. App. 876, 520 S.E.2d 48 (1999).

24-9-102. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings; hearing impaired persons to make requests for interpreters.

(a) The agency conducting any proceeding shall provide a qualified interpreter to the hearing impaired person:

(1) Whenever the hearing impaired person is a party to the proceeding or a witness before the proceeding; or

(2) Whenever a person below the age of 18 years whose parents are hearing impaired persons is a party to the proceeding or a witness before the proceeding conducted by an agency.

(b) The hearing impaired person shall notify the agency not less than ten days, excluding weekends and holidays, prior to the date of the proceeding of the need for a qualified interpreter. If the hearing impaired person receives notice of the proceeding less than ten days, excluding weekends and holidays, prior to the proceeding, he shall notify the agency as soon as practicable after receiving such notice. Upon receiving a request for a qualified interpreter, the agency shall immediately forward such request to the department. Upon receiving a request from an agency, the department shall provide a qualified interpreter for the proceeding specified in the request. (Code 1981, § 24-9-102, enacted by Ga. L. 1983, p. 852, § 2; Ga. L. 1985, p. 149, § 24.)

OPINIONS OF THE ATTORNEY GENERAL

Hearing impaired juror. — Subsection (a) of O.C.G.A. § 24-9-102 does not require that a court provide an interpreter for a hearing impaired prospective juror. 1987 Op. Att'y Gen. No. U87-11.

24-9-103. Procedure for interrogation and taking of statements from hearing impaired persons when arrested; interpreters to be provided upon arrest of hearing impaired persons.

(a) The arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person is taken into custody for allegedly violating any criminal law or ordinance of the state or any political subdivision thereof.

(b)(1) Except as provided in paragraph (2) of this subsection, the law enforcement agency shall immediately request a qualified interpreter from the department, and the department shall provide a qualified interpreter. No interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken until a qualified interpreter has been provided; and no answer, statement, admission, or other evidence acquired from the hearing impaired person shall be admissible in any criminal or quasi-criminal proceeding unless such was knowingly and voluntarily given through and in the presence of a qualified interpreter. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter.

(2) If a qualified interpreter is not available one hour after the hearing impaired person has been taken into custody and a request has been forwarded to the department, the arresting officer may interrogate or take a statement from such person, provided that such interrogation and

answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense. (Code 1981, § 24-9-103, enacted by Ga. L. 1983, p. 852, § 2.)

Law reviews. — For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

For casenote, “Rodriguez v. State: Addressing Georgia’s Implied Consent Requirements for Non-English-Speaking Drivers,” see 54 Mercer L. Rev. 1253 (2003).

JUDICIAL DECISIONS

Hearing impaired person arrested for driving under the influence was not entitled to a qualified interpreter before the person’s rights under the implied consent law were conveyed to the person by the arresting officer. *State v. Webb*, 212 Ga. App. 872, 443 S.E.2d 630 (1994).

Giving implied consent card inadequate. — Qualified interpreter was required to be present to convey implied consent warnings and rights to an impaired person before any questioning or advice was given and an officer’s giving the person an “implied consent card” to read and writing an explanation were not sufficient. *Allen v. State*, 218 Ga. App. 844, 463 S.E.2d 522 (1995).

Impact of one-hour waiting period. — When police have made a request for an interpreter and one has been provided, after the one-hour waiting period elapses, the police may proceed with their investigation under the implied consent laws. If, however, the impaired person intelligently waives the one-hour requirement, the police may proceed with written interrogatories and the person should answer in writing, and then the police may proceed under the implied consent law. *Allen v. State*, 218 Ga. App. 844, 463 S.E.2d 522 (1995).

Arresting officer failed to comply with statutory procedures. — DUI conviction was reversed when the arresting officer failed to comply with the statutory procedures for communicating with a hearing-impaired detainee because the requirements in the statute are mandatory, and if not met, the evidence acquired is not admissible under O.C.G.A. § 24-9-103. *Yates v. State*, 248 Ga. App. 35, 545 S.E.2d 169 (2001).

Non hearing-impaired defendant’s equal protection argument failed when the defen-

dant could not meet the defendant’s burden to show that O.C.G.A. § 24-9-103 is arbitrary or otherwise not rationally related to a legitimate state interest. *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998).

Failing to object to presence of interpreters. — With regard to two defendants’ convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants’ respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters’ personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. *Smith v. State*, 284 Ga. 599, 669 S.E.2d 98 (2008).

Impact of failure to comply with procedure. — When the arresting officer failed to comply with the procedure in O.C.G.A. § 24-9-103, such failure rendered blood test results inadmissible. *State v. Woody*, 215 Ga. App. 448, 449 S.E.2d 615 (1994).

Application to Spanish speaking people. — Defendant’s constitutional claims to the implied consent statutes were without merit since defendant, a Spanish speaking person, was not similarly situated to a hearing impaired person and, although similarly situated to an English-speaking person, there was a rational basis for requiring the implied consent warnings to be read in English. *Rodriguez v. State*, 275 Ga. 283, 565 S.E.2d 458 (2002).

24-9-104. Indigent hearing impaired defendants to be provided with interpreters.

(a) A court shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person has been provided with a court appointed legal counsel. The court shall request a qualified interpreter from the department, and the department shall provide a qualified interpreter.

(b) The qualified interpreter authorized by this Code section shall be present at all times when the hearing impaired person is consulting with legal counsel. (Code 1981, § 24-9-104, enacted by Ga. L. 1983, p. 852, § 2.)

24-9-105. Waiver of right to interpreter.

Whenever a hearing impaired person shall be authorized a qualified interpreter, such person may waive the right to the use of such interpreter. Any such waiver shall be in writing and shall be approved by the agency, law enforcement agency, or court before which the hearing impaired person is to appear. In no event shall the failure of a hearing impaired person to request an interpreter be deemed to be a waiver. (Code 1981, § 24-9-105, enacted by Ga. L. 1983, p. 852, § 2.)

JUDICIAL DECISIONS

Cited in *Yates v. State*, 248 Ga. App. 35, 545 S.E.2d 169 (2001).

24-9-106. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters; qualified interpreter list.

(a) Whenever a hearing impaired person shall be authorized a qualified interpreter, the agency, law enforcement agency, or court shall determine whether the qualified interpreter so provided is able to communicate accurately with and translate information to and from the hearing impaired person. If it is determined that the qualified interpreter cannot perform these functions, the agency, law enforcement agency, or court shall request another qualified interpreter from the department or shall appoint an intermediary interpreter to assist the qualified interpreter in communicating with the hearing impaired person.

(b) The department shall prepare and maintain a list of qualified interpreters and qualified intermediary interpreters from which such interpreters shall be provided. (Code 1981, § 24-9-106, enacted by Ga. L. 1983, p. 852, § 2.)

24-9-107. Oath of interpreters; privileged communications; situation of interpreters during proceedings; taping and filming of hearing impaired persons' testimony.

(a) Prior to providing any service to a hearing impaired person, any qualified interpreter or intermediary interpreter shall subscribe to an oath that he will interpret all communications in an accurate manner to the best of his skill and knowledge.

(b) Whenever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged, the presence of the interpreter shall not vitiate such privilege and the interpreter shall not be required to disclose the contents of such communication.

(c) Whenever an interpreter is required by this article, the agency, law enforcement agency, or court shall not begin the proceeding or take any action until the interpreter is in full view of and spatially situated so as to assure effective communication with the hearing impaired person.

(d) The agency, law enforcement agency, or court may, upon its own motion or upon motion of any party, witness, or participant, order that the testimony of the hearing impaired person be electronically and visually taped or filmed. Any such tape or film may be used to verify the testimony given by the hearing impaired person. (Code 1981, § 24-9-107, enacted by Ga. L. 1983, p. 852, § 2.)

24-9-108. Compensation of interpreters; fee schedule; fee may be assessed as cost in civil proceeding.

(a) Any qualified interpreter or intermediary interpreter providing service under this article shall be compensated by the agency, law enforcement agency, or court requesting such service. Compensation shall be as provided in the fee schedule developed by the department.

(b) The department shall develop a fee schedule to be used in determining the compensation to be paid interpreters under this article. The schedule shall include reasonable fees commensurate with the services provided and shall include travel expenses and subsistence allowances as are authorized for state employees.

(c) The expenses of providing a qualified interpreter or intermediary interpreter in any civil proceeding may be assessed by the court or agency as costs in such proceeding. (Code 1981, § 24-9-108, enacted by Ga. L. 1983, p. 852, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Expenditure for interpreter for indigent criminal defendant. — When the superior court exercises the court's discretion to appoint an interpreter for an indigent criminal defendant who neither speaks nor understands English, the court has inherent power to assess the cost of the interpreter against the county. 1989 Op. Att'y Gen. No. U89-24.

CHAPTER 10

SECURING ATTENDANCE OF WITNESSES AND PRODUCTION
AND PRESERVATION OF EVIDENCE

Article 1

General Provisions

- Sec.
24-10-1. Freedom of witnesses from arrest.
24-10-2. Female witnesses.
24-10-2.1. Procedure for claiming of fees by witnesses; effect of continuance upon fees.
24-10-3. Forfeiture of fees for causing continuance or absence from trial; no double fees.
24-10-4. Forfeiture of witness's fees for excessive claim; penalty.
24-10-5. Production of transcript of books sought by subpoena or notice — When allowed; oath.
24-10-6. Production of transcript of books sought by subpoena or notice — Procedure when adverse party dissatisfied.
24-10-7. Withdrawal of originals introduced in evidence; substitution of copies; discretion of court.

Article 2

Subpoenas and Notice to Produce

PART 1

IN GENERAL

- 24-10-20. Subpoena for attendance of witnesses — Form; issuance; subpoena in blank.
24-10-21. Subpoena for attendance of witnesses — Attendance at hearing or trial; where served.
24-10-22. Subpoena for production of documentary evidence; motion to quash or modify; denial on condition.
24-10-23. Service of subpoenas.
24-10-24. Fees and mileage; when tender required.
24-10-25. Enforcement of subpoenas; continuance; secondary evidence of books, papers, or documents.

Sec.

- 24-10-26. Notice to produce.
24-10-27. Witness fees for police officers, deputy sheriffs, or members of campus police.
24-10-27.1. Witness fees for member of Georgia State Patrol or Georgia Bureau of Investigation, law enforcement officer of Department of Natural Resources, correctional officer, or arson investigator of state fire marshal's office.
24-10-28. Legislators' exemption.
24-10-29. Applicability.

PART 2

SECURING TESTIMONY OF WITNESSES IN
CASES TRIED ON AFFIDAVITS

- 24-10-40. Application for subpoena; hearing; use of written questions.
24-10-41. Procedure when witness resides out of county in which case is pending.
24-10-42. Questioning of witness at residence.
24-10-43. Fees of officer.
24-10-44. Production of evidence.
24-10-45. Penalty for default of witness.

Article 3

Securing Attendance of Prisoners

- 24-10-60. Order requiring prisoner's delivery to serve as witness or criminal defendant generally; expenses; prisoner under death sentence as witness.
24-10-61. Issuance of order requiring prisoner's delivery to serve as witness in superior court.
24-10-62. Issuance of writ of habeas corpus requiring prisoner's delivery to serve as witness in superior court.

Article 4

Production of Medical Records

- 24-10-70. Definitions.

- Sec.
24-10-71. Production of substitutes in lieu of medical records; when authorized; order for production of originals for good cause.
- 24-10-72. Compliance with subpoena or order; custodian's appearance excused by certificate; when sanctions applied.
- 24-10-73. Payment of costs in advance; pauper's affidavit; tender prerequisite to contempt sanction; when costs deferred.
- 24-10-74. Custody of medical records; inspection; return.
- 24-10-75. Applicability.
- 24-10-76. Construction.

Article 5

Uniform Act to Secure the Attendance of Witnesses from Without the State

- 24-10-90. Short title.
- 24-10-91. Definitions.
- 24-10-92. Criminal or grand jury proceeding in foreign state — Certificate of need for testimony; hearing; summons; custody and delivery; expenses; punishment for failure to attend and testify.
- 24-10-93. Criminal or grand jury proceeding in foreign state — Certificate of need for prisoner's testimony; hearing; order and conditions; entry of order by judge in requesting state; applicability.
- 24-10-94. Criminal or grand jury proceeding in this state — Issuance of certificate; presentation; tender of expenses; how long witness detained; punishment for failure to attend and testify.
- 24-10-95. Criminal or grand jury proceeding in this state — Issuance of certificate seeking testimony of prisoner; presentation; notice to attorney general; order of compliance.
- 24-10-96. Exemption of witnesses from arrest and service of process.

- Sec.
24-10-97. Construction; applicability.

Article 6

Uniform Foreign Depositions Act

- 24-10-110. Short title.
- 24-10-111. How foreign depositions taken.
- 24-10-112. Construction.

Article 7

Depositions to Preserve Testimony in Criminal Proceedings

- 24-10-130. When deposition to preserve testimony in criminal proceedings may be taken; order of court.
- 24-10-131. Notice of deposition; presence of defendant at examination; effect of defendant's failure to appear; child witness.
- 24-10-132. Appointment of counsel; payment of costs and expenses.
- 24-10-133. Manner of taking and filing deposition.
- 24-10-134. Availability to defendant of deponent's previous statements.
- 24-10-135. Admissibility and use of deposition.
- 24-10-136. Objections to admission of deposition.
- 24-10-137. Recordation of deposition.
- 24-10-138. Agreement of parties to deposition.
- 24-10-139. Depositions taken only in exceptional circumstances; misuse of procedures.

Article 8

Perpetuation of Testimony

- 24-10-150. When proceedings to perpetuate testimony may be had.
- 24-10-151. Inadequacy of usual proceeding to be shown.
- 24-10-152. Materiality of possession of property; of availability of parties in interest.
- 24-10-153. Use of testimony.
- 24-10-154. Costs of proceedings.

Cross references. — Depositions and discovery, § 9-11-26 et seq.

RESEARCH REFERENCES

ALR. — Compelling testimony of opponent's expert in state court, 66 ALR4th 213.

ARTICLE 1

GENERAL PROVISIONS

24-10-1. Freedom of witnesses from arrest.

A witness shall not be arrested on any civil process while going to or returning from and attending on any court. An officer who holds him imprisoned after seeing his subpoena or being satisfied of the fact shall be liable for false imprisonment. (Laws 1799, Cobb's 1851 Digest, p. 463; Code 1863, § 3770; Code 1868, § 3794; Code 1873, § 3850; Code 1882, § 3850; Civil Code 1895, § 5265; Civil Code 1910, § 5854; Code 1933, § 38-1506.)

Law reviews. — For comment discussing immunity from service of civil process of a nonresident criminal defendant in light of Santos v. Figueroa, 87 N.J. Super. 227, 208

A.2d 810 (1965), see 17 Mercer L. Rev. 309 (1965). For comment on White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974), see 26 Mercer L. Rev. 317 (1974).

JUDICIAL DECISIONS

In general. — Nonresident witness or suitor in attendance upon the trial of any case in court is exempt from service of any writ or summons while so attending and in going to or returning from the court. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123 (1935); Ausbon v. Ausbon, 131 Ga. App. 530, 206 S.E.2d 546 (1974).

Service is voidable. — Service of process in violation of this statute is not void, but voidable upon proper action in proper time by the person served. Thornton v. American Writing Mach. Co., 83 Ga. 288, 9 S.E. 679, 20 Am. St. R. 320 (1889) (see O.C.G.A. § 24-10-1).

Officer's satisfaction. — It was not essential that a witness show any subpoena to the sheriff, all that is required is that the officer be "satisfied of the fact." Turner v. McGee, 217 Ga. 769, 125 S.E.2d 36 (1962).

Nonjudicial proceedings. — Privilege of exemption from service is not only assured while a nonresident is attending upon strictly judicial proceedings, but upon any tribunal whose business has reference to or

is intended to affect judicial proceedings. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123 (1935).

Inapplicable to criminal defendant. — Privilege is limited to witnesses and does not apply to a defendant in a criminal case. Rogers v. Rogers, 138 Ga. 803, 76 S.E. 48 (1912); Warren v. Hiers, 105 Ga. App. 202, 124 S.E.2d 445 (1962).

Applicable to criminal defendant. — Immunity from civil process extends to a nonresident defendant who voluntarily appears in answer to a criminal charge or who appears in compliance with a bail bond, because the defendant's appearance saves the state the expense, delay, and uncertainty of extradition and promotes the orderly, expeditious, and unobstructed administration of justice. White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974), for comment, see 26 Mercer L. Rev. 317 (1974).

Parties. — Suitors are exempted from arrest while going to, attending on, or returning from court and the fact that one of the suitors resided out of the state and has

previously had the suitors adversary arrested under bail process does not justify a departure from the practice. *Lomax v. Lomax*, 176 Ga. 605, 168 S.E. 863 (1933).

Deposition. — If a person is present in a county other than that of the person's residence for the sole purpose of attending the taking of depositions therein in a case to which the person is a party, and advantage is taken of the person's presence to serve process on the person in another action, to compel the person to defend it in a jurisdiction other than that of the person's residence, the service of such process should be quashed. *Ewing v. Elliott*, 51 Ga. App. 565, 181 S.E. 123 (1935).

Service of habitual-violator notice. — O.C.G.A. § 24-10-1 did not immunize defendant from service of notice that the defendant was a habitual violator under O.C.G.A. § 40-5-58 while defendant was being tried on an unrelated offense, since § 24-10-1 pertains to civil process, and service of notice of revocation under § 40-5-58 is not service of a civil process. *Hill v. State*, 162 Ga. App. 637, 292 S.E.2d 512 (1982).

Cited in *Vaughn v. Boyd*, 142 Ga. 230, 82 S.E. 576, 1915A L.R.A. 694 (1914); *Ewing v. Elliott*, 51 Ga. App. 565, 181 S.E. 123 (1935); *Payton v. Green*, 179 Ga. App. 438, 346 S.E.2d 884 (1986).

RESEARCH REFERENCES

ALR. — Waiver of privilege against or nonliability to arrest in civil action, 8 ALR 754.

Duration of imprisonment for refusal to answer question as a witness before the grand jury, 28 ALR 1364.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime, 74 ALR2d 592.

Immunity from service of process as affected by relationship between subject matters of litigation in which process was issued, and litigation which nonresident served was attending, 84 ALR2d 421.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 ALR4th 337.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party—modern cases, 80 ALR4th 405.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution—modern cases, 80 ALR4th 547.

24-10-2. Female witnesses.

Female witnesses in civil cases pending in the courts of this state shall be required to attend in person under the same conditions and requirements that apply to male witnesses. (Ga. L. 1953, Nov-Dec. Sess., p. 212, § 1.)

24-10-2.1. Procedure for claiming of fees by witnesses; effect of continuance upon fees.

A witness in making a claim or proof of a claim for fees for attendance shall indicate the date on which he attended and, in the event of a continuance, shall not claim or receive fees for any day after the date to which the docket shows the case was continued nor for any day before the continuance was granted on which he did not attend. (Ga. L. 1895, p. 41, § 2; Civil Code 1895, § 5141; Civil Code 1910, § 5727; Code 1933, § 81-1422.)

24-10-3. Forfeiture of fees for causing continuance or absence from trial; no double fees.

(a) A witness shall not receive any fees whatever for attendance on a subpoena if he is absent from the trial, or if the trial is continued at any time for his absence, where his absence did not arise from providential cause.

(b) No witness shall receive fees from both parties in the same case; the fees of a witness for both parties shall be apportioned equally between the parties unless the costs are all taxed against one party. (Orig. Code 1863, § 3771; Code 1868, § 3795; Code 1873, § 3851; Code 1882, § 3851; Civil Code 1895, § 5266; Civil Code 1910, § 5855; Code 1933, § 38-1507.)

24-10-4. Forfeiture of witness's fees for excessive claim; penalty.

A witness who claims more than is due to him shall forfeit all his fees and shall pay to the injured party, in addition thereto, four times the amount so unjustly claimed. (Orig. Code 1863, § 3766; Code 1868, § 3790; Code 1873, § 3843; Code 1882, § 3843; Civil Code 1895, § 5262; Civil Code 1910, § 5851; Code 1933, § 38-1503.)

JUDICIAL DECISIONS

Attendance pursuant to subpoena. — Expert, who was asked to conduct a preliminary review of evidence in order to better give an opinion as an expert, was entitled to demand extra compensation for attendance in court pursuant to a subpoena. *Kent v. Brown*, 238 Ga. App. 607, 518 S.E.2d 737 (1999).

Cited in *Nationwide Mut. Ins. Co. v. Glaccum*, 186 Ga. App. 148, 366 S.E.2d 772 (1988); *Nationwide Mut. Ins. Co. v. Glaccum*, 200 Ga. App. 108, 407 S.E.2d 90 (1991).

24-10-5. Production of transcript of books sought by subpoena or notice — When allowed; oath.

When any person is served with a subpoena for the production of evidence or a notice to produce, seeking books in his possession to be used as testimony on the trial of any cause, if the person makes oath that he cannot produce the books required without suffering a material injury in his business and also makes or causes to be made out a full transcript from the books of all the accounts and dealings with the opposite party, has the transcript examined and sworn to by an impartial witness, and produces the same in court, he shall be deemed to have complied with the notice to produce or subpoena for the production of evidence. (Orig. Code 1863, § 3446; Code 1868, § 3466; Code 1873, § 3517; Code 1882, § 3517; Civil Code 1895, § 5258; Civil Code 1910, § 5847; Code 1933, § 38-1001.)

Cross references. — Discovery of documents generally, § 9-11-34.

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1020.

24-10-6. Production of transcript of books sought by subpoena or notice — Procedure when adverse party dissatisfied.

When the transcript provided for in Code Section 24-10-5 is produced in court, if the adverse party is dissatisfied therewith and swears that he believes that the books contain entries material to him which do not appear in the transcript, the court will grant him a commission directed to certain persons named by the parties and approved by the court. The commission shall cause the person with possession of the books to produce the books required, the person swearing that the books produced are all that he has or had that answer to the description in the subpoena or notice to produce. The commission shall examine the books and transmit to the court a full and fair statement of the accounts and entries between the parties under their hand. When received by the court, the statement of the commission shall be deemed a compliance with the notice to produce or subpoena for the production of evidence. (Orig. Code 1863, § 3447; Code 1868, § 3467; Code 1873, § 3518; Code 1882, § 3518; Civil Code 1895, § 5259; Civil Code 1910, § 5848; Code 1933, § 38-1002.)

JUDICIAL DECISIONS

Notice to insurance company. — When notice was served on defendant insurance company to produce all the records of the company's dealings in Georgia, and the defendant furnished a transcript of the defendant's dealings with the plaintiff, this was sufficient. If the plaintiff was dissatisfied, plaintiff had a remedy under this statute.

Grant v. Alabama Gold Life Ins. Co., 76 Ga. 575 (1886).

Merchant's books. — Transcript from merchant's books, made out and produced under notice, and inspected by the party giving the notice, should be allowed to go to the jury as evidence in the case. Fielder & Bros. & Co. v. Collier, 13 Ga. 496 (1853).

24-10-7. Withdrawal of originals introduced in evidence; substitution of copies; discretion of court.

Parties interested and participating in the trial of all cases tried in the courts are authorized and empowered, on the order of the court trying the case, to withdraw from the court and record of the case all original deeds, maps, blueprints, notes, papers, and documents belonging to them and which are introduced in evidence on the trial, on substituting therefor, when required by the court, copies thereof, verified as such by the parties or their agents, representatives, or attorneys. However, if any such deeds, maps, blueprints, notes, papers, or documents shall be attacked by any party to the case as forgeries, or as not being genuine originals, it shall be in the

discretion of the court to require the original deeds, maps, blueprints, notes, papers, or documents so attacked to remain on file in the court as a part of the record in the case. (Ga. L. 1919, p. 235, § 1; Code 1933, § 38-1003; Ga. L. 1995, p. 10, § 24.)

RESEARCH REFERENCES

ALR. — Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 ALR2d 1156.

ARTICLE 2

SUBPOENAS AND NOTICE TO PRODUCE

Cross references. — Issuance of subpoena for taking of depositions, § 9-11-45. Further provisions regarding discovery and securing of attendance of witnesses at criminal proceedings, § 17-7-190 et seq.

RESEARCH REFERENCES

ALR. — Right of independent expert to refuse to testify as to expert opinion, 50 ALR4th 680.

PART 1

IN GENERAL

JUDICIAL DECISIONS

Cited in *Young Men's Christian Ass'n of Metro. Atlanta, Inc. v. Bailey*, 107 Ga. App. 417, 130 S.E.2d 242 (1963); *Thomason v. Harper Motor Lines*, 225 Ga. 312, 168 S.E.2d 147 (1969); *Home Indem. Co. v. Godley*, 122 Ga. App. 356, 177 S.E.2d 105 (1970); *Nix v. State*, 236 Ga. 110, 223 S.E.2d 81 (1976); *Gamarra v. State*, 142 Ga. App. 196, 235 S.E.2d 652 (1977); *Clark v. Board of Dental Exmrs.*, 240 Ga. 289, 240 S.E.2d 250 (1977); *Ervin v. State*, 144 Ga. App. 504, 241 S.E.2d 650 (1978); *State v. Bradshaw*, 145 Ga. App. 278, 243 S.E.2d 547 (1978); *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978); *In re Boswell*, 148 Ga. App. 519, 251 S.E.2d 596 (1978); *Park v. State*, 154 Ga. App. 348, 268 S.E.2d 401 (1980); *Sullivan v. State*, 154 Ga. App. 432, 268 S.E.2d 698 (1980); *Hatcher v. State*, 154 Ga. App. 770, 270 S.E.2d 16 (1980); *Odum v. State*, 156 Ga. App. 119, 274 S.E.2d 117 (1980); *Nelson v. State*, 247 Ga. 172, 274 S.E.2d 317 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 6.

C.J.S. — 97 C.J.S., Witnesses, §§ 2, 3, 4, 20 et seq.

24-10-20. Subpoena for attendance of witnesses — Form; issuance; subpoena in blank.

(a) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. (Laws 1792, Cobb's 1851 Digest, p. 353; Laws 1799, Cobb's 1851 Digest, p. 276; Code 1863, § 3764; Code 1868, § 3788; Ga. L. 1873, p. 25, § 1; Code 1873, § 3841; Code 1882, § 3841; Civil Code 1895, § 5260; Civil Code 1910, § 5849; Code 1933, § 38-1501; Ga. L. 1953, Nov-Dec. Sess., p. 484, § 1; Ga. L. 1966, p. 502, § 1.)

Law reviews. — For article, "Best Practices for Issuing Subpoenas Depositions of Geor-

gia Residents in Cases Pending Out of State," see 12 Ga. St. B.J. 12 (2007).

JUDICIAL DECISIONS

Use of word "shall" in this statute indicates that the subpoena must be issued by the clerk, signed by the clerk, and under the seal of the court; the word "shall" is in its ordinary signification a word of command. *State v. Brantley*, 147 Ga. App. 569, 249 S.E.2d 365 (1978).

Signature by clerk. — Subpoena commanding the presence of a person in court as a witness is a judicial writ, and to be valid must, when there is a clerk, be signed and issued by that officer. *Horton v. State*, 112 Ga. 27, 37 S.E. 100 (1900).

Signature by attorney. — Subpoena to which the attorney for a defendant has signed the name of the clerk, under a general direction from that officer to "prepare" the subpoenas in the case, is not valid. *Horton v. State*, 112 Ga. 27, 37 S.E. 100 (1900).

Signing and sealing are ministerial acts. — Signing and sealing of a subpoena amount to nothing more than ministerial acts which add nothing of substance to the subpoena, the only purpose of which is to give notice to

a witness to appear in court; a statute is regarded as directory when no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. *State v. Brantley*, 147 Ga. App. 569, 249 S.E.2d 365 (1978).

Defendant's responsibility to ensure presence of witnesses. — When defendant elected to represent oneself it was the defendant's responsibility, not the trial court's, to ensure the presence of witnesses by the issuance of subpoenas. *Kegler v. State*, 267 Ga. 147, 475 S.E.2d 593 (1996).

As the defendant, who was proceeding pro se during a criminal trial, failed to request issuance of subpoenas pursuant to O.C.G.A. §§ 24-10-20(b) and 24-10-21, there was no violation of the right to compulsory process. *Sheppard v. State*, 297 Ga. App. 806, 678 S.E.2d 509 (2009), cert. denied, No. S09C1575, 2009 Ga. LEXIS 795 (Ga. 2009).

Cited in *Almand v. Atlantic Coast Line R.R.*, 118 Ga. 468, 45 S.E. 302 (1903); *Watts v. State*, 14 Ga. App. 600, 81 S.E. 902 (1914).

OPINIONS OF THE ATTORNEY GENERAL

Issuing blank subpoena to requesting party proper. — Under O.C.G.A. § 24-10-20, clerk of superior court may properly issue to requesting party in pending case a subpoena which is blank except as to signature of clerk and seal of court. 1981 Op. Att’y Gen. No. U81-37.

Clerks of county recorder’s courts may issue in blank subpoenas to police officers to be completed by the officers and served upon witnesses in pending cases. 1983 Op. Att’y Gen. No. U83-41.

Information required by subsection (a) may be filled in by requesting party. — Since

subsection (b) of O.C.G.A. § 24-10-20 authorizes the clerk to issue a subpoena signed and sealed “but otherwise in blank,” the information contained in subsection (a) of § 24-10-20 could be filled in before service by party requesting the subpoena, thus providing witness with subpoena complete with all information required by § 24-10-20. 1981 Op. Att’y Gen. No. U81-37.

If a police officer has just issued a traffic citation, there would be a pending case for purposes of subpoena issuance. 1983 Op. Att’y Gen. No. U83-41.

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 6, 7.

C.J.S. — 97 C.J.S., Witnesses, §§ 5, 23, 24.

ALR. — Subpoenaing unnecessary witnesses as contempt, 37 ALR 1113.

Power of court to control evidence or witnesses going before grand jury, 52 ALR3d 1316.

24-10-21. Subpoena for attendance of witnesses — Attendance at hearing or trial; where served.

At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state. (Ga. L. 1966, p. 502, § 1; Ga. L. 1980, p. 70, § 2.)

JUDICIAL DECISIONS

Constitutionality. — Statute is not unconstitutional as applied to a habeas corpus proceeding. *Hooten v. State*, 245 Ga. 250, 264 S.E.2d 192, cert. denied, 446 U.S. 942, 100 S. Ct. 2168, 64 L. Ed. 2d 797 (1980).

Expenses. — Statute does not contemplate that the public shall bear the expense of bringing witnesses into court because the residents of other counties can be examined by depositions (oral examination or written interrogatories) if the defendant so desires. *Neal v. Smith*, 226 Ga. 96, 172 S.E.2d 684 (1970).

Habeas corpus proceeding. — Sixth amendment guarantee to the accused of compulsory process to obtain the testimony of witnesses has no application in the con-

text of habeas corpus proceedings, which are civil in nature. *Pulliam v. Balkcom*, 245 Ga. 99, 263 S.E.2d 123, cert. denied, 447 U.S. 927, 100 S. Ct. 3023, 65 L. Ed. 2d 1121 (1980).

Argument to jury. — When a witness is not amendable to subpoena, the witness’s failure to testify in person is not a proper subject matter of argument by counsel. *Floyd v. Colonial Stores, Inc.*, 121 Ga. App. 852, 176 S.E.2d 111 (1970).

Charge to jury that any accused has a right to subpoena any witnesses to testify that the accused wishes, but that the accused has no burden to produce any witnesses, and that jury should arrive at a decision from the evidence presented without speculating

about other matters, was without error. *Miller v. State*, 155 Ga. App. 54, 270 S.E.2d 466 (1980).

Trial court did not impermissibly shift the burden of proof when the court charged the jury that defendant had the right to subpoena witnesses. The jury charge was an accurate statement of the law and provided no ground for reversal. *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

Criminal defendant's right to compulsory process. — Trial court erred in making a determination that a prospective witness was incompetent to testify based on ex parte statements made by the administrator of the institution where the prospective witness was confined. When this error is not harmless beyond a reasonable doubt, if it is determined that one was competent, then defendant's right to compulsory process was abridged and a new trial must be ordered. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Defendant's responsibility to ensure presence of witnesses. — When defendant elected to represent defendant's it was one's self responsibility, not the trial court's, to ensure the presence of witnesses by the

issuance of subpoenas. *Kegler v. State*, 267 Ga. 147, 475 S.E.2d 593 (1996).

As the defendant, who was proceeding pro se during a criminal trial, failed to request issuance of subpoenas pursuant to O.C.G.A. §§ 24-10-20(b) and 24-10-21, there was no violation of the right to compulsory process. *Sheppard v. State*, 297 Ga. App. 806, 678 S.E.2d 509 (2009), cert. denied, No. S09C1575, 2009 Ga. LEXIS 795 (Ga. 2009).

Prior deposition. — Trial court's sua sponte determination that the existence of a prior deposition rendered the presence of a material witness subpoenaed by the plaintiff superfluous and that, hence, that witness would be excused, but no continuance would be granted, denied the plaintiff the right to present plaintiff's case to the jury in the manner in which plaintiff chose. *Ricketson v. Blair*, 171 Ga. App. 714, 320 S.E.2d 788 (1984).

Cited in *Jones v. Caldwell*, 230 Ga. 775, 199 S.E.2d 248 (1973); *Wingfield v. State*, 159 Ga. App. 69, 282 S.E.2d 713 (1981); *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983); *Birt v. Montgomery*, 725 F.2d 587 (11th Cir. 1984).

RESEARCH REFERENCES

C.J.S. — 97 C.J.S., Witnesses, § 5.

24-10-22. Subpoena for production of documentary evidence; motion to quash or modify; denial on condition.

(a) A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.

(b) The court, upon written motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. (Laws 1829, Cobb's 1851 Digest, p. 278; Code 1863, §§ 3443, 3444; Code 1868, §§ 3463, 3464; Code 1873, §§ 3514, 3515; Ga. L. 1877, p. 21, § 1; Ga. L. 1880-81, p. 78, § 1; Code 1882, §§ 3514, 3515; Ga. L. 1892, p. 60, § 1;

Civil Code 1895, §§ 5255, 5256; Civil Code 1910, §§ 5844, 5845; Code 1933, §§ 38-901, 38-902; Ga. L. 1966, p. 502, § 1.)

Cross references. — Discovery of documentary and tangible evidence generally, § 9-11-34.

JUDICIAL DECISIONS

Relevance. — While admissibility is a matter to be determined when records, documents, or other items are tendered in evidence and is not a test for determining whether an order requiring production should be entered, pertinence or relevance is. *Horton v. Huiet*, 113 Ga. App. 166, 147 S.E.2d 669 (1966).

Required prima facie showing of relevancy under statute entails proof of: (1) the existence of a grand jury investigation; (2) a general characterization of the subject matter and purpose of the investigation; and (3) the fact that each general category of the subpoenaed documents bears some relevance to the investigation being pursued. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

“Unreasonable and oppressive” standard is tested by the peculiar facts arising from the subpoena itself and other proper sources. *Kamensky v. Southern Oxygen Supply Co.*, 127 Ga. App. 343, 193 S.E.2d 164 (1972); *Aycock v. Household Fin. Corp.*, 142 Ga. App. 207, 235 S.E.2d 578 (1977), cert. dismissed, 240 Ga. 570, 241 S.E.2d 835 (1978); *Washburn v. Sardi’s Restaurants*, 191 Ga. App. 307, 381 S.E.2d 750, cert. denied, 191 Ga. App. 923, 381 S.E.2d 750 (1989).

Applicable only to court proceedings. — Statute providing for quashing or modifying a subpoena upon stated grounds, is applicable only to court proceedings and not to investigative procedures. *Southeastern Adjusters, Inc. v. Caldwell*, 229 Ga. 4, 189 S.E.2d 76 (1972).

Parties. — Subpoena duces tecum never issues to any one who is a party to the cause. *Ex parte Calhoun*, 87 Ga. 359, 13 S.E. 694 (1891).

Grand jury. — In a proper case, a subpoena duces tecum may issue in a cause pending before the grand jury to be brought before that body. *In re Lester*, 77 Ga. 143 (1886).

Necessity for production. — Court, before requiring the peremptory order to produce the books or papers of the adverse party, should satisfy itself of the necessity for such production. *Fluker v. Bank of Union Point*, 178 Ga. 297, 173 S.E. 149 (1934).

Inauguration of suit. — Subpoena duces tecum is not process by which to inaugurate a suit, or by which to connect a new party with a pending suit. *Ex parte Calhoun*, 87 Ga. 359, 13 S.E. 694 (1891).

Burden of proof. — An individual moving to quash a grand jury subpoena duces tecum as unreasonable has the general burden of persuasion. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

Burden of going forward. — Regarding the relevancy component of reasonableness, since the secrecy of grand jury deliberations insures that the party moving to quash a subpoena duces tecum has not precompliance knowledge of the subject matter of the investigation, the party who causes a subpoena duces tecum to issue has the burden of going forward, to make a prima facie showing that the subpoenaed documents are relevant to a legitimate grand jury investigation. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

Pleadings. — An abstract company cannot be compelled by a subpoena duces tecum to make discovery of the contents of lost public records in a proceeding to establish a copy of such records since the pleadings do not allege or set out anything whatever as the specific contents to be proved. *Ex parte Calhoun*, 87 Ga. 359, 13 S.E. 694 (1891).

Sufficiency of subpoena. — After a document has been produced under a subpoena duces tecum, the sufficiency of the subpoena as a means of compelling is not a material question in the case. *Starr v. Mayer & Co.*, 60 Ga. 546 (1878).

Deletion of privileged matter. — When any document sought to be produced con-

tains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Subpoena directed to corporation. — It was proper to issue a subpoena directed simply to a named company, and to have it served upon the general manager of such corporation; the documents called for being in the possession of the manager at the time, it was the manager's duty to respond to the subpoena duces tecum and produce the documents before the grand jury unless the manager desired to test the validity and sufficiency of the subpoena duces tecum by legal means. *Jones v. State*, 99 Ga. App. 858, 109 S.E.2d 859 (1959).

Interference by third party in ordering individual in possession of corporate documents sought by subpoena duces tecum to turn the documents over to the party for the purpose of concealing, destroying, or otherwise withholding the information therein contained from the grand jury would be an act of contempt which the court would be well authorized to punish. *Jones v. State*, 99 Ga. App. 858, 109 S.E.2d 859 (1959).

Identical subpoenas served on president and employee of corporation. — When identical subpoenas directed to a corporation were served upon the president in control of the corporation and an employee having actual custody of the papers, it was perfectly proper for the president to demand and acquire custody of the documents from the president's employee for the purpose of producing the papers in compliance with the subpoena served upon the individual as such president; it did not constitute a contempt of court that the defendant, before complying with the subpoena, saw fit to test its sufficiency by means of a motion to quash, since the defendant did in fact, upon obtaining a ruling by the court adverse to the defendant's contentions, surrender the documents called for by the subpoena. *Jones v. State*, 99 Ga. App. 858, 109 S.E.2d 859 (1959).

Agent of receiver. — Fact that the person directed to produce evidence was the agent of the receiver for a railway did not exempt the person from the enforcement of the

order for the production of the freight-bills and receipts in the person's possession, where they were material evidence in the investigation of criminal charges against the accused named in certain cases pending before the grand jury. *Blitch v. State*, 145 Ga. 882, 90 S.E. 42 (1916).

An entire record cannot be removed from one court to another by a notice to the officers to produce the record, or by a subpoena duces tecum directed to and served upon them. *In re Lester*, 77 Ga. 143 (1886).

Cell phone records not discoverable. — Trial court did not abuse the court's discretion in quashing a subpoena for the appellee's cell phone records as those cell phone records were not reasonably calculated to lead to the discovery of admissible evidence under O.C.G.A. § 24-10-22 or information relevant to the intrusiveness nature of the behavior alleged to be tortious. *Anderson v. Mergenhagen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007).

Continuance on ground of absence of witness. — When the postponement of a case was requested on the ground of the absence of a witness served with a subpoena duces tecum, it was not an abuse of discretion to refuse the request in view of this statute, when it appeared that the witness was a resident of the county and was not served with the subpoena duces tecum ten days prior to the trial of the case. *Frost v. Pennington*, 6 Ga. App. 298, 65 S.E. 41 (1909) (see O.C.G.A. § 24-10-22).

Post-judgment discovery. — It is clear that any forfeiture will not result from the answering of the questions or production of documents, but rather, as a result of a judgment already entered. Any other interpretation of this privilege would make the Georgia post-judgment discovery rules meaningless. *Kushner v. Mascho*, 143 Ga. App. 801, 240 S.E.2d 290 (1977).

Mayor, who is ex-officio the presiding judge of a court of record, is not subject to the subpoena duces tecum, commanding the mayor to bring into the superior court "the information docket" of this court, to be used in evidence before the grand jury, either in a specific case or generally. *In re Lester*, 77 Ga. 143 (1886).

Request for records of homicides overbroad. — Request for statistical information

contained in notes, books, records, writings, and/or documents pertaining to any and all homicides both solved and unsolved, either committed within the city limits of Atlanta, Fulton County or the surrounding counties in which bodies were found covering a period of almost a decade was overbroad rendering it unreasonable and oppressive. *Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983).

Subpoena for irrelevant evidence. — In the personal injury action filed by plaintiff against the pawn shop, the trial court did not err in granting the pawn shop's motion to quash a subpoena for production of the saw that caused the injury at the hearing on the summary judgment motion; the trial court did not abuse the court's discretion under O.C.G.A. § 24-10-22(b)(1) in quashing the subpoena since the manner in which the saw was functioning three years after the accident was not relevant. *Walker v. Bruhn*, 281 Ga. App. 149, 635 S.E.2d 322 (2006).

Court committed reversible error in quashing subpoena for former police officer's personnel file, where anything in the file tending to show training the former officer received which would enable the officer to commit and cover up the crimes of murder, arson, and rape was relevant to defendant's contention that the former officer committed the crimes. *Henderson v. State*, 255 Ga. 687, 341 S.E.2d 439 (1986).

Quashing of subpoena for gas chromatograph results reversible error. — Defendant had right to discovery of printed results from gas chromatograph test of defendant's blood alcohol level, and the trial court's quashing of a subpoena seeking such discovery was reversible error. *Price v. State*, 269 Ga. 222, 498 S.E.2d 262 (1998).

In a prosecution for driving with an unlawful blood-alcohol level, defendant was entitled to subpoena from the state's forensic chemist the chain of custody documents and other documents which pertained to the

actual test of defendant's blood, including gas chromatograph results. *Bazemore v. State*, 244 Ga. App. 460, 535 S.E.2d 830 (2000).

Documents which pertained to the qualifications of the person who drew defendant's blood and the certification documentation on the machine were not sufficiently relevant to be discovered by defendant in defendant's prosecution for driving with an unlawful blood-alcohol level. *Bazemore v. State*, 244 Ga. App. 460, 535 S.E.2d 830 (2000).

Attorney fees for quashing subpoena not permitted. — Trial judge in a criminal case is not authorized to award attorney fees as compensation in conjunction with an order quashing a subpoena duces tecum pursuant to O.C.G.A. § 24-10-22. *Garcia v. Allen*, 202 Ga. App. 529, 414 S.E.2d 742 (1992).

Motion to quash improperly denied. — When attorneys for a defendant in a capital case served a subpoena regarding the funding of indigent services on the Executive Director of the Georgia Public Defender Standards Council, it was error to deny the Council's motion to quash the subpoena. The documents had no bearing on the defendant's guilt or innocence and were irrelevant to the criminal case; moreover, the general funding that other capital defendants might have received had nothing to do with the funding of the present defendant's specific defense. *Britt v. State*, 282 Ga. 746, 653 S.E.2d 713 (2007).

Cited in *Wilson v. State Bar*, 225 Ga. 343, 168 S.E.2d 584 (1969); *Piper v. Piper*, 139 Ga. App. 19, 227 S.E.2d 842 (1976); *Hines v. Good Housekeeping Shop*, 161 Ga. App. 318, 291 S.E.2d 238 (1982); *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982); *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983); *Muff v. State*, 254 Ga. 45, 326 S.E.2d 454 (1985); *Bazemore v. State*, 225 Ga. App. 741, 484 S.E.2d 673 (1997); *Tuttle v. State*, 232 Ga. App. 530, 502 S.E.2d 355 (1998); *Bazemore v. State*, 233 Ga. App. 892, 506 S.E.2d 177 (1998).

ADVISORY OPINIONS OF THE STATE BAR

Subpoena issued pursuant to O.C.G.A. § 24-10-22(a) should only be issued for actual hearings and trials and should not be requested when in fact no hearing or trial has been scheduled. Likewise, a subpoena

issued pursuant to O.C.G.A. § 9-11-45 of the Civil Practice Act should be requested and issued only for depositions which have been actually scheduled by agreement between parties or when a notice of deposition has

been filed and served upon all parties, and should not be issued when no deposition has been scheduled. Adv. Op. No. 84-40 (September 21, 1984).

There is no need for notice of a subpoena

issue pursuant to O.C.G.A. § 24-10-22(a) because all parties receive notice of hearings and trials, so long as they are real hearings and real trials. Adv. Op. No. 84-40 (September 21, 1984).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, §§ 1012 et seq., 1023, 1024. 97 C.J.S., Witnesses, §§ 5, 32 et seq.

ALR. — Construction and application of provisions of Fair Labor Standards Act regarding investigatory subpoena duces tecum, 166 ALR 553.

Compelling production or authentication for use as evidence of court records or writings or objects in custody of court or officer thereof, 170 ALR 334.

Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents, 23 ALR2d 862.

Pretrial examination or discovery to ascertain from defendant in action for injury, death, or damages, existence and amount of

liability insurance and insurer's identity, 13 ALR3d 822.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records—modern status, 87 ALR Fed. 177.

24-10-23. Service of subpoenas.

A subpoena may be served by any sheriff, by his deputy, or by any other person not less than 18 years of age. Proof may be shown by return or certificate endorsed on a copy of the subpoena. Subpoenas may also be served by registered or certified mail or statutory overnight delivery, and the return receipt shall constitute prima-facie proof of service. Service upon a party may be made by serving his counsel of record. (Laws 1792, Cobb's 1851 Digest, p. 353; Laws 1799, Cobb's 1851 Digest, p. 276; Code 1863, § 3764; Code 1868, § 3788; Ga. L. 1873, p. 25, § 1; Code 1873, § 3841; Code 1882, § 3841; Civil Code 1895, § 5260; Civil Code 1910, § 5849; Code 1933, § 38-1501; Ga. L. 1966, p. 502, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code

section is applicable to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Invalid subpoena. — When service of the subpoenas was not effected either by personal service or by certified mail, the only two modes authorized by this statute, the lack of service invalidates the legal force and effect of the subpoena; therefore, the sub-

poena cannot serve as the basis for a conviction as a defaulting witness. *Edenfield v. State*, 147 Ga. App. 502, 249 S.E.2d 316 (1978) (see O.C.G.A. § 24-10-23).

Actual receipt immaterial. — With respect to subpoenas which must be served upon an

adversary party, it is immaterial that the party actually received the pleading or other matter when service was otherwise improper. *Heard v. Hopper*, 233 Ga. 617, 212 S.E.2d 797 (1975); *Edenfield v. State*, 147 Ga. App. 502, 249 S.E.2d 316 (1978); *Lake v. Hamilton Bank*, 148 Ga. App. 348, 251 S.E.2d 177 (1978).

Incompetent witness. — Defendant's offer to prove service of the subpoena in compliance with O.C.G.A. § 24-10-23 was foreclosed and its necessity mooted by the trial court's ruling, communicated to the jury, that the person upon whom the subpoena was purportedly served was incompetent to testify. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Inability of witness to appear. — When the failure to hand the subpoena to the witness personally appears to have had nothing to do with the absence of the witness, a motion for continuance should be granted. *Waters v. State*, 85 Ga. App. 79, 68 S.E.2d 233 (1951).

Informal notice of hearing date change sufficient. — Witness's duty to testify after the witness was properly served with the initial witness subpoena, was not dissolved merely because the witness received notice of a change in the hearing date from the witness's receptionist rather than by the means authorized for service of subpoenas under O.C.G.A. § 24-10-23. *Mijajlovic v. State*, 179 Ga. App. 506, 347 S.E.2d 325 (1986).

Nonparties. — Although O.C.G.A. § 24-10-23 permits service on a party by service on that party's attorney, it does not provide for such service on nonparties. *Haywood v. Aerospec, Inc.*, 193 Ga. App. 479, 388 S.E.2d 367 (1989).

Cited in *Graham v. Newsome*, 174 Ga. App. 351, 330 S.E.2d 98 (1985); *Hankinson v. Rackley*, 177 Ga. App. 734, 341 S.E.2d 231 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 9, 15.

C.J.S. — 97 C.J.S., Witnesses, §§ 26 et seq.

24-10-24. Fees and mileage; when tender required.

The witness fee shall be \$25.00 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance; but, when a witness resides outside the county where the testimony is to be given, service of the subpoena, to be valid, must be accompanied by tender of the fee for one day's attendance plus mileage of 20¢ per mile for traveling expenses for going from and returning to his or her place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency, postal money order, cashier's check, certified check, or the check of an attorney or law firm. When the subpoena is issued on behalf of the state, or an officer, agency, or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered. (Laws 1799, Cobb's 1851 Digest, p. 277; Laws 1842, Cobb's 1851 Digest, p. 280; Code 1863, §§ 3765, 3768; Code 1868, §§ 3789, 3792; Code 1873, §§ 3842, 3845; Ga. L. 1878-79, p. 66, § 1; Code 1882, §§ 3842, 3845; Ga. L. 1893, p. 38, § 1; Ga. L. 1894, p. 49, § 1; Civil Code 1895, § 5261; Penal Code 1895, § 1115; Ga. L. 1907, p. 58, § 1; Civil Code 1910, § 5850; Penal Code 1910, § 1144; Code 1933, §§ 38-1502, 38-1902; Ga. L. 1966, p. 502, § 1; Ga. L. 1980, p. 70, § 1; Ga. L. 2000, p. 1166, § 1.)

Cross references. — Witness fees for attendance before Judicial Qualifications

Commission, Rules of the Judicial Qualifications Commission, Rule 18(d).

JUDICIAL DECISIONS

Tender of fee and mileage. — Mileage and per diem required by statute for out of county residents must be tendered before their attendance may be compelled. *Neal v. Smith*, 226 Ga. 96, 172 S.E.2d 684 (1970).

Determination of mileage. — Nonresident witness is entitled to mileage from the county treasurer for the whole distance traveled from and returning to the witness's home. *Dutcher v. Justices of Inferior Court*, 38 Ga. 214 (1868).

Continuance. — Witness cannot charge for attendance rendered after the case has been postponed or continued, whether the witness happens to hear the announcement of the postponement or continuance or not. *Robison v. Banks*, 17 Ga. 211 (1855).

Expert witnesses. — No statute in Georgia allows or prohibits fees to expert witnesses, and while there can be no charge beyond the legal fees of ordinary witnesses for attendance on the court in obedience to subpoena, still, as a physician cannot be re-

quired to make any examination or preliminary preparations, or to listen to the testimony, in order the better to give the expert's opinion as an expert, the expert may for such services demand extra compensation. *Schofield v. Little*, 2 Ga. App. 286, 58 S.E. 666 (1907).

Lodging and airfare costs. — There is no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. *Smith v. State*, 272 Ga. 83, 526 S.E.2d 59 (2000), reversing *Smith v. State*, 236 Ga. App. 548, 512 S.E.2d 19 (1999).

Cited in *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972); *Farrell v. State*, 160 Ga. App. 321, 287 S.E.2d 318 (1981); *Cone v. Johnson*, 171 Ga. App. 404, 319 S.E.2d 550 (1984); *Hankinson v. Rackley*, 177 Ga. App. 734, 341 S.E.2d 231 (1986); *Walden v. State*, 185 Ga. App. 413, 364 S.E.2d 304 (1987); *Kent v. Brown*, 238 Ga. App. 607, 518 S.E.2d 737 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Legislative intent of this statute was to eliminate witness fees in justice courts. 1970 Op. Att'y Gen. U70-234 (see O.C.G.A. § 24-10-24).

Applicability. — Statute applies to both civil and criminal cases. 1972 Op. Att'y Gen. No. U72-55 (see O.C.G.A. § 24-10-24).

Criminal cases. — County must pay the per diem witness fee to witnesses summoned in criminal cases as well as to those summoned in civil cases; the source of funds for witness fees is from county taxes. 1970 Op. Att'y Gen. No. U70-11.

Resident of county from which the subpoena originates is entitled to payment of the witness fee, but, the resident cannot demand prepayment as a condition to the resident's appearance in court. 1967 Op. Att'y Gen. No. 67-311.

Peace officer who, required by subpoena, attends court on behalf of the state during any hours except regular duty hours, was entitled to mileage as provided by former

Code 1933, §§ 38-1502 and 38-1902 (see O.C.G.A. § 24-10-24); under these conditions, the officer was also entitled to per diem as provided in Ga. L. 1968, p. 434, § 1 (see O.C.G.A. § 24-10-27). 1971 Op. Att'y Gen. No. U71-57.

State officer or agent is to be treated as an ordinary witness and will follow the same procedure and payment as is set forth in statute. However, if the state officer is a witness for the state, an officer, agency, or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered as a condition precedent to appearance; as for the average citizen, service of the subpoena must be accompanied by tender of the above payment to a non-county resident or the subpoena is invalid; with respect to the rights of a county resident, this class of witness still has a right to the per diem witness fee, but the exact time of such payment is within the discretion of the court. 1967 Op. Att'y Gen. No. 67-311.

RESEARCH REFERENCES

C.J.S. — 97 C.J.S., Witnesses, §§ 31, 70 et seq.

ALR. — Amount of fees allowable to ex-

aminers of questioned documents or handwriting experts for serving and testifying, 86 ALR2d 1283.

24-10-25. Enforcement of subpoenas; continuance; secondary evidence of books, papers, or documents.

(a) Subpoenas may be enforced by attachment for contempt and by a fine not exceeding \$300.00 and imprisonment not exceeding 20 days. In all cases under this Code section, the court shall consider whether under the circumstances of each case the subpoena was served within a reasonable time, but in any event not less than 24 hours prior to the time that appearance thereunder was required.

(b) The court may also in appropriate cases grant continuance of the cause. Where subpoenas were issued in blank, no continuance shall be granted because of failure to respond thereto when the party obtaining them fails to present to the clerk the name and address of the witness so subpoenaed at least six hours before appearance is required.

(c) When books, papers, or documents are unsuccessfully sought, secondary evidence thereof shall be admissible. (Laws 1799, Cobb's 1851 Digest, p. 276; Code 1863, § 3767; Code 1868, § 3791; Code 1873, § 3844; Code 1882, § 3844; Civil Code 1895, § 5263; Civil Code 1910, § 5852; Code 1933, § 38-1504; Ga. L. 1966, p. 502, § 1; Ga. L. 1995, p. 10, § 24.)

JUDICIAL DECISIONS

Service. — In order to compel the attendance of a witness by attachment, it must be shown that the witness has been served with the precept of the court. *Harrison v. Langston & Woodson*, 100 Ga. 394, 28 S.E. 162 (1897).

Witness not served. — When the defendant's motion for continuance is based upon the absence of a material witness for whom a subpoena was not issued by the defendant until the morning the trial was to begin and who had not been served therewith at the time the motion was made, there is no error in overruling the motion. *Eady v. State*, 129 Ga. App. 656, 200 S.E.2d 767 (1973).

Service less than 24 hours. — Trial court cannot impose sanctions upon a witness who fails or refuses to appear in answer to a subpoena served less than 24 hours before the required appearance. *Eubanks v. Brooks*, 139 Ga. App. 166, 227 S.E.2d 923 (1976).

Trial court did not err in failing to enforce

defendant's subpoenas because the subpoenas were not served more than 24 hours prior to trial. *Byron v. State*, 229 Ga. App. 795, 495 S.E.2d 123 (1998).

In a personal injury action, because a driver waited until the eve of trial to serve the doctor with a subpoena for the doctor's testimony, the trial court: (1) did not abuse the court's discretion in determining that such service was not reasonable under O.C.G.A. § 24-10-25(a); and (2) did not err in refusing to grant the driver a continuance or citing the physician in contempt for failing to appear in court; moreover, since the subpoena was unenforceable, evidence surrounding the doctor's failure to appear became irrelevant under O.C.G.A. § 24-2-1. *Buster v. Poole*, 279 Ga. App. 828, 632 S.E.2d 680 (2006).

Discretion of court. — An important exercise of discretion on the part of the trial judge is necessary under the statute, and it is

only when this discretion is abused that it should be controlled by the reviewing court. *Carter & Co. v. Southern Ry.*, 3 Ga. App. 34, 59 S.E. 209 (1907).

Circumstances of each case. — Statute allows the trial court to consider the circumstances of each case in determining whether the period between service of the subpoena and the required appearance was sufficient. *Eubanks v. Brooks*, 139 Ga. App. 166, 227 S.E.2d 923 (1976).

Trial court can extend length of notice when it believes preparation is required but trial court cannot arbitrarily reduce the notice requirement below 24 hours. *Eubanks v. Brooks*, 139 Ga. App. 166, 227 S.E.2d 923 (1976).

Contempt power of imprisonment applies only in the event that the witness, after having been cited, refuses to testify in the case. *Moody v. State*, 131 Ga. App. 355, 206 S.E.2d 79 (1974).

Subpoenas may be enforced by attachment for contempt, but this means citation, notice, hearing, and assistance of counsel, as in contempts generally, and not the punishment meted out for courtroom incidents under the court's inherent power to maintain order. *Moody v. State*, 131 Ga. App. 355, 206 S.E.2d 79 (1974).

Challenge to subpoena to produce gun waived by production of gun. — In a prosecution against a defendant for aggravated assault and other charges arising out of a road rage incident, the defendant waived a challenge under O.C.G.A. § 24-10-25 to the timeliness of a subpoena directing the production of the defendant's gun by producing the gun prior to moving to quash the subpoena, and the defendant failed to provide a means of appellate review by including the subpoena or any service affidavit in the record; the defendant's motion to quash the subpoena under O.C.G.A. § 24-10-25(a) was therefore properly denied. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Interference by third party in ordering individual in possession of corporate documents sought by subpoena duces tecum to turn the documents over to the third party for the purpose of concealing, destroying, or otherwise withholding the information therein contained from the grand jury would be an act of contempt which the court

would be well authorized to punish. *Jones v. State*, 99 Ga. App. 858, 109 S.E.2d 859 (1959).

Identical subpoenas served on president and employee of corporation. — When identical subpoenas directed to a corporation were served upon the president in control of the corporation and an employee having actual custody of the papers, it was perfectly proper for the president to demand and acquire custody of the documents from the employee for the purpose of producing the documents in compliance with the subpoena served upon the individual as such president; it did not constitute a contempt of court that the defendant, before complying with the subpoena, saw fit to test the subpoena's sufficiency by means of a motion to quash, since the defendant did in fact, upon obtaining a ruling by the court adverse to the defendant's contentions, surrender the documents called for by the subpoena. *Jones v. State*, 99 Ga. App. 858, 109 S.E.2d 859 (1959).

Continuance. — When the court offers to issue an attachment to compel the attendance of a witness, and the witness's counsel declines to take the same, but instead thereof relies upon the service of a second subpoena, which latter the witness likewise disobeys, there is not abuse of discretion in refusing a continuance on account of the absence of the witness. *Brady v. State*, 120 Ga. 181, 47 S.E. 535 (1904).

Waiver. — Subpoenaed witness may waive the 24 hour notice requirement. *Eubanks v. Brooks*, 139 Ga. App. 166, 227 S.E.2d 923 (1976).

Notice period waived by witness testifying. — Subpoenaed witness waived the 24-hour notice requirement when the witness refused the trial court's offer of continuance and voluntarily testified at trial. *Stein v. Cherokee Ins. Co.*, 169 Ga. App. 1, 311 S.E.2d 220 (1983).

Motions to compel and for sanctions are not proper vehicles for the enforcement of a notice to produce. *Bergen v. Cardiopul Medical, Inc.*, 175 Ga. App. 700, 334 S.E.2d 28 (1985).

Motion to produce filed on morning of trial is too late. *Williams v. State*, 142 Ga. App. 764, 236 S.E.2d 893 (1977).

Secondary evidence admissible. — When a party to a cause serves on the opposite

party, who is presumably in possession of a once existing material writing, a notice to produce such writing, and the party served responds that the writing is lost, or fails to produce it at the trial, secondary evidence as to the contents of the original writing becomes admissible. *Middlebrooks v. Cabaniss*, 193 Ga. 764, 20 S.E.2d 10 (1942).

Cited in *Murphy v. State*, 132 Ga. App.

654, 209 S.E.2d 101 (1974); *Carter v. State*, 161 Ga. App. 734, 288 S.E.2d 749 (1982); *Muff v. State*, 254 Ga. 45, 326 S.E.2d 454 (1985); *Mijajlovic v. State*, 179 Ga. App. 506, 347 S.E.2d 325 (1986); *Fowler v. State*, 195 Ga. App. 874, 395 S.E.2d 33 (1990); *Collins v. Kiah*, 218 Ga. App. 484, 462 S.E.2d 158 (1995).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, §§ 1019, 1020, 1022. 97 C.J.S., Witnesses, §§ 5, 32 et seq.

ALR. — *Mandamus to compel court or judge to require witness to testify or produce documents*, 41 ALR 436.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person, 175 ALR 234.

Tort or statutory liability for failure or refusal of witness to give testimony, 61 ALR3d 1297.

24-10-26. Notice to produce.

Where a party desires to compel production of books, writings, or other documents or tangible things in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party. Service may be perfected in accordance with Code Section 24-10-23, but no fees or mileage shall be allowed therefor. Such notices may be enforced in the manner prescribed by Code Section 24-10-25, and Code Section 24-10-22 shall also apply to such notices. The notice shall be in writing, signed by the party seeking production of the evidence, or his attorney, and shall be directed to the opposite party or his attorney. (Laws 1799, Cobb's 1851 Digest, p. 463; Laws 1841, Cobb's 1851 Digest, p. 465; Code 1863, §§ 3437, 3438, 3439, 3440, 3441, 3442, 3757; Code 1868, §§ 3457, 3458, 3459, 3460, 3461, 3462, 3781; Code 1873, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834; Ga. L. 1880-81, p. 78, § 1; Code 1882, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834; Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254; Civil Code 1910, §§ 5837, 5838, 5839, 5840, 5841, 5842, 5843; Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807; Ga. L. 1966, p. 502, § 1.)

Cross references. — Discovery of documentary and tangible evidence generally, § 9-11-34.

Law reviews. — For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976).

For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CRIMINAL CASES

1. IN GENERAL
2. ITEMS NOT SUBJECT TO NOTICE TO PRODUCE
3. ITEMS SUBJECT TO NOTICE TO PRODUCE

General Consideration

Purpose of statute. — Notice under this statute is the appropriate means of procuring the primary evidence, or of laying the foundation for secondary evidence. *McAdam v. Weikel & Smith Spice Co.*, 64 Ga. 441 (1879) (see O.C.G.A. § 24-10-26).

Notice to produce applies only to parties. — *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Subpoena duces tecum and notice distinguished. — Papers are produced under notice, when directed to parties or their counsel; when in the possession of others, they must be reached by a subpoena duces tecum. *Wright v. Central R.R. & Banking Co.*, 21 Ga. 345 (1857); *Ex parte Calhoun*, 87 Ga. 359, 13 S.E. 694 (1891).

Equitable and legal cases. — Provisions of statute are applicable to all cases, whether the relief prayed for be legal or equitable. *Georgia Iron & Coal Co. v. Etowah Iron Co.*, 104 Ga. 395, 30 S.E. 878 (1898).

General description sufficient. — There is no necessity for a technical description of the papers to have them produced; a very general description will be effectual. *Fletcher v. Faust*, 22 Ga. 559 (1857).

Specificity of notice. — Notice to produce should be specific enough in its demands to relate the documents sought to the questions at issue. *Horton v. Huiet*, 113 Ga. App. 166, 147 S.E.2d 669 (1966).

Sufficiency of description. — Description is sufficiently definite if the party who is called on to produce or to give an inspection will be enabled to know what to produce or what the party must give an inspection of. *Fluker v. Bank of Union Point*, 178 Ga. 297, 173 S.E. 149 (1934).

Material not in possession of party. — Failure to produce material not in possession, control, or custody does not constitute a failure to comply with notice to produce. *Gibson v. State*, 150 Ga. App. 718, 258 S.E.2d 537 (1979).

Materiality of evidence question for court.

— Determination of the materiality of evidence involves the exercise of a judicial function; the conclusion of a witness that the contents of a paper are material, when there is no proof as to what the paper contains, is no proof that the papers sought to be produced are in fact necessary, and can not relieve the court from the duty of passing upon the question of materiality. *Central of Ga. Ry. v. Lewis*, 2 Ga. App. 428, 58 S.E. 674 (1907).

Term to term. — Notice to produce is not defective in that the notice does not specifically call for the production of the paper from "term to term," and the party served therewith is not relieved from compliance with the notice because the trial occurs at a term subsequent to the term at which such party was notified to produce the paper. *Carrington v. Brooks*, 121 Ga. 250, 48 S.E. 970 (1904).

All books covered by the notice to produce must be produced. *American Nat'l Bank v. Brunswick Light & Water Co.*, 100 Ga. 92, 26 S.E. 473 (1896).

Books which are irrelevant, though produced under notice, are not admissible. *Gow v. Charlotte, C. & A.R.R.*, 68 Ga. 54 (1881).

Motion to produce filed on morning of trial is too late. *Williams v. State*, 142 Ga. App. 764, 236 S.E.2d 893 (1977).

Motion to produce timely despite expiration of time under Superior Court Rule 5.1.

— Plaintiff who served a notice to produce approximately 20 days prior to trial was entitled to have documents produced even though the six-month discovery period provided by Superior Court Rule 5.1 had expired. *Gaffron v. Metropolitan Atlanta Rapid Transit Auth.*, 229 Ga. App. 426, 494 S.E.2d 54 (1997).

Quashing or enforcement of notice. — Motions pursuant to O.C.G.A. §§ 9-11-26, 9-11-34, and 9-11-37 for a protective order or sanctions are not proper vehicles for the

General Consideration (Cont'd)

quashing or the enforcement of a O.C.G.A. § 24-10-26 notice to produce. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Motions to compel and for sanctions are not proper vehicles for the enforcement of a notice to produce. *Bergen v. Cardiopul Medical, Inc.*, 175 Ga. App. 700, 334 S.E.2d 28 (1985).

Trial court did not have the discretion to hold that a notice to produce under O.C.G.A. § 24-10-26 had been converted into a request for production under O.C.G.A. § 9-11-34. *Bergen v. Cardiopul Medical, Inc.*, 175 Ga. App. 700, 334 S.E.2d 28 (1985).

Cited in *Lingerfelt v. State*, 147 Ga. App. 371, 249 S.E.2d 100 (1978); *Brooker v. State*, 242 Ga. 773, 251 S.E.2d 518 (1979); *Chambliss v. State*, 149 Ga. App. 654, 255 S.E.2d 120 (1979); *State v. Madigan*, 249 Ga. 571, 292 S.E.2d 406 (1982); *State v. Meminger*, 249 Ga. 561, 292 S.E.2d 681 (1982); *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983); *Heard v. State*, 170 Ga. App. 130, 316 S.E.2d 504 (1984); *Thomas v. State*, 171 Ga. App. 306, 319 S.E.2d 511 (1984); *Simmons v. State*, 174 Ga. App. 171, 329 S.E.2d 312 (1985); *White v. Dilworth*, 178 Ga. App. 226, 342 S.E.2d 709 (1986); *Strawder v. State*, 207 Ga. App. 365, 427 S.E.2d 792 (1993).

Criminal Cases

1. In General

Statute is applicable in criminal cases. — See *Brown v. State*, 238 Ga. 98, 231 S.E.2d 65 (1976); *Phillips v. State*, 146 Ga. App. 423, 246 S.E.2d 438 (1978); *Natson v. State*, 242 Ga. 618, 250 S.E.2d 420 (1978); *Watson v. State*, 147 Ga. App. 847, 250 S.E.2d 540 (1978); *Crosby v. State*, 150 Ga. App. 804, 258 S.E.2d 593 (1979); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980); *Jackson v. State*, 158 Ga. App. 530, 281 S.E.2d 252 (1981) (see O.C.G.A. § 24-10-26).

Use of statute by state. — Statute applies not only to the obligation of the state to produce certain items, but also applies to any party who desires to compel production of books, writings, or other documents or tangible things in the possession, custody, or

control of another party; accordingly, the state has as much right to utilize this statute as a defendant. *Phillips v. State*, 146 Ga. App. 423, 246 S.E.2d 438 (1978) (see O.C.G.A. § 24-10-26).

Constitutionality of use by state. — Sanctioning the state's resort to this statute in compelling a defendant to produce specific property for use as evidence against the defendant would be unconstitutional. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Unconstitutional self-incrimination. — State may not use a notice to produce to re seize property and red vest defendant of custody and possession by retaining the property and using the property as evidence in a criminal proceeding; unconstitutional self-incrimination would be the result of compliance with the state's notice. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Omission of evidence of reasonable doubt is commission of constitutional error. — Proper standard of materiality must reflect the overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. *Smith v. State*, 248 Ga. 507, 284 S.E.2d 406 (1981).

No discovery in criminal cases. — Although an accused may utilize the notice to produce provision of this statute to compel the production of tangible objects and documents at trial, discovery as such is not available to an accused in criminal cases in Georgia. *Howard v. State*, 144 Ga. App. 208, 240 S.E.2d 908 (1977); *Pryor v. State*, 238 Ga. 698, 234 S.E.2d 918, overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977);

Toole v. State, 146 Ga. App. 305, 246 S.E.2d 338 (1978).

Notice to produce not used to circumvent discovery reciprocity. — Notice to produce under O.C.G.A. § 24-10-26 cannot be used as a discovery tool to circumvent discovery reciprocity under the discovery act. Farmer v. State, 222 Ga. App. 506, 474 S.E.2d 711 (1996); McGuire v. State, 243 Ga. App. 899, 534 S.E.2d 549 (2000).

Compared with Civil Practice Act. — Notice to produce in a criminal case is not as all-inclusive as a request to produce discoverable evidence under the Civil Practice Act. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

There is no absolute right to examine original evidence; the motion for an independent examination must be timely made, and the accused must show that the original evidence is materially favorable to the accused. Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977).

Criminal defendant has burden of showing how defendant's case has been materially prejudiced by failure to produce even when trial court declines to make an in camera inspection. Patterson v. State, 154 Ga. App. 877, 270 S.E.2d 86 (1980).

In camera inspection. — On motion for production of specific material, the defendant must be furnished exculpatory information; i.e., information favorable to the defendant and material either to guilt or punishment. When a motion is made and the prosecutor does not make the specified material available to defense counsel, the trial judge should make an in camera inspection of the material sought. On motion by the defendant the material examined in camera should either be sealed and filed, or an inventory or record of the examined material made so as to permit appellate review. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

Refusal to search for evidence. — Prosecution does not suppress evidence by refusing to conduct a search for the evidence, even though the evidence may be more accessible to the state than to the defense. Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980).

Right of victim prevails over right of defendant. — Fourth amendment right of the

victim of a crime to be secure against an unreasonable search must prevail over the right of the accused to obtain evidence for the accused's defense. State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978).

Confidential informant. — It is within the sound discretion of a trial court whether to require the state to disclose to the defendant the name and address of a confidential informant. Clayton v. State, 145 Ga. App. 541, 244 S.E.2d 67 (1978).

2. Items Not Subject to Notice to Produce

Material not in state's possession is not subject to a notice to produce. — Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653 (1980); Patterson v. State, 154 Ga. App. 877, 270 S.E.2d 86 (1980).

When the materials sought by defendant were not types of items reasonably expected to be found in the custody of the solicitor (now district attorney) preparing the case against defendant and such evidence could have been obtained only if the prosecution actively sought the evidence, thereby causing the state to investigate the case for the defense, the trial court did not err in denying defendant's motion to produce such evidence or in denying the motion for continuance based upon the absence of the materials in the courtroom at the time of trial. Fletcher v. State, 157 Ga. App. 707, 278 S.E.2d 444 (1981).

In a prosecution for homicide by vehicle, it was not error to deny the defendant's motion to produce the deceased's automobile, absent a showing that the automobile was in the state's possession, custody, or control. Wheat v. State, 171 Ga. App. 583, 320 S.E.2d 808 (1984).

State was not required to produce documents pursuant to defendants' motions, since the materials sought were not of the type reasonably expected to be found in the custody of the solicitor (now district attorney) preparing the case. Dixon v. State, 196 Ga. App. 15, 395 S.E.2d 577 (1990).

In a prosecution for driving under the influence, the state was not required to comply with defendant's notice to produce documents relating to the Intoxilyzer because such materials are not reasonably expected to be found in the possession, cus-

Criminal Cases (Cont'd)**2. Items Not Subject to Notice to Produce (Cont'd)**

tody, or control of the prosecutor. *Maurer v. State*, 240 Ga. App. 145, 525 S.E.2d 104 (1999).

District attorney's work product. — Notice to produce cannot be used in a criminal case to require the production of the district attorney's work product; reports, memoranda, and documents in the files of law enforcement officers; addresses and telephone numbers of the state's witnesses; or the names and addresses of other persons with knowledge of the facts. *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

File of district attorney. — Defendant in a criminal case does not have the right to inspect the file of the district attorney before the defendant is put on trial. *White v. State*, 230 Ga. 327, 196 S.E.2d 849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973).

Notice to produce cannot be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district attorney's file. *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

Defendant's diaries, which were in the state's possession, were not proper subject of discovery under O.C.G.A. § 24-10-26. *Sims v. State*, 251 Ga. 877, 311 S.E.2d 161 (1984).

Statement of defendant. — State was under no duty to provide defense counsel a prior contradictory statement of defendant which impeached defendant because the statement was neither exculpatory nor likely to be used in evidence by the defense. *Farmer v. State*, 222 Ga. App. 506, 474 S.E.2d 711 (1996).

Photos of the crime scene not presented in evidence by the state and not exculpatory were not subject to discovery. *Sims v. State*, 251 Ga. 877, 311 S.E.2d 161 (1984).

Statements of witnesses in the prosecutor's files, if nothing more appears, may not be reached by statutory provisions on notice to produce. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978); *Spain v. State*, 243 Ga. 15, 252 S.E.2d 436 (1979); *Holton v. State*, 243

Ga. 312, 253 S.E.2d 736 (1979); *Hamby v. State*, 243 Ga. 339, 253 S.E.2d 759 (1979); *Stanley v. State*, 153 Ga. App. 42, 264 S.E.2d 533 (1980); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980); *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982); *Hill v. State*, 161 Ga. App. 346, 287 S.E.2d 779 (1982); *Holbrook v. State*, 162 Ga. App. 400, 291 S.E.2d 729 (1982); *Ivester v. State*, 252 Ga. 333, 313 S.E.2d 674 (1984); *Pittman v. State*, 175 Ga. App. 50, 332 S.E.2d 356 (1985).

Witness statements have never been subject to a notice to produce, although exculpatory witness statements are subject to disclosure, if requested under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *Welch v. State*, 251 Ga. 197, 304 S.E.2d 391 (1983); *Ivester v. State*, 252 Ga. 333, 313 S.E.2d 674 (1984).

Pretrial statements of state's witnesses are not within the ambit of O.C.G.A. § 24-10-26 notice to produce. *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986).

Evidence used on behalf of state and not needed for defense. — Failure to produce a photo array which was displayed to an eyewitness before the array was introduced at trial did not violate O.C.G.A. § 24-10-26 since the array and the identification pursuant to it were used as evidence on behalf of the state, and were not needed by defendant as evidence in support of the defendant's defense. *Gilstrap v. State*, 256 Ga. 20, 342 S.E.2d 667 (1986).

Trial court did not err in admitting two photographs of a rape victim when, although the state had not supplied the photographs in response to defendant's pretrial notice to produce, the photographs were used as evidence on behalf of the state and were not needed by defendant as evidence in support of defendant's defense. *Sweetenburg v. State*, 197 Ga. App. 36, 397 S.E.2d 451 (1990).

Police surveillance videotape was not subject to discovery since the tape was not needed for use as evidence on the defendant's behalf and was only introduced on re-direct examination to rehabilitate the testimony of a witness. *Deal v. State*, 199 Ga. App. 184, 404 S.E.2d 343 (1991).

Statement of nonwitness. — When no exculpatory material is suppressed, there is

no requirement that the prosecution allow discovery of a statement of a person who is not a trial witness. *Crosby v. State*, 150 Ga. App. 804, 258 S.E.2d 593 (1979).

Tape recordings of drug transaction. — Tape recording of a drug transaction was not discoverable pursuant to O.C.G.A. § 24-10-26 nor under § 17-7-210 [repealed], since the recording was not of any taped statement given by the defendant while in police custody, nor under former § 17-7-211, since the tape recording did not constitute a written scientific report. *Weldon v. State*, 204 Ga. App. 221, 419 S.E.2d 59 (1992).

Police and investigation reports. — Statute does not require a district attorney to open the district attorney's files to the attorney for the accused, nor is the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the client. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978), cert. denied, 449 U.S. 891, 101 S. Ct. 251, 66 L. Ed. 2d 118 (1980).

There is no Georgia procedure requiring the district attorney to open the district attorney's files to the accused, nor is the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the accused. *Baker v. State*, 245 Ga. 657, 266 S.E.2d 477 (1980).

Reports and summaries made by police investigators are not the types of "books, writings or other documents or tangible things" subject to a notice to produce. *Carter v. State*, 150 Ga. App. 119, 257 S.E.2d 11 (1979); *Bennett v. State*, 158 Ga. App. 421, 280 S.E.2d 429 (1981).

Scientific reports. — Motion to produce pursuant to O.C.G.A. § 24-10-26, which included inter alia, a demand for production of all reports and the results and copies of all reports of any scientific tests, experiments, or studies made in connection with the defendant's case, was not adequate pursuant to former § 17-7-211 for production of scientific reports. *Murray v. State*, 203 Ga. App. 858, 418 S.E.2d 624 (1992).

Intoximeter data. — Computer data upon which an intoximeter test was based were not the types of items reasonably expected to be found in the "custody" of the solicitor (now

district attorney) preparing the case against defendant. *Ross v. State*, 192 Ga. App. 850, 386 S.E.2d 721 (1989).

Improper use of notice to produce. — Defendant having "moved to suppress" the evidence by virtue of contesting the libel for condemnation of former Code 1933, § 79A-828 (see O.C.G.A. § 16-13-49) and the state having failed to meet the state's burden in that regard, the state may not use the notice to produce to "re-seize" the property for evidentiary purposes. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Possession of bullet in body of victim. — State cannot, under any theory, be deemed to have in the state's possession a bullet lodged in the body of a victim of a crime, and the state does not have any more right to require the removal of a bullet from the body of a living victim than does the accused. *State v. Haynie*, 240 Ga. 866, 242 S.E.2d 713 (1978).

3. Items Subject to Notice to Produce

Admissible and necessary evidence. — Notices to produce can be used in a criminal case "to compel production of books, writings or other documents or tangible things in the possession, custody or control" of the opposite party (district attorney and investigating officers), for use at trial or at a pretrial evidentiary hearing, when such books, etc., would be admissible and are needed for use as evidence on behalf of the defendant. *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

Tangible objects and documents. — Accused may use the notice to produce provision to compel the production of tangible objects and documents at trial. *Brooks v. State*, 141 Ga. App. 725, 234 S.E.2d 541 (1977).

More than list of witnesses. — Notice to produce is available in criminal cases for more than the limited purpose of obtaining a copy of the accusation and list of witnesses already available under § 17-7-110 [repealed]. *Brown v. State*, 238 Ga. 98, 231 S.E.2d 65 (1976).

Exculpatory matter. — Defendant is entitled to discovery of all exculpatory matter and anything in the district attorney's file which is favorable to defendant's defense.

Criminal Cases (Cont'd)**3. Items Subject to Notice to****Produce (Cont'd)**

Maddox v. State, 136 Ga. App. 370, 221 S.E.2d 231 (1975).

Material creating reasonable doubt. —

Prosecutor is under a duty to furnish the defendant, without request, material which creates a reasonable doubt as to the defendant's guilt. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Law enforcement officer who is covered by the Fair Labor Standards Act of 1938 would not be entitled to the witness fee

established by O.C.G.A. § 24-10-26 for testifying during "off-duty" hours. 1986 Op. Att'y Gen. No. U86-26.

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 755.

ALR. — Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 ALR3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 ALR3d 181.

24-10-27. Witness fees for police officers, deputy sheriffs, or members of campus police.

(a) Notwithstanding any other provision in this article, any member of a municipal or county police force or any deputy sheriff or any campus policeman as defined in Code Section 20-8-1 or a member of a local fire department who shall be required by writ of subpoena to attend any superior court, other courts having jurisdiction to enforce the penal laws of this state, municipal court having jurisdiction to enforce the penal laws of this state as provided by Code Section 40-13-21, juvenile court, or grand jury, or hearing or inquest held or called by a coroner, or magistrate court involving any criminal matter, as a witness on behalf of the state during any hours except the regular duty hours to which the officer is assigned, may be paid for such attendance at a fixed rate to be established by the governing authority, but not less than \$20.00 per diem. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify this statement. The dates of attendance shall be certified by the judge or the prosecuting attorney of the court attended. The chief of police, the sheriff, the director of public safety of a college or university, or the local fire chief shall certify that the claimant has not received any overtime pay for his attendance and that his attendance was required during hours other than regular duty hours. The amount due may be paid by the governing body authorized to dispense public funds for the operation of the court. However, no such officer may claim or receive more than one witness fee per day for attendance in any court or before the grand jury regardless of the number of subpoenas which the officer may have received requiring him to appear in such court or before the grand jury on any one day.

(b)(1) Notwithstanding any other provision in this article except paragraph (2) of this subsection, any member of a municipal or county police force or any deputy sheriff or any campus policeman as defined in Code Section 20-8-1 or any arson investigator of the state fire marshal's office or a member of a local fire department who shall be required by writ of subpoena to attend any court of this state with respect to any civil case, as a witness concerning any matter relative to the law enforcement duties of such officer during any hours except the regular duty hours to which the officer is assigned, may be paid for such attendance at a fixed rate to be established by the governing authority, but not less than \$20.00 per diem. Any such officer shall also be entitled to the mileage allowance provided in Code Section 24-10-24 when such officer resides outside the county where the testimony is to be given. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify this statement. The dates of attendance shall be certified by the party obtaining the subpoena. The chief of police, the sheriff, the director of public safety of a college or university, or the local fire chief shall certify that the claimant has not received any overtime pay for his attendance and that his attendance was required during hours other than regular duty hours.

(2) Any officer covered by paragraph (1) of this subsection who is required by writ of subpoena to attend any court with respect to any civil case, as a witness concerning any matter which is not related to the duties of such officer, shall be compensated as provided in Code Section 24-10-24.

(c) The fee specified by subsections (a) and (b) of this Code section shall not be paid if the officer receives any overtime pay for time spent attending such court pursuant to the writ of subpoena.

(d) For the purposes of this Code section, the term "regular duty hours" means the daily shift of duty to which such officer is assigned and shall not include paid or unpaid vacation, paid or unpaid sick leave, paid or unpaid holiday or any other paid or unpaid leave status established pursuant to the personnel regulations or scheduling practices of the employing agency. (Ga. L. 1968, p. 434, § 1; Ga. L. 1978, p. 925, § 1; Ga. L. 1980, p. 439, § 1; Ga. L. 1982, p. 982, §§ 1, 2; Ga. L. 1983, p. 3, § 17; Ga. L. 1983, p. 884, § 3-24; Ga. L. 1984, p. 964, § 1; Ga. L. 1985, p. 407, § 1; Ga. L. 1987, p. 3, § 24; Ga. L. 1987, p. 404, § 1; Ga. L. 1987, p. 834, § 1; Ga. L. 1989, p. 332, § 1; Ga. L. 1990, p. 1446, §§ 1, 2; Ga. L. 1991, p. 773, § 1.)

Editor's notes. — Ga. L. 1991, p. 773, § 1, which amended this Code section, pur-ported to amend only subsection (a) but also amended paragraph (b)(1).

JUDICIAL DECISIONS

Failure of proof that fee accrued. — When a police officer did not in the officer's affidavit verify that the officer's attendance was required during hours which were other than the officer's regularly assigned duty hours and there was no certification from the officer's superior that the officer was neither paid additional compensation nor given time off on account of the officer's service, there was a failure of proof that a witness fee had accrued. *Walden v. State*, 185

Ga. App. 413, 364 S.E.2d 304 (1987), rev'd on other grounds, 258 Ga. 503, 371 S.E.2d 852 (1988), aff'd, 189 Ga. App. 896, 378 S.E.2d 418 (1989).

Lodging and airfare costs. — There is no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. *Smith v. State*, 272 Ga. 83, 526 S.E.2d 59 (2000), reversing *Smith v. State*, 236 Ga. App. 548, 512 S.E.2d 19 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Purpose of this statute is to ensure that witness fees are not denied certain officers in cases involving penal statutes when those officers are connected with the enforcement of those statutes in such a way that testimony at a trial during off-duty hours might nevertheless be considered within their regular duties and therefore already compensated for by their salaries. 1972 Op. Att'y Gen. No. 72-157.

Criminal as well as civil cases. — County must pay the per diem witness fee to witnesses summoned in criminal cases, as well as to those summoned in civil cases; the source of funds for witness fees is from county taxes. 1970 Op. Att'y Gen. No. U70-11.

Word "member" in statute does not include fingerprint experts employed by the Division of Investigation. 1972 Op. Att'y Gen. No. 72-157.

Peace officer who, required by subpoena, attended court on behalf of the state during any hours except regular duty hours, was entitled to mileage as provided by O.C.G.A. § 24-10-24; under these conditions, the peace officer was also entitled to per diem as provided in Ga. L. 1968, p. 434, § 1 (see O.C.G.A. § 24-10-27). 1971 Op. Att'y Gen. No. U71-57.

State trooper is entitled to be compensated separately from each court in which the trooper appears as a witness under subpoena; however, the trooper may not receive more than one witness fee per day for ap-

pearing as a witness under subpoena in any single court. 1983 Op. Att'y Gen. No. 83-4.

Attendance at justice court commitment hearing does not entitle an officer to a fee. 1970 Op. Att'y Gen. No. U70-234.

University officers not entitled to fees. — University system law enforcement officers may enforce municipal ordinances of all kinds within 500 yards of the Board of Regents' property and may prosecute those cases in any court of this state. However, such officers are not entitled to the statutory witness stipend provided under subsection (a) of O.C.G.A. § 24-10-27. 1993 Op. Att'y Gen. No. 93-20.

Endorsement of claim for fees. — Under the provisions of O.C.G.A. § 24-10-27, a post commander may endorse a state trooper's claim for witness fees stating that attendance was required during hours other than the trooper's regular duty hours. However, only the commanding officer of the division to which the trooper is assigned is authorized to certify that the claimant has been paid no additional compensation and has been given no time off on account of the claimant's court appearance. 1985 Op. Att'y Gen. No. U85-28.

Subpoena of duty records by grand juries. — Grand juries do not have the power to subpoena duty records of the state patrol or city police to determine the accuracy of disbursement of witness fees by the clerk's office. 1985 Op. Att'y Gen. No. U85-28.

RESEARCH REFERENCES

C.J.S. — 97 C.J.S., Witnesses, § 75.

24-10-27.1. Witness fees for member of Georgia State Patrol or Georgia Bureau of Investigation, law enforcement officer of Department of Natural Resources, correctional officer, or arson investigator of state fire marshal's office.

(a) Notwithstanding any other provision in this article, any member of the Georgia State Patrol or Georgia Bureau of Investigation, any correctional officer, any person employed by the Department of Natural Resources as a law enforcement officer, or any arson investigator of the state fire marshal's office who shall be required by writ of subpoena to attend any superior court, other courts having jurisdiction to enforce the penal laws of this state, municipal court having jurisdiction to enforce the penal laws of this state as provided by Code Section 40-13-21, juvenile court, or grand jury or hearing or inquest held or called by a coroner or magistrate court involving any criminal matter, as a witness on behalf of the state during any hours except the regular duty hours to which the officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than \$20.00 per diem. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify this statement. The dates of attendance shall be certified by the judge or the prosecuting attorney of the court attended. The director of the Georgia Bureau of Investigation or his or her designees, the commanding officer of the Georgia State Patrol or his or her designees, the commissioner of natural resources or his or her designees, the superintendent of the institution, or the state fire marshal shall certify that the claimant has not received any overtime pay for his or her attendance and that his or her attendance was required during hours other than regular duty hours. The amount due shall be paid by the governing body authorized to dispense public funds for the operation of the court. However, no such officer may claim or receive more than one witness fee per day for attendance in any court or before the grand jury regardless of the number of subpoenas which the officer may have received requiring him or her to appear in such court or before the grand jury on any one day.

(b)(1) Notwithstanding any other provision in this article except paragraph (2) of this subsection, any member of the Georgia State Patrol, Georgia Bureau of Investigation, any correctional officer, any person employed by the Department of Natural Resources as a law enforcement officer, or any arson investigator of the state fire marshal's office who shall be required by writ of subpoena to attend any court of this state with respect to any civil case, as a witness concerning any matter relative to the

law enforcement duties of such officer during any hours except the regular duty hours to which the officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than \$20.00 per diem. Any such officer shall also be entitled to the mileage allowance provided in Code Section 24-10-24 when such officer resides outside the county where the testimony is to be given. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify this statement. The dates of attendance shall be certified by the party obtaining the subpoena. The director of the Georgia Bureau of Investigation or his or her designees, the commanding officer of the Georgia State Patrol or his or her designees, the commissioner of natural resources or his or her designees, the superintendent of the institution, or the state fire marshal shall certify that the claimant has not received any overtime pay for his or her attendance and that his or her attendance was required during hours other than regular duty hours.

(2) Any officer covered by paragraph (1) of this subsection who is required by writ of subpoena to attend any court with respect to any civil case, as a witness concerning any matter which is not related to the duties of such officer, shall be compensated as provided in Code Section 24-10-24. (Code 1981, § 24-10-27.1, enacted by Ga. L. 1991, p. 773, § 2; Ga. L. 1996, p. 315, § 1; Ga. L. 2010, p. 878, § 24/HB 1387.)

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, revised punctuation in the first sentence of subsection (a).

Code Commission notes. — Pursuant to

Code Section 28-9-5, in 1996, “commissioner of natural resources” was substituted for “Commissioner of Natural Resources” in the fifth sentence of subsection (a) and in the last sentence of paragraph (b)(1).

24-10-28. Legislators’ exemption.

No member of the General Assembly of Georgia shall be compelled to attend and give testimony at any hearing or trial or to produce books, papers, documents, or other tangible things while the General Assembly is in regular or extraordinary session. (Ga. L. 1968, p. 1200, § 1.)

24-10-29. Applicability.

This article shall apply to all civil cases and, insofar as consistent with the Constitution, to all criminal cases. (Ga. L. 1966, p. 502, § 2.)

Law reviews. — For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976).

For note, “Criminal Discovery: The Use of Notices to Produce,” see 30 Mercer L. Rev. 331 (1978).

JUDICIAL DECISIONS

Limitation on use by state. — Words “insofar as consistent with the Constitution” constitute a limitation on the state’s use of subpoenas and notices to produce more than a limitation on its use by an accused. *Brown v. State*, 238 Ga. 98, 231 S.E.2d 65 (1976); *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Unconstitutional self-incrimination. — State may not use a notice to produce to reseize property and redvest defendant of custody and possession by retaining the property and using the property as evidence in a criminal proceeding; unconstitutional self-incrimination would be the result of compliance with the state’s notice. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Notice to produce. — Pursuant to Ga. L. 1966, p. 502, § 2 and former Code 1933, §§ 38-801—38-807 (see O.C.G.A. § 24-10-26), providing for notices to produce writing and tangible objects in lieu of subpoena, is applicable to criminal cases. *Goldsmith v. State*, 148 Ga. App. 786, 252 S.E.2d 657 (1979); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

Discovery as such not available to accused in criminal cases in Georgia, but a motion to produce books, writings, or other documents or tangible things pursuant to O.C.G.A. § 24-10-26 is applicable to criminal cases. *Pryor v. State*, 238 Ga. 698, 234 S.E.2d 918, cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), reh’g denied, 434 U.S. 1003, 98 S. Ct. 650, 54 L. Ed. 2d 500 (1977), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

Exculpatory matter. — Defendant is entitled to discovery of all exculpatory matter and anything in the district attorney’s file which is favorable to defendant’s defense. *Maddox v. State*, 136 Ga. App. 370, 221 S.E.2d 231 (1975).

Material creating reasonable doubt. — Prosecutor is under a duty to furnish the defendant, without request, material which creates a reasonable doubt as to the defendant’s guilt. *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

Confidential informant. — It is within the sound discretion of a trial court whether to require the state to disclose to the defendant the name and address of a confidential informant. *Clayton v. State*, 145 Ga. App. 541, 244 S.E.2d 67 (1978).

Reports and summaries made by police investigators are not the types of books, writings, or other documents or tangible things subject to a notice to produce. *Bennett v. State*, 158 Ga. App. 421, 280 S.E.2d 429 (1981).

Improper use of notice to produce. — Defendant having “moved to suppress” the evidence by virtue of contesting the libel for condemnation of former Code 1933, § 79A-828 (see O.C.G.A. § 16-13-49) and the state having failed to meet the state’s burden in that regard, the state may not use the notice to produce to “reseize” the property for evidentiary purposes. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Corporate document not protected by self-incrimination privilege. — Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant’s personal right against self-incrimination and the small size of the corporation was immaterial. *Thompson v. State*, 294 Ga. App. 363, 670 S.E.2d 152 (2008).

Cited in *Satterfield v. State*, 127 Ga. App. 528, 194 S.E.2d 295 (1972); *Nix v. State*, 236 Ga. 110, 223 S.E.2d 81 (1976); *Haynie v. State*, 141 Ga. App. 688, 234 S.E.2d 406 (1977); *Ervin v. State*, 144 Ga. App. 504, 241 S.E.2d 650 (1978); *Phillips v. State*, 146 Ga. App. 423, 246 S.E.2d 438 (1978); *Goldsmith v. State*, 148 Ga. App. 786, 252 S.E.2d 657 (1979); *Hatcher v. State*, 154 Ga. App. 770, 270 S.E.2d 16 (1980); *Odum v. State*, 156 Ga. App. 119, 274 S.E.2d 117 (1980); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981); *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1013.

ALR. — Subpoenaing unnecessary witnesses as contempt, 37 ALR 1113.

Mandamus to compel court or judge to require witness to testify or produce documents, 41 ALR 436.

Construction and application of provisions of Fair Labor Standards Act regarding investigatory subpoena duces tecum, 166 ALR 553.

PART 2

SECURING TESTIMONY OF WITNESSES IN CASES TRIED ON AFFIDAVITS

24-10-40. Application for subpoena; hearing; use of written questions.

(a) Any party to an application for injunction, motion for new trial, or other case tried only on affidavits who desires to introduce into evidence the affidavit of any witness not a party to the record and who is unwilling to make affidavit may apply to the clerk of the superior court where the action is pending for a subpoena to compel the attendance of such witness at the hearing, subject to the rules applicable to the case of ordinary witnesses. Written questions may be prepared by the party desiring the evidence; and the witness shall answer such questions in the presence of the judge or of some person to be designated as commissioner by the judge, who may swear the witness to testify truly in answer to the questions propounded. The answers of the witness shall be written down, sworn to, and subscribed by the witness at the hearing. If the witness at the hearing consents, an affidavit containing the facts may be prepared and may then be sworn to by the witness. No cross-examination shall be allowed.

(b) When any application for injunction, motion for new trial, or other case tried only on affidavits is heard in any county other than the county in which the action is pending, any party to such injunction, motion for new trial, or other case who desires to introduce into evidence the affidavit of any witness not a party to the record and unwilling to make affidavit may prepare written questions to elicit the information he desires. On application, the clerk of the superior court of the county in which the action is pending and in which the witness resides shall issue a subpoena requiring the witness to attend before some officer of the county named therein, authorized to administer oaths, on a day therein fixed, to answer the questions. The answers shall be reduced to writing and sworn to by the officer who shall forward or deliver the questions and answers to the clerk of the court in which the case is pending, as in the case of interrogatories. It shall be the duty of the clerk to enter on the questions and on the answers a certificate of the date of receipt and from whom or in what manner he received them, to sign the same, and, on application of the party or his counsel interrogating the witness, to deliver the same to him. (Ga. L. 1882-83, p. 96, § 1; Civil Code 1895, § 5323; Civil Code 1910, § 5918; Ga. L. 1921, p. 119, § 1; Code 1933, § 38-2401.)

JUDICIAL DECISIONS

Motion for new trial in criminal case. — Statute does not apply to a motion for a new trial in a criminal case which is set for hearing in a county other than that in which the trial was had. *Thompson v. State*, 138 Ga. 267, 75 S.E. 357 (1912); *Thompson v. State*, 139 Ga. 592, 77 S.E. 811 (1913).

Oral testimony at motion for new trial. — In a hearing on an extraordinary motion for a new trial, when the witnesses are present, and do not object, the presiding judge has discretion as to whether the judge will hear affidavits or oral testimony. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Oral examination at interlocutory injunction hearing. — While generally at the hear-

ing of an application for an interlocutory injunction, the testimony is introduced by means of affidavits, the rule is not inflexible, and where witnesses are present, without objection on their part, for the purpose of testifying, the presiding judge may, in the judge's discretion, allow the witnesses to be examined orally, due care being taken that no injustice is worked thereby. *Chattanooga & C.I. Ry. v. Morrison*, 140 Ga. 769, 79 S.E. 903 (1913); *Cassidy v. Howard*, 140 Ga. 844, 80 S.E. 1 (1913).

Cited in *Perry v. State*, 117 Ga. 719, 45 S.E. 77 (1903); *Battle v. State*, 73 Ga. App. 476, 36 S.E.2d 873 (1946); *Royals v. State*, 208 Ga. 78, 65 S.E.2d 158 (1951).

RESEARCH REFERENCES

ALR. — Necessity of showing authority or qualification of affiant in affidavit made in behalf of corporation, 3 ALR 132.

24-10-41. Procedure when witness resides out of county in which case is pending.

If the witness whose affidavit is desired resides out of the county in which the case is pending or falls within any of the classes for whom interrogatories must be taken in ordinary cases, the party desiring to use such witness's testimony in the cases referred to in Code Section 24-10-40 may prepare written questions to elicit the information he desires. On application, the clerk of the superior court of the county in which the witness resides shall issue a subpoena requiring the witness to attend before some officer of the county, named therein, authorized to administer oaths, on a day therein fixed, to answer the questions. The answers shall be reduced to writing and sworn to before the officer who shall forward or deliver the questions and answers to the clerk of the court where the case is pending, as in cases of interrogatories. (Ga. L. 1882-83, p. 96, § 2; Civil Code 1895, § 5324; Civil Code 1910, § 5919; Code 1933, § 38-2402.)

JUDICIAL DECISIONS

Motion for new trial in criminal case. — Statute does not apply to a motion for a new trial in a criminal case which is set for hearing in a county other than that in which

the trial was had. *Thompson v. State*, 138 Ga. 267, 75 S.E. 357 (1912); *Thompson v. State*, 139 Ga. 592, 77 S.E. 811 (1913).

24-10-42. Questioning of witness at residence.

If, due to the condition of his health or the nature of his business, it is not possible to secure the attendance of the witness without manifest inconvenience to the public and to himself, on the day named in the subpoena the officer shall proceed to the residence of the witness and take the answers to the questions. (Ga. L. 1882-83, p. 96, § 2; Civil Code 1895, § 5325; Civil Code 1910, § 5920; Code 1933, § 38-2403; Ga. L. 1953, Nov.-Dec. Sess., p. 288, § 2.)

24-10-43. Fees of officer.

The fees of the officer shall be paid by the party desiring the testimony and may be taxed against the party against whom costs are taxed on the final trial. (Ga. L. 1882-83, p. 96, § 2; Civil Code 1895, § 5326; Civil Code 1910, § 5921; Code 1933, § 38-2404.)

24-10-44. Production of evidence.

The provisions of this chapter in relation to subpoenas for the production of evidence and notices to produce shall be applicable to the cases specified in Code Section 24-10-40. (Ga. L. 1882-83, p. 96, § 3; Civil Code 1895, § 5327; Civil Code 1910, § 5922; Code 1933, § 38-2405.)

24-10-45. Penalty for default of witness.

Any witness summoned under Code Sections 24-10-40 through 24-10-44 who fails or refuses to obey the subpoena shall be liable for the penalties prescribed in the case of defaulting witnesses in the superior court. (Ga. L. 1882-83, p. 96, § 4; Civil Code 1895, § 5328; Civil Code 1910, § 5923; Code 1933, § 38-2406.)

ARTICLE 3**SECURING ATTENDANCE OF PRISONERS****24-10-60. Order requiring prisoner's delivery to serve as witness or criminal defendant generally; expenses; prisoner under death sentence as witness.**

(a) When a prisoner confined in any state prison, county correctional institution, or other penal institution under the jurisdiction of the Board of Corrections, other than a prisoner under a death sentence, is needed as a witness in any civil or criminal proceeding in any court of record in this state or when it is desired that such person stand trial on an indictment or accusation charging him with commission of a felony or misdemeanor, the

judge of the court wherein the proceeding is pending is authorized to and shall issue an ex parte order, directed to the Board of Corrections, requiring his delivery to the sheriff of the county where the prisoner is desired as a witness or defendant. The sheriff or his deputies shall take custody of the prisoner on the date named in the order, safely keep him pending the proceeding, and shall return him to the original place of detention after his discharge by the trial judge.

(b) If the prisoner was desired as a witness by the state in a criminal proceeding or if the prisoner's release to the sheriff was for the purpose of standing trial on criminal charges, the county wherein the case was pending shall pay all expenses of transportation and keeping, including per diem and mileage of the sheriff, jail fees, and any other proper expense approved by the trial judge.

(c) If the prisoner was desired as a witness by the defendant in a criminal proceeding, or by either party to a civil proceeding, the costs and expenses referred to in subsection (b) of this Code section shall be borne by the person requesting the prisoner as a witness. The court shall require a deposit of money sufficient to defray same, except where the judge, after examining into the matter, determines that the prisoner's presence is required by the ends of justice and that the party requesting it is financially unable to make the deposit, in which case the expenses shall be taxed as costs of court.

(d) If a prisoner under a death sentence is needed as a witness for either the prosecution or the defense in any felony case, the requesting party may interview the proposed witness. Following such interview, the requesting party may move for a writ of habeas corpus ad testificandum. Such motion shall be accompanied by a proffer of the testimony of the proposed witness. The requesting party shall make such motion and proffer as soon as possible but shall not make such motion later than 20 days prior to the date of the trial. Nothing in this Code section shall limit the right of a party from presenting a material witness at a hearing or trial and to have compulsory process for that purpose. (Ga. L. 1882-83, p. 106, §§ 1, 2; Penal Code 1895, §§ 1187, 1188, 1189, 1190, 1191; Penal Code 1910, §§ 1180, 1181, 1182, 1183, 1184; Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, 38-2005; Ga. L. 1956, p. 161, § 31; Ga. L. 1969, p. 607, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1988, p. 1732, § 1.)

Code Commission notes. — Pursuant to substituted for “amd” near the end of sub-
Code Section 28-9-5, in 1988, “and” was section (b).

JUDICIAL DECISIONS

Some showing of need is contemplated in the production of convicts as witnesses. Reid v. State, 119 Ga. App. 368, 166 S.E.2d 900 (1969); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206 (1980).
Trial judge must exercise discretion in

determining whether the presence of the witnesses is "required by the ends of justice." In the exercise of the judge's discretion, the trial judge may require this to be shown by affidavits or depositions. *Phillips v. Hopper*, 237 Ga. 68, 227 S.E.2d 1 (1976).

Defendant has burden of satisfying the trial court that the defendant is unable to pay the expenses of having prisoners produced as witnesses and that the presence of the prisoners as witnesses is required by the ends of justice before the defendant can secure an order requiring the production of the prisoners as witnesses and taxing the expenses thereof as costs of courts. *Phillips v. Hopper*, 237 Ga. 68, 227 S.E.2d 1 (1976).

Habeas corpus. — Law does not require the court to subpoena witnesses at the request of the petitioner for habeas corpus. *Phillips v. Hopper*, 237 Ga. 68, 227 S.E.2d 1 (1976).

Prisoner not required to pay prisoner's expenses. — Prisoner confined in the state penitentiary under a prior conviction is not required to pay expenses involved in the prisoner's transportation from the state penitentiary to the county of the superior court for trial of a pending indictment or indictments against the prisoner therein, or the expenses of the prisoner's return from the county of the prisoner's trial to the state penitentiary; these expenses are a proper charge of the county of that trial court. *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Court has no compulsory process powers without state. — *Reid v. State*, 119 Ga. App. 368, 166 S.E.2d 900 (1969).

Cited in *Edwards v. State*, 144 Ga. App. 665, 242 S.E.2d 326 (1978).

RESEARCH REFERENCES

ALR. — Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness, 4 ALR4th 617.

24-10-61. Issuance of order requiring prisoner's delivery to serve as witness in superior court.

Any judge of the superior court may issue his order to any officer having a lawfully imprisoned person in his custody, requiring the production of such person before his court for the purpose of giving evidence in any criminal cause pending therein, without any formal application or writ of habeas corpus for that purpose. (Orig. Code 1863, § 3928; Code 1868, § 3951; Code 1873, § 4027; Code 1882, § 4027; Penal Code 1895, § 1230; Penal Code 1910, § 1311; Code 1933, § 50-123.)

JUDICIAL DECISIONS

Accused had the right to have the presence of the inmate compelled by court order, pursuant to O.C.G.A. § 24-10-61, and when the witness, without fault on the part of the accused, failed to be present when the case was called, the accused was entitled to a continuance, in order to obtain the presence of the witness. *Grant v. State*, 212 Ga. App. 565, 442 S.E.2d 899 (1994).

Tender of expenses. — Tender of money to defray the expenses of the witness was not necessary since application was made to the court. *Roberts v. State*, 72 Ga. 673 (1884).

Cited in *Walker v. State*, 216 Ga. App. 236, 454 S.E.2d 156 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 5.
C.J.S. — 97 C.J.S., Witnesses, §§ 65 et seq.

ALR. — Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

24-10-62. Issuance of writ of habeas corpus requiring prisoner's delivery to serve as witness in superior court.

The writ of habeas corpus ad testificandum may be issued by the superior court to cause the production in court of any witness under legal imprisonment. (Orig. Code 1863, § 3769; Code 1868, § 3793; Code 1873, § 3849; Code 1882, § 3849; Civil Code 1895, § 5264; Civil Code 1910, § 5853; Code 1933, § 38-1505.)

JUDICIAL DECISIONS

Some showing of need is contemplated. *Brand v. State*, 154 Ga. App. 781, 270 S.E.2d 206 (1980).

Dismissal of inmate's mandamus action was error. — Trial court erred when the court dismissed an inmate's mandamus action pursuant to O.C.G.A. § 9-6-20, wherein the inmate sought additional jail time credit, upon the inmate's failure to appear at a

hearing in the matter, as the trial court had failed to rule on the inmate's motion for habeas corpus ad testificandum under O.C.G.A. § 24-10-62 and, accordingly, the inmate had no ability to appear in court on the hearing date. *Rozar v. Donald*, 280 Ga. 111, 622 S.E.2d 850 (2005).

Cited in *Reid v. State*, 119 Ga. App. 368, 166 S.E.2d 900 (1969).

RESEARCH REFERENCES

C.J.S. — 97 C.J.S., Witnesses, §§ 65 et seq.
ALR. — Constitutionality of statute restoring competency of convicts as witnesses, 63 ALR 982.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

ARTICLE 4

PRODUCTION OF MEDICAL RECORDS

Cross references. — Rights and privileges of psychiatric patients as to maintenance and release of clinical records, § 37-3-160 et seq.

JUDICIAL DECISIONS

Hearsay rule not eliminated. — Statutory provisions on production of medical records deal with the method of authenticating records which are otherwise admissible and does not contain new rules of admissibility eliminating the hearsay rule. *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

ble. — *Rowland v. State*, 73 Ga. App. 729, 37 S.E.2d 923 (1946), clearly a solitary aberration, holding that records containing opinions, diagnoses, and other hearsay are inadmissible, is expressly overruled. *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

Admissibility of contents of hospital records is governed by the rules of admissi-

Records containing hearsay are inadmissi-

bility and not by the manner in which the records are obtained, whether the records be obtained through certification, or through subpoena or notice to produce. *Dennis v. Adcock*, 138 Ga. App. 425, 226 S.E.2d 292 (1976).

Records not absolutely confidential. — Hospital records, being obtainable in legal proceedings by subpoena and other means, are obviously not absolutely confidential in the sense that the records cannot be used. *Dennis v. Adcock*, 138 Ga. App. 425, 226 S.E.2d 292 (1976).

Admissibility of portion of record. — Records which contain diagnostic opinions, conclusions, and other statements of third parties not before the court are still not admissible if tendered in toto though relevant portions of such records not subject to such defects may be. *Moody v. State*, 244 Ga. 247, 260 S.E.2d 11 (1979).

Cited in *Graham v. State*, 236 Ga. 378, 223 S.E.2d 803 (1976); *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978); *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982).

RESEARCH REFERENCES

ALR. — Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in

medical test, or of report based upon such test, 66 ALR2d 536.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 ALR4th 668.

24-10-70. Definitions.

As used in this article, the term:

(1) "Institution" shall have the meaning set forth in paragraph (4) of Code Section 31-7-1 and shall also include a psychiatric hospital as defined in paragraph (7) of Code Section 37-3-1.

(2) "Medical records" means all written clinical information which relates to the treatment of individuals when such information is kept in an institution.

(3) "Patient" means any natural person to whom information contained in medical records relates directly, whether or not the person has been discharged from the institution keeping medical records. (Ga. L. 1971, p. 441, § 1; Ga. L. 1984, p. 22, § 24; Ga. L. 1991, p. 94, § 24; Ga. L. 2008, p. 12, § 2-5/SB 433.)

The 2008 amendment, effective July 1, 2009, substituted "paragraph (4)" for "paragraph (1)" in paragraph (1).

JUDICIAL DECISIONS

Cited in *Taylor v. State*, 229 Ga. 536, 192 S.E.2d 249 (1972); *B.G. v. State*, 143 Ga. App. 725, 240 S.E.2d 133 (1977).

24-10-71. Production of substitutes in lieu of medical records; when authorized; order for production of originals for good cause.

(a) Where it appears that medical records for which a subpoena or order for production has been issued should be kept in an institution as reasonably necessary for the treatment of a patient, the court in which admission is sought shall order that reproduction of the medical records shall be made, the reproduction when duly certified to be admissible in place of the medical records.

(b) Where it does not so appear that medical records should be kept in an institution, an institution upon request at any time shall be permitted to substitute reproductions for medical records, provided such reproductions shall be accompanied by a certificate executed by the person responsible for keeping medical records that the reproductions are true and accurate copies of the medical records.

(c) A court upon good cause shown may order that available medical records be produced to determine the accuracy of reproductions made pursuant to this Code section. (Ga. L. 1971, p. 441, § 2.)

Cross references. — Admissibility of medical tests and blood tests in proceedings to determine paternity, § 19-7-46.

RESEARCH REFERENCES

ALR. — Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 ALR3d 944.

24-10-72. Compliance with subpoena or order; custodian's appearance excused by certificate; when sanctions applied.

(a) An institution, as such, and its personnel shall be in compliance with a subpoena or order for production if it shows timely delivery of the medical records or substitutes and certificate to the clerk of court or other authorized person (by way of illustration, counsel seeking production in discovery proceedings) by any means, including, but not limited to, certified or registered mail or statutory overnight delivery.

(b) A certificate signed before a notary public or other officer authorized to administer oaths shall excuse the personal appearance of any person responsible for keeping medical records. No sanction or remedy for contempt shall be applied against any such person or institution unless a subpoena or order expressly commanding the person's presence has been issued by authority of the court or body for good cause shown, such cause and authority appearing of record and on the face of the subpoena or order. (Ga. L. 1971, p. 441, § 2; Ga. L. 2000, p. 1589, § 4.)

Editor's notes. — Ga. L. 2000, p. 1589, section is applicable to notices delivered on § 16, not codified by the General Assembly, or after July 1, 2000. provides that the amendment to this Code

24-10-73. Payment of costs in advance; pauper's affidavit; tender prerequisite to contempt sanction; when costs deferred.

The court or agency compelling the production of medical records or of reproductions thereof pursuant to subsections (a) and (c) of Code Section 24-10-71 shall in civil cases and administrative proceedings, except upon pauper's affidavit, provide for payment in advance to the institution keeping the records of the reasonable costs of reproduction and reasonable costs incident to the transportation of the records. No institution or person shall be held in contempt or otherwise penalized for failure of production unless it appears of record that the costs provided in this Code section have been established and tendered. When the institution, at the time of service of a subpoena or order for production, is a party to the proceeding, the court or agency may in its discretion defer such costs and award them with the other costs in the proceeding. (Ga. L. 1971, p. 441, § 2.)

24-10-74. Custody of medical records; inspection; return.

When medical records are removed from any institution to the custody of a court pursuant to a subpoena or order, the records so removed shall be kept in the custody of the clerk of the court or the clerk or secretary of an administrative agency and shall be open to inspection according to the terms of the subpoena or order or modification thereof. Upon completion of the necessity for their use, the records shall be promptly returned by the party compelling production to the institution from which they came. (Ga. L. 1971, p. 441, § 2.)

24-10-75. Applicability.

This article applies to all situations for which subpoenas may issue or for which production may be sought, including, but not limited to, trials, hearings, and discovery. (Ga. L. 1971, p. 441, § 3.)

24-10-76. Construction.

(a) Nothing in this article shall be deemed to restrict the admissibility of evidence heretofore determined admissible by law nor to be in derogation of the right of a person on trial for an alleged criminal offense to confront and cross-examine witnesses against him when such right is asserted.

(b) Nothing contained in this article shall be deemed to abrogate or repeal any law or rule of evidence respecting the use of confidences, such as that provided in Code Section 24-9-21, relating to communications between psychiatrist and patient. (Ga. L. 1971, p. 441, §§ 4, 5.)

RESEARCH REFERENCES

ALR. — Construction and effect of statute removing or modifying, in personal injury actions, patient’s privilege against disclosure by physician, 25 ALR2d 1429.

Testimony of witness as basis of civil action for damages, 54 ALR2d 1298.

ARTICLE 5

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES
FROM WITHOUT THE STATE

Cross references. — Securing attendance of witnesses at grand jury or trial proceedings generally, § 17-7-190 et seq.

JUDICIAL DECISIONS

Provisions of § 17-7-192 not applicable to procedure under this article. — Provisions of O.C.G.A. § 17-7-192, prohibiting a continuance due to the absence of witnesses where the accused has failed to use the means provided in the preceding sections, which deal with the accused’s right to obtain subpoenas for such witnesses as the accused may deem material for the accused’s defense, do not apply to the procedure set forth in O.C.G.A. Art. 5, Ch. 10, T. 24. *Farrell v. State*, 160 Ga. App. 321, 287 S.E.2d 318 (1981).

Defendant lacked standing to complain of any procedural irregularities involved in obtaining a witness whom the state had procured by means of O.C.G.A. Art. 5, Ch. 10, T. 24. *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733 (1991), rev’d on other grounds sub nom. *Zant v. Moon*, 264 Ga. 93, 440 S.E.2d 657 (1994).

RESEARCH REFERENCES

U.L.A. — Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (U.L.A.). Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (U.L.A.).

ALR. — Availability under uniform act to secure the attendance of witnesses from without a state in criminal proceedings of subpoena duces tecum, 7 ALR4th 836.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is “material witness” justifying

certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 ALR4th 742.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is “material and necessary” justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 ALR4th 771.

24-10-90. Short title.

This article shall be known and may be cited as “The Uniform Act to Secure the Attendance of Witnesses from Without the State.” (Ga. L. 1976, p. 1366, § 1; Ga. L. 1995, p. 10, § 24.)

JUDICIAL DECISIONS

Subpoena duces tecum request not sufficiently specific. — Trial court properly denied a child molestation defendant's motion for a subpoena duces tecum to obtain out-of-state records pertaining to the victims. The defendant failed to identify any specific person, entity, agency, or records custodian who should be directed to produce the records and thus did not satisfy the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq. *French v. State*, 288 Ga. App. 775, 655 S.E.2d 224 (2007).

Defendant failed to show evidence sought was material to defendant's case. — A trial

court did not err in finding that a defendant had not made a sufficient showing that evidence of adjustments made in the Intoxilyzer 5000 source code for asthma sufferers was material to the defendant's case, which was the defendant's burden under the Uniform Act to Secure the Attendance of Witnesses From Without the State, O.C.G.A. § 24-10-90 et seq. *Davenport v. State*, No. A09A1619, 2010 Ga. App. LEXIS 121 (Feb. 11, 2010).

Cited in *Welch v. State*, 207 Ga. App. 27, 427 S.E.2d 22 (1992); *Parker v. State*, 283 Ga. App. 714, 642 S.E.2d 111 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 25B Am. Jur. Pleading and Practice Forms, Witnesses, § 2.

24-10-91. Definitions.

As used in this article, the term:

(1) "Penal institution" means a jail, prison, penitentiary, house of correction, or other place of penal detention.

(2) "State" means any state or territory of the United States and the District of Columbia.

(3) "Summons" means a subpoena, order, or other notice requiring the appearance of a witness.

(4) "Witness" means a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding held by the prosecution or the defense, including a person who is confined in a penal institution in any state. (Ga. L. 1976, p. 1366, § 2.)

JUDICIAL DECISIONS

No counsel error in failing to secure witness for trial. — Because the only testimony in a hearing on a motion for a new trial with regard to defendant's murder conviction regarding the content of defendant's sister's potential testimony showed that it would

have merely reiterated defendant's mother's testimony, the trial court did not err by failing to secure the attendance of the sister through an interstate subpoena. *Tollette v. State*, 280 Ga. 100, 621 S.E.2d 742 (2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 50, 51. **C.J.S.** — 97 C.J.S., Witnesses, §§ 1, 7, 12.

24-10-92. Criminal or grand jury proceeding in foreign state — Certificate of need for testimony; hearing; summons; custody and delivery; expenses; punishment for failure to attend and testify.

(a) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person within this state is a material witness in such prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which the person is found, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(b) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending or, where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima-facie evidence of all the facts stated therein.

(c) If such certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that the witness be forthwith brought before him for the hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima-facie proof of such desirability, may, in lieu of issuing subpoena or summons, order that the witness be forthwith taken into custody and delivered to an officer of the requesting state.

(d) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 12¢ a mile for each mile by the ordinarily traveled route to and from the court where the

prosecution is pending and \$25.00 for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. (Ga. L. 1976, p. 1366, § 3.)

JUDICIAL DECISIONS

Scope of statute. — Statute does not provide for the issuance of a subpoena, but is rather a process for obtaining a court order for the production of the witness, who may also appear in the jurisdiction where the witness is found and convince the court to deny or quash the subpoena. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979) (see O.C.G.A. § 24-10-92).

No absolute right to witness. — Party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness sought under O.C.G.A. Art. 5, Ch. 10, T. 24. It must be shown that the witness sought is a necessary and material witness to the case, and the party desiring the witness must carry the burden of establishing those facts. *Chesser v. State*, 168 Ga. App. 195, 308 S.E.2d 589 (1983).

Defendant lacked standing to complain of any procedural irregularities involved in obtaining a witness whom the state had procured by means of O.C.G.A. Art. 5, Ch. 10, T. 24. *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733 (1991), rev'd on other grounds sub nom. *Zant v. Moon*, 264 Ga. 93, 440 S.E.2d 657 (1994).

No guarantee of appearance. — Right to compulsory process does not amount to a guarantee by the state that the witness requested by a defendant will in fact appear at trial, but only relates to the issuance of the process. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Witness must be necessary and material. — In order to satisfy the requirements of due process, it must be shown that the witness sought is a necessary and material witness to the case, and the party desiring the witness must carry the burden of estab-

lishing those facts. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

When the assistant state's attorney in Maryland presented evidence sufficient to persuade the requesting court that the Georgia resident was essential to the grand jury's investigation and the local Georgia trial court found the facts similarly persuasive, the Georgia resident, having presented no evidence, failed to convince the superior court to deny the state's petition to grant Maryland's request. *Wollesen v. State*, 242 Ga. App. 317, 529 S.E.2d 630 (2000).

To meet the demands of due process, law requires the presentation of enough facts to enable both the court in the demanding state and the court in the state to which the requisition is directed to determine whether the witness should be compelled to travel to a trial in a foreign jurisdiction. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Judicial discretion. — Implicit in law is the precept that the decision whether to grant the process is a matter for determination by the trial judge in the exercise of the judge's sound discretion. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Unlocated witness. — Neither the Georgia nor the United States Constitution obligates the state to compel the attendance of witnesses who cannot be located within the state's jurisdiction. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Attendance of district attorney. — Assistant district attorney has both a right and a duty to attend a hearing and to represent the state's interest, as well as to question whether the party seeking the witness made a proper showing of necessity and materiality. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Order to testify encompasses production of documents. — Power to order a witness to travel to a foreign state for the purpose of testifying at a grand jury hearing implicitly

encompasses the power to order the witness to produce relevant documents. *Wollesen v. State*, 242 Ga. App. 317, 529 S.E.2d 630 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S. — 38A C.J.S., Grand Juries, § 42. 97 C.J.S., Witnesses, §§ 7, 8, 10 et seq., 20, 25, 53 et seq., 59 et seq., 69, 70.

24-10-93. Criminal or grand jury proceeding in foreign state — Certificate of need for prisoner's testimony; hearing; order and conditions; entry of order by judge in requesting state; applicability.

(a) A judge of a state court of record in another state which by its laws has made provision for commanding persons confined in penal institutions within that state to attend and testify in this state may certify that there is a criminal proceeding or investigation by a grand jury or a criminal action pending in the court, that a person who is confined in a penal institution in this state is a material witness in the proceeding, investigation, or action, and that his presence will be required during a specified time. Upon presentation of the certificate to any judge having jurisdiction over the person confined and upon notice to the Attorney General, the judge in this state shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that the prisoner be produced before him at the hearing.

(b) If at the hearing the judge determines that the witness is material and necessary, that his attending and testifying are not adverse to the interest of this state or to the health and legal rights of the witness, that the laws of the state in which he is required to testify will give him protection from arrest and the service of civil and criminal process because of any act committed prior to his arrival in the state under the order, and that as a practical matter the possibility is negligible that the witness may be subject to arrest or to the service of civil or criminal process in any state through which he will be required to pass, the judge shall issue an order, with a copy of the certificate attached, directing the witness to attend and testify, directing the person having custody of the witness to produce him in the court where the criminal action is pending or where the grand jury investigation is pending at a time and place specified in the order, and prescribing such conditions as the judge shall determine. The judge, in lieu of directing the person having custody of the witness to produce him in the requesting jurisdiction's court, may direct and require in his order that the requesting jurisdiction shall come to the Georgia penal institution in which the witness is confined to accept custody of the witness for physical transfer to the requesting jurisdiction; that the requesting jurisdiction shall provide proper safeguards on his custody while in transit; that the requesting jurisdiction shall be liable for and shall pay all expenses incurred in producing and returning the witness, including, but not limited to, food,

lodging, clothing, and medical care; and that the requesting jurisdiction shall promptly deliver the witness back to the same or another Georgia penal institution as specified by the Department of Corrections at the conclusion of his testimony.

(c) The order to the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his testimony, proper safeguards on his custody, and proper financial reimbursement or prepayment by the requesting jurisdiction for all expenses incurred in the production and return of the witness and may prescribe such other conditions as the judge thinks proper or necessary. If the judge directs and requires the requesting jurisdiction to accept custody of the witness at the Georgia penal institution in which the witness is confined and to deliver the witness back to the same or another Georgia penal institution at the conclusion of his testimony, no prepayment of expenses shall be necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed.

(d) This Code section does not apply to any person in this state confined as insane or mentally ill or under sentence of death. (Ga. L. 1976, p. 1366, § 4; Ga. L. 1977, p. 847, § 1; Ga. L. 1985, p. 283, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, a misspelling of “Georgia” was corrected the first time that word appeared in the last sentence of subsection (b).

RESEARCH REFERENCES

Am. Jur. 2d. — 38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68. **C.J.S.** — 38A C.J.S., Grand Juries, § 42. 38A C.J.S., Grand Juries, § 42. 97 C.J.S., Witnesses, 7, 12, 69, 70.

24-10-94. Criminal or grand jury proceeding in this state — Issuance of certificate; presentation; tender of expenses; how long witness detained; punishment for failure to attend and testify.

(a) If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in this state, he shall be tendered the sum of 12¢ a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and \$25.00 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state for a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. (Ga. L. 1976, p. 1366, § 5.)

JUDICIAL DECISIONS

Scope of statute. — Statute does not provide for the issuance of a subpoena, but is rather a process for obtaining a court order for the production of the witness, who may also appear in the jurisdiction where the witness is found and convince the court to deny or quash the subpoena. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979) (see O.C.G.A. § 24-10-94).

No absolute right to witness. — Party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness sought under O.C.G.A. Art. 5, Ch. 10, T. 24. It must be shown that the witness sought is a necessary and material witness to the case, and the party desiring the witness must carry the burden of establishing those facts. *Chesser v. State*, 168 Ga. App. 195, 308 S.E.2d 589 (1983).

No guarantee of appearance. — Right to compulsory process does not amount to a guarantee by the state that the witness requested by a defendant will in fact appear at trial, but only relates to the issuance of the process. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Witness must be necessary and material. — In order to satisfy the requirements of due process, it must be shown that the witness sought is a necessary and material witness to the case, and the party desiring the witness must carry the burden of estab-

lishing those facts. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

To meet the demands of due process, the law requires the presentation of enough facts to enable both the court in the demanding state and the court in the state to which the requisition is directed to determine whether the witness should be compelled to travel to a trial in a foreign jurisdiction. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Judicial discretion. — Implicit in the law is the precept that the decision whether to grant the process is a matter for determination by the trial judge in the exercise of the judge's sound discretion. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

As to out-of-state witnesses to whom the court's subpoena power is inapplicable, the decision whether to utilize the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without the State is purely discretionary. *Ealy v. State*, 251 Ga. 426, 306 S.E.2d 275 (1983).

Unlocated witness. — Neither the Georgia nor the United States Constitution obligates the state to compel the attendance of witnesses who cannot be located within the state's jurisdiction. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Trial counsel was not ineffective for failing to take the steps necessary to try to secure an alibi witness, after counsel made attempts to locate the witness, and based on the testimony of both of defendant's accomplices, and the evidence corroborating that testimony, it was unlikely that the trial would

have been different had this alleged alibi witness been found, specially subpoenaed, and testified. *Ziegler v. State*, 270 Ga. App. 787, 608 S.E.2d 230 (2004), cert. denied, 546 U.S. 1019, 126 S. Ct. 656, 163 L. Ed. 2d 532 (2005).

Attendance of district attorney. — Assistant district attorney has both a right and a duty to attend a hearing and to represent the state's interest, as well as to question whether the party seeking the witness made a proper showing of necessity and materiality. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Trial court did not err by denying the defendant's motion for a ruling that the source code for the Intoxilyzer machine on

which the defendant's breath was tested was evidence relevant to the defense because the motion was not in compliance with the Uniform Act to Secure Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq.; the defendant's motion sought a relevancy ruling solely to facilitate production of the source code from a corporation in the State of Kentucky, but there was nothing in the record showing that the defendant identified or sought to obtain testimony from a witness who had to be compelled to produce the evidence. *Yeary v. State*, 302 Ga. App. 535, 690 S.E.2d 901 (2010).

Cited in *Castell v. State*, 252 Ga. 418, 314 S.E.2d 210 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S. — 38A C.J.S., Grand Juries, § 41. 97 C.J.S., Witnesses, §§ 7, 12, 20, 25, 69, 70.

24-10-95. Criminal or grand jury proceeding in this state — Issuance of certificate seeking testimony of prisoner; presentation; notice to attorney general; order of compliance.

(a) If a person confined in a penal institution in any other state is a material witness in a criminal action pending in a court of record or in a grand jury investigation in this state, a judge of the court may certify that there is a criminal proceeding or investigation by a grand jury or a criminal action pending in the court, that a person who is confined in a penal institution in the other state is a material witness in the proceeding, investigation, or action, and that his presence will be required during a specified time. The certificate shall be presented to a judge of a court of record in the other state having jurisdiction over the prisoner confined, and a notice shall be given to the attorney general of the state in which the prisoner is confined.

(b) The judge of the court in this state may enter an order directing compliance with the terms and conditions prescribed by the judge of the state in which the witness is confined. (Ga. L. 1976, p. 1366, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 4, 34, 35, 39.

C.J.S. — 97 C.J.S., Witnesses, §§ 7, 12, 20, 25.

24-10-96. Exemption of witnesses from arrest and service of process.

(a) If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(b) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons. (Ga. L. 1976, p. 1366, § 7.)

Cross references. — Exercise of personal jurisdiction over nonresidents generally, § 9-10-90 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 85. 62B Am. Jur. 2d, Process, § 36 et seq. 81 Am. Jur. 2d, Witnesses, §§ 34, 35, 39.

C.J.S. — 6A C.J.S., Arrest, § 5. 72 C.J.S., Process, §§ 33 et seq. 97 C.J.S., Witnesses, §§ 8, 10, 11, 13.

ALR. — Immunity of nonresident litigant

or witness from service of process as affected by transactions or activities unrelated to action, 162 ALR 280.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime, 74 ALR2d 592.

24-10-97. Construction; applicability.

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it and shall be applicable only to such states as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as provided in this article. (Ga. L. 1976, p. 1366, § 8; Ga. L. 2010, p. 878, § 24/HB 1387.)

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, substituted “such states” for “such state”.

JUDICIAL DECISIONS

Cited in Parker v. State, 283 Ga. App. 714, 642 S.E.2d 111 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 236 et seq. **C.J.S.** — 82 C.J.S., Statutes, § 505.

ARTICLE 6

UNIFORM FOREIGN DEPOSITIONS ACT

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, §§ 16, 18.

ALR. — Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule

of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 ALR Fed. 537.

24-10-110. Short title.

This article may be cited as the “Uniform Foreign Depositions Act.” (Ga. L. 1959, p. 311, § 3.)

24-10-111. How foreign depositions taken.

Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state. (Ga. L. 1959, p. 311, § 1.)

Law reviews. — For article, “Best Practices for Issuing Subpoenas Depositions of Georgia Residents in Cases Pending Out of

State,” see 12 Ga. St. B.J. 12 (2007). For article, “Methods for Discovery in Arbitration,” see 13 Ga. St. B.J. 22 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, §§ 16, 18, 94.

ALR. — Compelling expert to testify, 77 ALR2d 1182; 66 ALR4th 213.

24-10-112. Construction.

This article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. (Ga. L. 1959, p. 311, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, §§ 16, 18.

ARTICLE 7

DEPOSITIONS TO PRESERVE TESTIMONY
IN CRIMINAL PROCEEDINGS

RESEARCH REFERENCES

ALR. — Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 ALR Fed. 537.

24-10-130. When deposition to preserve testimony in criminal proceedings may be taken; order of court.

(a)(1) At any time after a defendant has been charged with an offense against the laws of this state or an ordinance of any political subdivision or authority thereof, upon motion of the state or the defendant, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of a prospective material witness of a party be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place.

(2) At any time after a defendant has been charged with an offense of child molestation, aggravated child molestation, or physical or sexual abuse of a child, upon motion of the state or the defendant, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of any physician whose testimony is relevant to such charge be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place.

(b) The court shall not order the taking of the witness's testimony, except as provided in paragraph (2) of subsection (a) of this Code section, unless it appears to the satisfaction of the court that the testimony of the witness is material to the case and the witness:

(1) Is in imminent danger of death;

(2) Has been threatened with death or great bodily harm because of the witness's status as a potential witness in a criminal trial or proceeding;

(3) Is about to leave the state and there are reasonable grounds to believe that such witness will be unable to attend the trial;

(4) Is so sick or infirm as to afford reasonable grounds to believe that such witness will be unable to attend the trial; or

(5) Is being detained as a material witness and there are reasonable grounds to believe that the witness will flee if released from detention.

(c) A motion to take a deposition of a material witness, or a physician as provided in paragraph (2) of subsection (a) of this Code section, shall be verified and must state:

(1) The nature of the offense charged;

(2) The status of the criminal proceedings;

(3) The name of the witness and an address in Georgia where the witness may be contacted;

(4) That the testimony of the witness is material to the case or that the witness is a physician as provided in paragraph (2) of subsection (a) of this Code section; and

(5) The basis for taking the deposition as provided in subsection (b) of this Code section.

(d) A motion to take a deposition shall be filed in the court having jurisdiction to try the defendant for the offense charged; provided, however, if the defendant is charged with multiple offenses, only the court having jurisdiction to try the most serious charge against the defendant shall have jurisdiction to hear and decide the motion to take a deposition.

(e) The party moving the court for an order pursuant to this Code section shall give not less than one day's notice of the hearing to the opposite party. A copy of the motion shall be sent to the opposing party or his or her counsel by any means which will reasonably ensure timely delivery including transmission by facsimile or by digital or electronic means. A copy of the notice shall be attached to the motion and filed with the clerk of court.

(f) If the court is satisfied that the examination of the witness is authorized by law and necessary, the court shall enter an order setting a time period of not more than 30 days during which the deposition shall be taken.

(g) On motion of either party, the court may designate a judge who will be available to rule on any objections to the interrogation of the witness or before whom the deposition shall be taken. The judge so designated may be a judge of any court of this state who is otherwise qualified to preside over the trial of criminal cases in the court having jurisdiction over the offense charged. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1; Ga. L. 1994, p. 1895, § 5; Ga. L. 1995, p. 10, § 24; Ga. L. 1995, p. 1360, § 1; Ga. L. 1996, p. 795, §§ 1, 2; Ga. L. 1996, p. 1233, §§ 5, 6.)

Editor's notes. — Ga. L. 1994, p. 1895, § 13, not codified by the General Assembly, provides that the amendment to this Code section is applicable to all cases docketed on or after January 1, 1995.

Ga. L. 1995, p. 1360, § 2, not codified by the General Assembly, provides that the amendment to this Code section is applicable to all cases filed on or after July 1, 1995.

Law reviews. — For note on the 1994 amendments of Code Sections 24-10-130 to 24-10-133, 24-10-135, 24-10-137 and enactment of Code Sections 24-10-138 to 24-10-139 of this article, see 11 Ga. St. U.L. Rev. 137 (1994). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 201 (1995).

JUDICIAL DECISIONS

Any technical violation of the notice provision of O.C.G.A. § 24-10-130 was harmless since defendant did in fact receive notice of the date, time, and place of the deposition and did not request a predeposition hearing on the propriety or necessity of taking a deposition. *Burrell v. State*, 258 Ga. 841, 376 S.E.2d 184 (1989).

Defendant's pretrial request to depose victims after the victims refused to talk with defense counsel was properly denied by the trial court. *Evans v. State*, 233 Ga. App. 85, 503 S.E.2d 344 (1998).

Introduction of material witness's sworn statement improper. — Because the state never filed a motion to take a material witness's deposition as required by O.C.G.A. § 24-10-130, the trial court never held a hearing, never found grounds for the deposition, and never ordered that the deposition be taken during a particular time period; therefore, defendant's conviction for financial transaction card fraud under O.C.G.A. § 16-9-33(a) was reversed and the case was remanded for a new trial. *Evans v. State*, 275 Ga. App. 621, 621 S.E.2d 584 (2005).

Victim's deposition properly taken. — Trial court did not abuse the court's discretion in allowing 80-year-old victim's deposition to be taken under O.C.G.A. § 24-10-130(b)(4) because the victim had a brain tumor, which predisposed the victim to dizziness and vertigo, and a generalized anx-

iety disorder, which sometimes caused the victim to suffer chest pains, shortness of breath, blurred vision, confusion, and loss of consciousness when the victim was exposed to unfamiliar or stressful public situations. *Austin v. State*, 275 Ga. App. 560, 621 S.E.2d 546 (2005).

Deposition of allegedly ineffective counsel. — When a habeas court found an inmate's claim of ineffective assistance of counsel was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise the issue on direct appeal because the allegedly ineffective counsel could not, due to illness, attend a hearing held on remand during the inmate's direct appeal, and, thus, could not be cross-examined, this was error because, even if the claim was different enough from barred claims to fall within a defaulted-claim analysis, it overlooked the readily available legal remedy of a court order to obtain counsel's sworn testimony for use at the remand hearing, under O.C.G.A. § 24-10-130, so counsel's absence from the hearing did not establish cause for failure to raise the ineffective assistance claim. *Schofield v. Meders*, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 127 S. Ct. 958, 2007 U.S. LEXIS 257, 166 L.Ed.2d 729 (2007).

Cited in *Herndon v. State*, 229 Ga. App. 457, 494 S.E.2d 262 (1997); *Rice v. State*, 281 Ga. 149, 635 S.E.2d 707 (2006).

24-10-131. Notice of deposition; presence of defendant at examination; effect of defendant's failure to appear; child witness.

(a) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined.

(b) On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

(c) The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination unless, after being warned by the judge that disruptive conduct will cause the defendant's removal from the place where the deposition is being taken, the defendant persists in conduct which would justify exclusion from that place.

(d) A defendant not in custody shall have the right to be present at the examination; but failure of the defendant, absent good cause shown, to appear, after notice and tender of expenses, shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(e) Notwithstanding the provisions of subsections (c) and (d) of this Code section, if the witness is a child, the court may order that the deposition be taken in accordance with Code Section 17-8-55. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1; Ga. L. 1994, p. 1895, § 6.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1994, “24-10-131” was substituted for “124-10-131” as the designation for this Code section.

JUDICIAL DECISIONS

Interviews not depositions. — In a prosecution for child molestation, audio and videotapes of interviews with the victims were not depositions, and O.C.G.A. § 24-10-131 did not require that the state notify defendant before the interviews were conducted. *Price v. State*, 223 Ga. App. 185, 477 S.E.2d 353 (1996).

24-10-132. Appointment of counsel; payment of costs and expenses.

(a) If a defendant is financially unable to employ counsel, the court shall appoint counsel as provided in the uniform rules of the courts, unless the defendant elects to proceed without counsel.

(b) Whenever a deposition is taken at the instance of the state, the cost of any such deposition shall be paid by the state in the same manner as is provided by law for the payment of costs in the appellate courts.

(c) Depositions taken at the instance of a defendant shall be paid for by the defendant; provided, however, that, whenever a deposition is taken at the instance of a defendant who is eligible for the appointment of counsel as provided in the uniform rules of the courts, the court shall direct that the reasonable expenses for the taking of the deposition and of travel and subsistence of the defendant and the defendant's attorney, not to exceed

the limits established pursuant to Article 2 of Chapter 7 of Title 45, for attendance at the examination be paid for out of the fine and forfeiture fund of the county where venue is laid. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1; Ga. L. 1994, p. 1895, § 7.)

Editor's notes. — Ga. L. 1994, p. 1895, section is applicable to all cases docketed on § 13, not codified by the General Assembly, or after January 1, 1995. provides that the amendment to this Code

24-10-133. Manner of taking and filing deposition.

Except as provided in Code Section 24-10-137, a deposition shall be taken and filed in the manner provided in civil actions, provided that (1) in no event shall a deposition be taken of a party defendant without his or her consent and (2) the scope of examination and cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the defendant, the court may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. Such request shall constitute a waiver by the defendant of any objection to the taking and use of the deposition based upon its being so taken. If a judge has been designated to rule on objections or to preside over the deposition, objections to interrogation of the witness shall be made to and ruled on by such judge in the same manner as at the trial of a criminal case. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1; Ga. L. 1994, p. 1895, § 8.)

Editor's notes. — Ga. L. 1994, p. 1895, section is applicable to all cases docketed on § 13, not codified by the General Assembly, or after January 1, 1995. provides that the amendment to this Code

24-10-134. Availability to defendant of deponent's previous statements.

The state shall make available to the defendant, for his examination and use at the taking of the deposition, any statement of the witness being deposed which is in the possession of the state and which the state would be required to make available to the defendant if the witness were testifying at the trial. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1.)

24-10-135. Admissibility and use of deposition.

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if the witness is unavailable. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts. A witness is not unavailable if the exemption, refusal to testify, claim of lack of memory, inability, or absence of such witness is due to the procurement or wrongdoing of the

party offering the deposition at the hearing or trial for the purpose of preventing the witness from attending or testifying. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1; Ga. L. 1994, p. 1895, § 9.)

Editor's notes. — Ga. L. 1994, p. 1895, § 13, not codified by the General Assembly, provides that the amendment to this Code

section is applicable to all cases docketed on or after January 1, 1995.

JUDICIAL DECISIONS

Prosecuting attorney's agreement to cooperate with defense counsel in videotaping of a deposition did not constitute an agreement of stipulation that the deposition could be admitted at trial. *Hullender v. State*, 256 Ga. 86, 344 S.E.2d 207 (1986).

Victim's deposition at retrial. — Trial court did not abuse the court's discretion in allowing a deposition of an 80-year-old victim, who had a brain tumor and a generalized anxiety disorder, to be offered in lieu of

the victim's testimony at defendant's retrial because the trial court had overruled defendant's O.C.G.A. § 24-10-135 objection in defendant's first trial and stood on the court's earlier ruling in defendant's retrial; while it would have been better to make an explicit finding of unavailability in the retrial, the finding was implicit in the trial court's ruling and was authorized by the evidence. *Austin v. State*, 275 Ga. App. 560, 621 S.E.2d 546 (2005).

24-10-136. Objections to admission of deposition.

Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1.)

24-10-137. Recordation of deposition.

(a) Any party shall have the right to require that the deposition be recorded and preserved by the use of audio-visual equipment in addition to a stenographic record. The audio-visual recording shall be transmitted to the clerk of the court which ordered the deposition and shall be made available for viewing and copying only to the prosecuting attorney and defendant's attorney prior to trial. An audio-visual recording made pursuant to this Code section shall not be available for inspection or copying by the public until such audio-visual recording has been admitted into evidence during a trial or hearing in the case in which such deposition is made.

(b) An audio-visual recording made pursuant to this Code section may be admissible at trial or hearing as an alternative to the stenographic record of the deposition.

(c) A stenographic record of the deposition contemplated in this Code section shall be made pursuant to Code Section 9-11-28. (Code 1933, § 38-1301a, enacted by Ga. L. 1980, p. 426, § 1; Ga. L. 1994, p. 1895, § 10.)

Editor's notes. — Ga. L. 1994, p. 1895, section is applicable to all cases docketed on § 13, not codified by the General Assembly, or after January 1, 1995. provides that the amendment to this Code

24-10-138. Agreement of parties to deposition.

Nothing in this article shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition by agreement of the parties with the consent of the court. (Code 1981, § 24-10-138, enacted by Ga. L. 1994, p. 1895, § 11.)

Editor's notes. — Ga. L. 1994, p. 1895, section is applicable to all cases docketed on § 13, not codified by the General Assembly, or after January 1, 1995. provides that the amendment to this Code

24-10-139. Depositions taken only in exceptional circumstances; misuse of procedures.

It is the intent of the General Assembly that depositions shall be taken in criminal cases only in exceptional circumstances when it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial. If the court finds that any party or counsel for a party is using the procedures set forth in this article for the purpose of harassment or delay, such conduct may be punished as contempt of court. (Code 1981, § 24-10-139, enacted by Ga. L. 1994, p. 1895, § 11.)

Editor's notes. — Ga. L. 1994, p. 1895, section is applicable to all cases docketed on § 13, not codified by the General Assembly, or after January 1, 1995. provides that the amendment to this Code

ARTICLE 8

PERPETUATION OF TESTIMONY

Cross references. — For further provisions regarding perpetuation of testimony, see § 9-11-27.

24-10-150. When proceedings to perpetuate testimony may be had.

Superior courts may entertain proceedings for the perpetuation of testimony in all cases in which the fact to which the testimony relates cannot immediately be made the subject of investigation at law and in which, for any cause, the common-law proceeding authorized under this Code is not as available, or as completely available, as a proceeding in equity. (Orig. Code 1863, § 3041; Code 1868, § 3053; Code 1873, § 3108; Code 1882, § 3108; Civil Code 1895, § 3958; Civil Code 1910, § 4555; Code 1933, § 38-1301.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 4.

24-10-151. Inadequacy of usual proceeding to be shown.

A petition for discovery merely or to perpetuate testimony shall not be sustained unless some reason is shown why the usual proceeding at law is inadequate. (Orig. Code 1863, § 4094; Code 1868, § 4123; Code 1873, § 4182; Code 1882, § 4182; Civil Code 1895, § 3959; Civil Code 1910, § 4556; Code 1933, § 38-1302.)

JUDICIAL DECISIONS

Discovery must be necessary. — For equity to take jurisdiction on the ground of discovery, it must appear that the discovery is necessary, not merely that discovery is desirable or may be useful or that the complainant can more satisfactorily prove the complainant's case with than without discovery. *Lucas v. Neidlinger*, 210 Ga. 557, 81 S.E.2d 825 (1954).

Pleading. — Pleadings must set forth facts which show either that the matter to which the testimony will apply can not be immedi-

ately investigated in a court of law; or if it can be so investigated, that the sole right of action belongs to the other party; or that the opposite party has interposed some impediment to an immediate trial of the suit, so that there is danger of a loss of the evidence before trial. *Booker v. Booker*, 20 Ga. 777 (1856).

Cited in *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 4.

24-10-152. Materiality of possession of property; of availability of parties in interest.

The possession of the property is immaterial; nor shall the proceeding be denied though all parties in interest cannot be ascertained or reached. (Orig. Code 1863, § 3042; Code 1868, § 3054; Code 1873, § 3109; Code 1882, § 3109; Civil Code 1895, § 3960; Civil Code 1910, § 4557; Code 1933, § 38-1303.)

24-10-153. Use of testimony.

Testimony taken in the proceedings contemplated under Code Section 24-10-150 shall be used only from the necessity of the case, but in such case may be used against all persons, whether parties to the proceeding or not. (Orig. Code 1863, § 3043; Code 1868, § 3055; Code 1873, § 3110; Code 1882, § 3110; Civil Code 1895, § 3961; Civil Code 1910, § 4558; Code 1933, § 38-1304.)

JUDICIAL DECISIONS

Witness available. — When a witness is alive and capable of examination at the time of trial, the testimony can not be read. *Booker v. Booker*, 20 Ga. 777 (1856), compare, *Howard v. Crawford*, 15 Ga. 423 (1854).

24-10-154. Costs of proceedings.

The complainant shall in all cases be taxed with the costs of proceedings to perpetuate testimony. (Orig. Code 1863, § 3044; Code 1868, § 3056; Code 1873, § 3111; Code 1882, § 3111; Civil Code 1895, § 3962; Civil Code 1910, § 4559; Code 1933, § 38-1305.)

APPENDIX

AMERICAN EXPERIENCE MORTALITY TABLE

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
10	48.72	47	23.08
11	48.08	48	22.36
12	47.45	49	21.63
13	46.80	50	20.91
14	46.16	51	20.20
15	45.50	52	19.49
16	44.85	53	18.79
17	44.19	54	18.09
18	43.53	55	17.40
19	42.87	56	16.72
20	42.20	57	16.05
21	41.53	58	15.39
22	40.85	59	14.74
23	40.17	60	14.10
24	39.49	61	13.47
25	38.81	62	12.86
26	38.12	63	12.26
27	37.43	64	11.67
28	36.73	65	11.10
29	36.03	66	10.54
30	35.33	67	10.00
31	34.63	68	9.47
32	33.92	69	8.97
33	33.21	70	8.48
34	32.50	71	8.00
35	31.78	72	7.55
36	31.07	73	7.11
37	30.35	74	6.68
38	29.62	75	6.27
39	28.90	76	5.88
40	28.18	77	5.49
41	27.45	78	5.11
42	26.72	79	4.74
43	26.00	80	4.39
44	25.27	81	4.05
45	24.54	82	3.71
46	23.81	83	3.39

APPENDIX

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
84	3.08	90	1.42
85	2.77	91	1.19
86	2.47	92	.98
87	2.18	93	.80
88	1.91	94	.64
89	1.66	95	.50

Cross references. — Admissibility of this table in civil cases where life expectancy of a person is an issue, § 24-444.

APPENDIX

**THE COMMISSIONERS 1958 STANDARD ORDINARY MORTALITY
TABLE**

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
0	68.30	38	33.97
1	67.78	39	33.07
2	66.90	40	32.18
3	66.00	41	31.29
4	65.10	42	30.41
5	64.19	43	29.54
6	63.27	44	28.67
7	62.35	45	27.81
8	61.43	46	26.95
9	60.51	47	26.11
10	59.58	48	25.27
11	58.65	49	24.45
12	57.72	50	23.63
13	56.80	51	22.82
14	55.87	52	22.03
15	54.95	53	21.25
16	54.03	54	20.47
17	53.11	55	19.71
18	52.19	56	18.97
19	51.28	57	18.23
20	50.37	58	17.51
21	49.46	59	16.81
22	48.55	60	16.12
23	47.64	61	15.44
24	46.73	62	14.78
25	45.82	63	14.14
26	44.90	64	13.51
27	43.99	65	12.90
28	43.08	66	12.31
29	42.16	67	11.73
30	41.25	68	11.17
31	40.34	69	10.64
32	39.43	70	10.12
33	38.51	71	9.63
34	37.60	72	9.15
35	36.69	73	8.69
36	35.78	74	8.24
37	34.88	75	7.81

APPENDIX

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
76	7.39	88	3.55
77	6.98	89	3.31
78	6.59	90	3.06
79	6.21	91	2.82
80	5.85	92	2.58
81	5.51	93	2.33
82	5.19	94	2.07
83	4.89	95	1.80
84	4.60	96	1.51
85	4.32	97	1.18
86	4.06	98	.83
87	3.80	99	.50

Cross references. — Admissibility of this table in cases of wrongful death or permanent personal injury, § 24-445.

APPENDIX

ANNUITY MORTALITY TABLE FOR 1949, ULTIMATE

Age	Expectation of Life (Years)		Age	Expectation of Life (Years)	
	Male	Female		Male	Female
0	73.18	78.69	38	37.02	42.01
1	72.47	77.94	39	36.08	41.06
2	71.59	77.04	40	35.15	40.11
3	70.65	76.10	41	34.22	39.17
4	69.70	75.14	42	33.29	38.22
5	68.75	74.17	43	32.38	37.28
6	67.78	73.19	44	31.47	36.35
7	66.82	72.21	45	30.57	35.41
8	65.85	71.23	46	29.67	34.48
9	64.89	70.24	47	28.80	33.56
10	63.92	69.26	48	27.93	32.64
11	62.95	68.27	49	27.07	31.72
12	61.98	67.29	50	26.23	30.81
13	61.01	66.30	51	25.40	29.91
14	60.04	65.32	52	24.58	29.01
15	59.07	64.33	53	23.78	28.11
16	58.10	63.35	54	22.98	27.22
17	57.13	62.37	55	22.20	26.33
18	56.17	61.39	56	21.44	25.46
19	55.20	60.41	57	20.68	24.59
20	54.23	59.43	58	19.93	23.72
21	53.26	58.45	59	19.20	22.87
22	52.30	57.48	60	18.48	22.02
23	51.33	56.50	61	17.76	21.18
24	50.37	55.53	62	17.06	20.36
25	49.41	54.55	63	16.37	19.54
26	48.44	53.58	64	15.68	18.73
27	47.48	52.61	65	15.01	17.94
28	46.52	51.64	66	14.36	17.16
29	45.56	50.67	67	13.71	16.39
30	44.61	49.70	68	13.08	15.64
31	43.65	48.73	69	12.46	14.90
32	42.70	47.77	70	11.86	14.18
33	41.74	46.80	71	11.28	13.47
34	40.79	45.84	72	10.71	12.78
35	39.85	44.88	73	10.15	12.11
36	38.90	43.92	74	9.61	11.45
37	37.96	42.97	75	9.09	10.82

APPENDIX

Expectation of Life (Years)			Expectation of Life (Years)		
Age	Male	Female	Age	Male	Female
76	8.58	10.20	93	2.67	2.92
77	8.10	9.60	94	2.47	2.68
78	7.63	9.02	95	2.28	2.45
79	7.17	8.47	96	2.10	2.24
80	6.74	7.93	97	1.94	2.05
81	6.32	7.42	98	1.79	1.87
82	5.92	6.93	99	1.65	1.71
83	5.54	6.46	100	1.52	1.56
84	5.18	6.01	101	1.40	1.42
85	4.84	5.58	102	1.29	1.30
86	4.51	5.18	103	1.20	1.19
87	4.20	4.79	104	1.10	1.09
88	3.90	4.43	105	1.02	0.99
89	3.62	4.09	106	0.94	0.91
90	3.36	3.77	107	0.86	0.83
91	3.12	3.47	108	0.75	0.73
92	2.88	3.19	109	0.50	0.50

Cross references. — Admissibility of this table in cases of wrongful death or permanent personal injury, § 24-445.

Index

A

ACTUARIES.

Tables.

Evidence.

American experience mortality tables,
§24-44.

Other mortality tables, §24-45.

ADMINISTRATIVE PROCEDURE.

Deaf and hearing impaired persons.

Witnesses.

Interpreters generally, §§24-9-100 to
24-9-108.

Witnesses.

Deaf and hearing impaired persons.

Interpreters generally, §§24-9-100 to
24-9-108.

ADMIRALTY.

Judicial notice in courts, §24-1-4.

ADMISSIONS.

Agents.

Evidence, §24-3-33.

Coerced admissions.

Improper evidence, §24-3-37.

Confessions.

Distinguished, §24-3-15.

Consent.

Evidence of acquiescence, §24-3-36.

Conversation as a whole.

Right to have whole conversation heard,
§24-3-38.

Estoppels, §24-4-24.

Evidence, §§24-3-30 to 24-3-38, 24-3-53.

Acquiescence, §24-3-36.

Agents, §24-3-33.

Care in receipt, §24-3-53.

Conversation as a whole.

Right to have whole conversation
heard, §24-3-38.

Excludable admissions, §24-3-37.

Parties.

Generally, §24-3-31.

Pleadings, §24-3-30.

Privies, §24-3-32.

Real parties in interest, §24-3-34.

Silence, §24-3-36.

Third parties, §24-3-35.

Fraudulently obtained admissions.

Improper evidence, §24-3-37.

Hearsay, §§24-3-30 to 24-3-38.

ADMISSIONS —Cont'd

Intoxication.

Inducing intoxication to obtain,
§24-3-37.

Parties.

Evidence.

Generally, §24-3-31.

Real parties in interest.

Evidence, §24-3-34.

Pleadings.

Evidence, §24-3-30.

Privies.

Evidence, §24-3-32.

Real parties in interest.

Evidence, §24-3-34.

Silence.

Evidence of admission, §24-3-36.

Solemn admissions judicial estoppels,

§24-4-24.

Third parties.

Evidence, §24-3-35.

ADULTERY.

Witnesses.

Competency of husband or wife, §24-9-2.

ADVERSE POSSESSION.

Evidence.

Declarations as to title by one in
possession.

Hearsay exception, §24-3-7.

AFFIDAVITS.

Cases tried on affidavits.

Securing testimony of witnesses and
evidence, §§24-10-40 to 24-10-45.

Lost or destroyed papers.

Establishment by petition in superior
court, §24-8-24.

AFFIRMATIONS.

Witnesses, §24-9-60.

AGENTS.

Admissions.

Evidence, §24-3-33.

AGRICULTURE.

Inspections.

U. S. department of agriculture
inspection certificates.

Prima facie evidence, §24-4-46.

AIDING AND ABETTING.

Corroboration where only witness accomplice, §24-4-8.

AIDS.

Confidentiality of information.

Disclosure of confidential information,
§24-9-47.

Disclosure of confidential information,

§24-9-47.

Privileged information.

Physician-patient relationship, §24-9-40.1.

ALIAS.

AIDS disclosures, §24-9-47.

**AMERICAN EXPERIENCE MORTALITY
TABLES.**

Admissibility in evidence, §24-4-44.

ANCIENT BOUNDARIES.

Hearsay exception, §24-3-13.

ANCIENT DOCUMENTS.

Hearsay exception, §24-3-13.

ANCIENT LANDMARKS.

Hearsay exception, §24-3-13.

APPEALS.

Evidences of indebtedness.

Summary establishment of lost
evidences, §24-8-21.

Lost evidences of indebtedness.

Summary establishment, §24-8-21.

ARREST.

Deaf and hearing impaired persons.

Interpreters during interrogation and
arrest, §24-9-103.

Procedures to be followed upon arrest,
§24-1-5.

Nonresidents.

Witnesses summoned to testify in state.
Exemption from arrest, §24-10-96.

Witnesses.

Freedom from arrest, §24-10-1.

Nonresident witnesses summoned to
testify in state, §24-10-96.

ATTACHMENT.

Subpoenas.

Enforcement of attachment of person,
§24-10-25.

ATTORNEY-CLIENT PRIVILEGE,

§§24-9-21, 24-9-24, 24-9-25.

**When attorney may testify for or against
client,** §24-9-25.

ATTORNEY GENERAL.

Witnesses.

Grant of immunity, §24-9-28.

ATTORNEYS.

Attorney-client privilege, §§24-9-21, 24-9-24,
24-9-25.

ATTORNEYS —Cont'd

Clients.

Attorney-client privilege, §§24-9-21,
24-9-25.

Depositions.

Appointment of counsel.

Depositions to preserve testimony in
criminal proceedings, §24-10-132.

Privileged communications, §§24-9-21,
24-9-24.

When attorney may testify for or against
client, §24-9-25.

AUDIO RECORDINGS.

Evidence.

Admissibility upon unavailability of
witness, §24-4-48.

AUTHENTICATION EVIDENCE.

Documents generally, §§24-7-1 to 24-7-9.

Public records, §§24-7-20 to 24-7-27.

B

BAD CHARACTER.

Defendant.

Inadmissible, §24-9-20.

Witnesses.

Impeachment, §24-9-84.

BEST EVIDENCE RULE, §§24-5-1 to
24-5-33.

Burden of proof.

Existence of original document, §24-5-25.

Copies of writings, §§24-5-30 to 24-5-33.

Existence of original essential to
admissibility of copy, §24-5-25.

Corporate books or records.

Transcripts, §24-5-29.

Decrees of secondary evidence, §24-5-5.

Deeds.

Certified copies, §§24-5-27, 24-5-28.

**Exceptions to general rule requiring
production of primary evidence,**
§24-5-3.

General rule, §24-5-4.

Inscriptions.

Copies, §24-5-32.

Judicial proceedings.

Copies of records, §24-5-31.

Letters of guardianship.

Copies, §24-5-30.

Letters testamentary or of administration.

Copies, §24-5-30.

Microphotographic reproductions, §24-5-26.

Enlargements or facsimiles, §24-5-26.

BEST EVIDENCE RULE —Cont'd

Military discharges.

Certified copies, §24-5-33.

Ordinances and resolutions.

Certified copies of ordinances and resolutions included in general codification.

Judicial notice, §24-7-22.

Original document rule, §24-5-4.

Photostatic or photographic reproductions, §24-5-26.

Enlargements or facsimiles, §24-5-26.

Primary evidence.

Exceptions to general rule requiring its production, §24-5-3.

Judicial records.

Authenticated copies, §24-5-31.

Letters of guardianship.

Copies, §24-5-30.

Letters testamentary or of administration.

Copies, §24-5-30.

Public records.

Exemplification, §24-5-20.

Secondary evidence.

Distinguished, §24-5-1.

Wills admitted to probate.

Authenticated copies, §24-5-31.

Public records.

When exemplifications considered primary evidence, §24-5-20.

Recordation of papers.

Where record book lost or destroyed or record incorrectly made or destroyed, §24-5-24.

Registered papers.

Certified copy where original lost or destroyed, §24-5-22.

Secondary evidence.

Degrees, §24-5-5.

Destroyed records, §24-5-23.

Destroyed registry, §24-5-23.

Diligence issue, §24-5-21.

Judicial records.

Copies, §24-5-31.

Primary evidence.

Distinguished, §24-5-1.

Showing necessary to admit, §24-5-2.

When admissible, §24-5-21.

Wills admitted to probate.

Copies, §24-5-31.

Wills admitted to probate.

Authenticated copies, §24-5-31.

BILLS OF EXCHANGE.

Destroyed bills.

Procedure as to action on, §24-8-28.

BILLS OF EXCHANGE —Cont'd

Destroyed bills —Cont'd

Summary establishment, §§24-8-21, 24-8-22.

Lost bills.

Procedure as to action on, §24-8-28.

Summary establishment, §§24-8-21, 24-8-22.

Notarial acts.

Authentication by certificate of notary, §24-7-23.

BLOOD SAMPLES.

DNA analysis.

Sex offenses.

Persons convicted of certain sex offenses.

Analysis and storage of blood samples, §24-4-62.

Withdrawal of blood sample, §24-4-61.

BLUEPRINTS.

Evidence.

Withdrawal of originals.

Substitution of copies, §24-10-7.

BOND ISSUES.

Destroyed bonds.

Procedure as to action on, §24-8-28.

Summary establishment, §§24-8-21, 24-8-22.

Lost bonds.

Procedure as to action on, §24-8-28.

Summary establishment, §§24-8-21, 24-8-22.

BOUNDARIES.

Ancient boundaries.

Hearsay exception, §24-3-13.

Ancient rights.

Declaration of deceased persons.

Hearsay exception, §24-3-9.

Evidence.

Ancient boundaries.

Hearsay exception, §24-3-13.

Declarations of deceased persons as to ancient rights.

Hearsay exception, §24-3-9.

BURDEN OF PROOF, §§24-4-1 to 24-4-8.

Best evidence rule.

Existence of original document, §24-5-25.

Showing necessary to admit secondary evidence, §24-5-2.

Change, §24-4-2.

Civil cases.

Identity, §24-4-40.

BURDEN OF PROOF —Cont'd

Civil cases —Cont'd

Mental conviction.

Amount required, §24-4-3.

Preponderance of evidence, §24-4-3.

Court's discretion to change, §24-4-2.

Criminal cases.

Circumstantial evidence.

When conviction may be had, §24-4-6.

Mental conviction.

Amount required, §24-4-3.

Reasonable doubt, §24-4-5.

Defenses, §24-4-1.

Identity, §24-4-10.

Mental conviction.

Amount required, §24-4-3.

Opponents of facts, §24-4-1.

Preponderance of evidence.

Civil cases, §24-4-3.

Defined, §24-1-1.

Determining where preponderance lies, §24-4-4.

Presumptions generally, §§24-4-20 to 24-4-27.

Proponents of facts, §24-4-1.

Reasonable doubt.

Criminal cases, §24-4-5.

Sufficient evidence.

Defined, §24-1-1.

Who has, §24-4-1.

BUREAU OF INVESTIGATION.

Witnesses.

Fees for members, §24-10-27.1.

BUSINESSES.

Evidence of vocation.

As evidence of identity, §24-4-10.

BUSINESS LETTERS.

Failure to answer.

Presumption from, §24-4-23.

BUSINESS RECORDS.

Hearsay exception, §24-3-14.

C

CALENDARS.

Proof of dates, §24-4-43.

CAMPUS POLICE.

Witness fees, §24-10-27.

CERTIFICATES OF INSPECTION.

Issued by United States department of agriculture.

Prima-facie evidence, §24-4-46.

CERTIFICATES OF JUSTICE OF PEACE COURTS IN OTHER STATES.

Proof of judgments and proceedings, §24-7-26.

CERTIFICATES OF NEED FOR PERSON'S TESTIMONY.

Criminal or grand jury proceedings in foreign state, §24-10-92.

Criminal or grand jury proceedings in this state, §24-10-94.

CERTIFICATES OF NEED FOR PRISONER'S TESTIMONY.

Criminal or grand jury proceedings in foreign state, §24-10-93.

Criminal or grand jury proceedings in this state, §24-10-95.

CERTIFICATES OF NOTARIES.

Medical records.

Personal appearance by person responsible for keeping excused, §24-10-72.

Notarial acts proved by, §24-7-23.

CERTIFICATES OF PUBLIC OFFICERS.

Admissibility in evidence, §24-7-20.

CHAIN OF CUSTODY.

AIDS confidential information disclosure.

Subpoenas to establish chain of custody, §24-9-47.

CHARACTER EVIDENCE.

Defendant.

Inadmissible, §24-9-20.

Party's character.

Relevancy, §24-2-2.

Rape victims.

Past sexual behavior, §24-2-3.

Relevancy, §24-2-2.

Witnesses.

Impeachment.

Bad character, §24-9-84.

Rehabilitation, §§24-9-83, 24-9-84.

CHASTITY.

Rape shield law, §24-2-3.

CHECKS.

Copy of check with original bank statement.

Presumption check paid, §24-4-23.1.

Destroyed checks.

Summary establishment, §§24-8-21, 24-8-22.

Lost checks.

Summary establishment, §§24-8-21, 24-8-22.

CHECKS —Cont'd

Payment by means of check.

Presumption check paid, §24-4-23.1.

Presumptions.

Payment of check, §24-4-23.1.

CHILD ABUSE AND NEGLECT.

Evidence.

Child's description of sexual contact or physical abuse.

Hearsay exception, §24-3-16.

Sexual abuse.

Evidence.

Child's description of sexual contact.

Hearsay exception, §24-3-16.

CHILD MOLESTATION.

Hearsay exception, §24-3-16.

Witnesses.

Child's competency to testify, §24-9-5.

Testimony as to child's description of sexual conduct or physical abuse, §24-3-16.

CHILD WITNESSES.

Competency of persons without use of reason, §24-9-5.

Sexual conduct or physical abuse.

Testimony as to child's description, §24-3-16.

CHIROPRACTORS.

Bills for services.

Identification evidence, §24-7-9.

Expressions of benevolence, regret, mistake, error, sympathy or apology.

Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

Offers of assistance relating to unanticipated outcome.

Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

CIRCUMSTANTIAL EVIDENCE.

Criminal convictions.

When may be had, §24-4-6.

Defined, §24-1-1.

Reasonable doubt in criminal cases, §24-4-5.

CLEAR AND CONVINCING EVIDENCE.

AIDS confidential information disclosure, §24-9-47.

CLERGYMAN-PENITENT PRIVILEGE, §24-9-22.

CLERKS OF COURT.

Lost or destroyed papers.

Establishment in superior court.

Furnishing of certified indorsement of copy, §24-8-27.

CLOSING STATEMENTS.

Defendant's testimony.

Effect, §24-9-20.

CLOTHING.

Criminal or grand jury proceeding in foreign state.

Requesting jurisdiction liable for furnishing, §24-10-93.

COCONSPIRATORS.

Declarations of conspirators, §24-3-5.

COERCION AND DURESS.

Admissions obtained by constraint.

Improper evidence, §24-3-37.

COLLATERAL BENEFITS.

Confessions made under promise of, §24-3-51.

COLLATERAL FACTS.

Admissions by third parties received in evidence, §24-3-35.

COLLATERAL UNDERTAKINGS BETWEEN PARTIES OF SAME PART.

Proof of unwritten portions of contract, §24-6-2.

COMMERCIAL PAPER.

Bills of exchange.

Notarial acts.

Authentication by certificate of notary, §24-7-23.

Blank indorsements.

Explanation.

Parol evidence, §24-6-10.

Destroyed evidences of indebtedness.

Procedure as to action on, §24-8-28.

Summary establishment, §§24-8-21, 24-8-22.

Indorsements.

Blank indorsements.

Explanation.

Parol evidence, §24-6-10.

Lost evidences of indebtedness.

Procedure as to action on, §24-8-28.

Summary establishment, §§24-8-21, 24-8-22.

Parol evidence.

Blank indorsements.

Explanation, §24-6-10.

COMMERCIAL PAPER —Cont'd

Promissory notes.

Notarial acts.

Authentication by certificate of notary,
§24-7-23.

COMMON LAW.

Depositions before action or pending appeal.

When proceedings to perpetuate
testimony may be had, §24-10-150.

Perpetuation of testimony.

When proceedings may be had,
§24-10-150.

COMPLETENESS DOCTRINE.

Admissions.

Right to have whole conversation heard,
§24-3-38.

Evidence of documents or records, §24-2-4.

COMPROMISE AND SETTLEMENT.

Admissions or propositions made with view to compromise.

Admissibility as evidence, §24-3-37.

Evidence.

Admissions or propositions made with
view to compromise, §24-3-37.

COMPULSORY PROCESS.

Medical records disclosure.

Confidential or privilege to include
protection afforded by, §24-9-41.

Prisoners delivery to serve as witness or criminal defendant, §24-10-60.

CONFESSIONS, §§24-3-50 to 24-3-53.

Admissions.

Distinguished, §24-3-15.

Cautionary receipt, §24-3-53.

Coconspirator's confession.

Evidence, §24-3-52.

Cooperation required, §24-3-53.

Corroborating evidence.

Required for conviction, §24-3-53.

Fraud in obtaining confession, §24-3-37.

Promises of collateral benefit.

Admissibility of confessions under,
§24-3-51.

Promises of secrecy.

Admissibility of confessions under,
§24-3-51.

Spiritual exhortation.

Admissibility of confessions under,
§24-3-51.

Voluntariness, §§24-3-50, 24-3-51.

**CONFIDENTIALITY OF INFORMATION.
AIDS.**

AIDS information, §24-9-40.1.

Disclosure, §24-9-47.

DNA analysis.

Sex offenses, §24-4-62.

Genetic testing.

Sex offenses, §24-4-62.

Library records, §24-9-46.

Medical records, §§24-9-41 to 24-9-45.

Raw research data, §24-9-40.2.

CONFIDENTIAL RELATIONS.

Evidence.

Exclusion of evidence, §§24-9-21 to
24-9-25.

**CONSCIENCE BEYOND REASONABLE
DOUBT.**

Reasonable doubt in criminal cases,
§24-4-5.

CONSENT.

Admissions.

Evidence of acquiescence, §24-3-36.

CONSPIRACIES.

Confession of coconspirator.

Against whom admissible, §24-3-52.

Declarations of coconspirators.

Hearsay exception, §24-3-5.

Dying declarations, §24-3-6.

Statements of coconspirators.

Hearsay exceptions, §24-3-5.

CONSTITUTION OF GEORGIA.

Judicial notice, §24-1-4.

CONSTRUCTIVE FRAUD.

Equitable estoppel, §24-4-27.

CONTEMPT.

Medical records.

Production of medical records,
§§24-10-72, 24-10-73.

Witnesses.

Privilege of parties and witnesses,
§24-9-27.

Refusal to testify after grant of immunity,
§24-9-28.

Securing witnesses and evidence.

Enforcement of subpoenas, §24-10-25.

CONTINUANCES.

Fees.

Effect of continuance, §24-10-2.1.

Forfeiture for causing continuance,
§24-10-3.

CONTINUANCES —Cont'd

Lost or destroyed papers.

Establishment in superior court,
§24-8-25.

Subpoenas.

Enforcement, §24-10-25.

CONTRACTS.

Ambiguities.

Explaining by parol evidence, §24-6-3.

Contemporaneous writings.

Admissibility to explain each other,
§24-6-3.

Discharge of contract.

Parol evidence, §24-6-6.

Execution.

Circumstances surrounding.

Proof by parol evidence, §24-6-4.

Interpretation.

Parol evidence rule.

Generally, §§24-6-1 to 24-6-10.

Mistake.

Proof by parol evidence, §24-6-7.

Parol evidence.

Parol evidence rule generally, §§24-6-1 to
24-6-10.

Performance.

Time or place.

Proof of change by parol evidence,
§24-6-6.

Subsequent agreements.

Proof by parol evidence, §24-6-6.

Unwritten portions.

Proof by parol evidence, §24-6-2.

Usages of trade.

Known usages.

Parol evidence, §24-6-5.

Voidness.

Original or subsequent voidness.

Proof by parol evidence, §24-6-8.

CONTRADICTORY STATEMENTS.

Impeachment of witnesses, §24-9-83.

CORPORATIONS.

Books.

Transcripts.

Evidence, §24-5-29.

Records.

Evidence.

Transcripts, §24-5-29.

CORROBORATION.

Co-defendant's testimony.

Requirement to convict, §24-4-8.

Confessions.

Requirement for conviction, §24-3-53.

CORROBORATION —Cont'd

Impeached witnesses.

When testimony must be corroborated,
§24-9-85.

Number of witnesses required generally.

Effect of corroboration, §24-4-8.

COSTS.

Depositions.

Preservation of testimony in criminal
proceedings, §24-10-132.

Interpreters.

Fee of interpreter for hearing impaired
person.

Assessment as cost in civil proceeding,
§24-9-108.

Perpetuation of testimony, §24-10-154.

COUNTIES.

Judicial notice.

Ordinances and resolutions.

Certified copies included in general
codification, §24-7-22.

Ordinances.

Judicial notice.

Certified copies included in general
codification, §24-7-22.

COUNTY POLICE.

Privileges in criminal proceedings.

Law enforcement officer's privilege not
to divulge address, §24-9-26.

COURTS.

Conduct.

Proper conduct.

Estoppel, §24-4-24.

Evidence.

Applicability of rules to all courts,
§24-1-3.

Records.

Evidence, §24-5-31.

Other states' judicial records, §24-7-24.
Justices of the peace proceedings,
§24-7-26.

Full faith and credit.

Other states' judicial records, §24-7-24.

COVERTURE.

Confidentiality of certain communications,
§24-9-21.

CRIME INFORMATION CENTER.

Computer transmitted records.

Admissibility in evidence, §24-3-17.

CRIMINAL LAW AND PROCEDURE.

Argument of counsel.

Defendant's testimony.

Effect on order, §24-9-20.

CRIMINAL LAW AND PROCEDURE

—Cont'd

Burden of proof.

Circumstantial evidence.

When conviction may be had, §24-46.

Mental conviction.

Amount required, §24-43.

Standard required for conviction,
§24-45.

Confidentiality of raw research data.

Court ordering production, §24-9-40.2.

**Corroboration where only witness
accomplice, §24-48.**

Depositions to preserve testimony,

§§24-10-130 to 24-10-139.

Admissibility of deposition, §24-10-135.

Objections, §24-10-136.

Agreement of parties to deposition,
§24-10-138.

Appointment of counsel, §24-10-132.

Child witness, §24-10-131.

Exceptional circumstances, §24-10-139.

Filing of deposition, §24-10-133.

Misuse of procedures, §24-10-139.

Notice, §24-10-131.

Payment of costs and expenses,
§24-10-132.

Presence of defendant at examination,
§24-10-131.

Previous statements of deponent.

Availability to defendant, §24-10-134.

Recordation of deposition, §24-10-137.

Taking of deposition, §24-10-133.

Use of deposition at trial or hearing,
§24-10-135.

When may be taken, §24-10-130.

Evidence.

Expert opinion testimony.

Admissibility, §24-9-64.

Expert opinion testimony.

Admissibility, §24-9-67.

Nonresident witnesses.

Securing attendance generally,
§§24-10-90 to 24-10-97.

Presumptions.

Presumption of guilt, §24-4-21.

Presumption of innocence, §24-4-21.

Raw research data, confidentiality.

Court ordering production, §24-9-40.2.

Treason.

Witnesses required for conviction,
§24-4-8.

Trials.

Victims of crime.

Right to be present in courtroom,
§24-9-61.1.

CRIMINAL LAW AND PROCEDURE

—Cont'd

Witnesses.

Corroboration of witness testimony,
§24-4-8.

Defendants, §24-9-20.

Competency to testify, §24-9-1.

Spouse, §24-9-23.

Expert opinion testimony.

Admissibility, §24-9-67.

Number of witnesses required, §24-4-8.

CROSS-EXAMINATION.

Impeachment, §§24-9-81 to 24-9-85.

Character of witness, §24-9-84.

Credit of impeached witness for jury,
§24-9-85.

Disapproving testimony, §24-9-82.

Manner of impeaching, §24-9-82.

Character evidence, §24-9-84.

Opposite party or person with related
interest, §24-9-81.

Party's own witness, §24-9-81.

Previous contradictory statements,
§24-9-83.

Medical report in narrative form.

Adverse party's right to cross-examine
person signing, §24-3-18.

Objections made on direct examination.

Waiver by cross-examination, effect,
§24-9-70.

Right of cross-examination, §24-9-64.

D

DAMAGES.

Wrongful death.

Computing value of decedent's life.

Admissibility of mortality tables,
§§24-4-44, 24-4-45.

DEADMAN'S STATUTE, §24-3-6.

**DEAF AND HEARING IMPAIRED
PERSONS.**

Arrest.

Interpreters during interrogation and
arrest, §24-9-103.

Procedures to be followed upon arrest,
§24-1-5.

Indigent persons.

Interpreters to be provided, §24-9-104.

Interpreters.

Appointment of interpreter.

Agency proceedings, §24-9-102.

Intermediary interpreter, §24-9-106.

DEAF AND HEARING IMPAIRED

PERSONS —Cont'd

Interpreters —Cont'd

- Arrest of hearing impaired person.
- Interrogation, §24-9-103.
- Compensation of interpreter, §24-9-108.
- Definitions, §24-9-101.
- Fee schedule, §24-9-108.
- Indigent defendants, §24-9-104.
- Lists of qualified interpreters.
- Preparation and maintenance, §24-9-106.
- Oath of interpreters, §24-9-107.
- Policy of state, §24-9-100.
- Privileged communications, §24-9-107.
- Replacement interpreters, §24-9-106.
- Waiver of right to interpreter, §24-9-105.

Privileged communications.

- Interpreters, §24-9-107.

Sign language.

- Interpreters generally, §§24-9-100 to 24-9-108.

Statements, §24-1-5.

Witnesses.

- Filing of persons' testimony, §24-9-107.
- Interpreters generally, §§24-9-100 to 24-9-108.
- Taping of persons' testimony, §24-9-107.

DEATH.

Evidence.

- Presumption of continuance of life for seven years, §24-4-21.
- Written finding or report by authorized federal officer, §24-4-47.

Presumptions, §24-4-21.

- Written finding or report by authorized federal officer.
- Admissibility in evidence, §24-4-47.

Witnesses.

- Subscribing witnesses.
- Proof of execution of writing when inaccessible, §24-7-5.

DEATH PRESUMPTION, §24-4-21.

Written finding or report by authorized federal officer.

- Admissibility in evidence, §24-4-47.

DECLARATIONS.

Hearsay exceptions.

- Declaration against interest, §24-1-5.
- Declarations of co-conspirators, §24-3-5.
- Dying declarations, §24-3-6.

Lost declarations.

- Establishment, §24-8-20.

DECLARATIONS AGAINST INTEREST.

When admissible, §24-3-8.

DEEDS.

Ancient deeds.

- Estoppel, §24-4-24.

Certified copies.

- Evidence, §§24-5-27, 24-5-28.

Evidence.

- Certified copies, §§24-5-27, 24-5-28.
- Parol evidence.
- Proof of mistake in deed, §24-6-7.
- Withdrawal of originals.
- Substitution of copies, §24-10-7.

Mistakes.

- Proof by parol evidence, §24-6-7.

Parol evidence rule.

- Proof of mistake in deed, §24-6-7.

Recitals.

- Estoppels, §24-4-24.

DEFENSES.

Burden of proof, §24-4-1.

DEFINED TERMS.

Agencies.

- Intermediary interpreters in sign language, §24-9-101.

Bank.

- Presumption of payment of check, §24-4-23.1.

Business.

- Hearsay exceptions, §24-3-14.

Check.

- Presumption of payment of check, §24-4-23.1.

Circumstantial evidence, §24-1-1.

Competent evidence, §24-1-1.

Confidential or privileged.

- Medical records, §24-9-41.

Confidential raw research data, §24-9-40.2.

Cumulative evidence, §24-1-1.

Direct evidence, §24-1-1.

Disclosure.

- Medical records, §24-9-41.

Estoppels.

- Presumptions, §24-4-24.

Health care facility.

- Medical records, §24-9-41.

Health care provider.

- Certain statements by inadmissible in evidence, §24-3-37.1.

Hearing impaired person.

- Intermediary interpreters and sign language, §24-9-101.

Hearsay evidence, §24-3-1.

Indirect evidence, §24-1-1.

Intermediary interpreters, §24-9-101.

Laws requiring disclosure.

- Medical records, §24-9-41.

DEFINED TERMS —Cont'd

Limited consent to disclosure.

Medical records, §24-9-41.

Medical matter.

Disclosure of medical records, §24-9-41.

Medical records.

Evidence, §24-7-8.

Nurse.

Medical records, §24-9-41.

Penal institution.

Securing attendance of out-of-state witnesses, §24-10-91.

Physician.

Medical records, §24-9-41.

Preponderance of evidence, §24-1-1.

Presumptive evidence, §24-1-1.

Proceeding.

Intermediary interpreters and sign language, §24-9-101.

Psychotherapeutic relationship.

Confidential communications, §24-9-21.

Qualified interpreter.

Intermediary interpreter and sign language, §24-9-101.

Regular duty hours.

Witness fees for police officers, etc., §24-10-27.

State.

Securing attendance of out-of-state witnesses, §24-10-91.

Sufficient evidence, §24-1-1.

Summons.

Securing attendance of out-of-state witnesses, §24-10-91.

Unanticipated outcome.

Certain statements by health care providers inadmissible in evidence, §24-3-37.1.

Unavailability of witness.

Admissibility of photographs, motion pictures, videotapes and audio recordings, §24-4-48.

Witnesses.

Securing attendance of out-of-state witnesses, §24-10-91.

DENTISTS.

Bills for services.

Identification evidence, §24-7-9.

Expressions of benevolence, regret, mistake, error, sympathy or apology.

Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

DENTISTS —Cont'd

Offers of assistance relating to unanticipated outcome.

Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

DEPOSITIONS.

Attorneys at law.

Appointment of counsel.

Depositions to preserve testimony in criminal proceedings, §24-10-132.

Costs.

Preservation of testimony in criminal proceedings, §24-10-132.

Criminal proceedings.

Preservation of testimony.

Admissibility of deposition, §24-10-135.

Objections, §24-10-136.

Agreement of parties to deposition, §24-10-138.

Appointment of counsel, §24-10-132.

Exceptional circumstances, §24-10-139.

Filing of deposition, §24-10-133.

Notice of deposition, §24-10-131.

Payment of costs and expenses, §24-10-132.

Presence of defendant at examination, §24-10-131.

Previous statements of deponent.

Availability to defendant, §24-10-134.

Recordation, §24-10-137.

Taking of deposition, §24-10-133.

Use of deposition at trial or hearing, §24-10-135.

When deposition may be taken, §24-10-130.

Foreign depositions, §§24-10-110 to 24-10-112.

Citation of article, §24-10-110.

Construction of article, §24-10-112.

How taken, §24-10-111.

Medical reports in narrative form.

Presentation to jury as deposition, §24-3-18.

Notice.

Preservation of testimony in criminal proceedings, §24-10-131.

Recordation.

Preservation of testimony in criminal proceedings, §24-10-137.

DESCENDANTS.

Proof of pedigree, §24-3-12.

DEVELOPMENTAL DISABILITIES.

Witnesses.

- Competency, §24-9-5.
- Determination by court, §24-9-7.

DIAGNOSIS.

Medical reports in narrative form.

- Admissibility in civil case involving injury or disease, §24-3-18.

DISABLED PERSONS.

Interpreters.

- Competency of witness to testify, §24-9-4.

Witnesses.

- Competency to testify, §24-9-4.

DISCOVERY.

Confidential raw research data in researcher's possession, §24-9-40.2.

Execution of judgments.

- Privilege of party or witness, §24-9-27.

Raw research data in researcher's possession.

- Confidential raw research data, §24-9-40.2.

DISEASES.

Medical reports in narrative form.

- Admissibility in civil case involving injury or disease, §24-3-18.

DISTRICT ATTORNEYS.

Witnesses.

- Grant of immunity, §24-9-28.

DNA ANALYSIS.

Sex offenses.

- Persons convicted of certain sex offenses.
- Confidentiality of results, §24-4-62.
- Dissemination of information in data bank.
- Comparison of profile, §24-4-63.
- Law enforcement officials, §24-4-63.
- Request for search, §24-4-63.
- Fees, §24-4-63.
- Storage of profile and data bank, §24-4-60.

DOCTOR-PATIENT PRIVILEGE, §24-9-40.

DOCTOR-PATIENT RELATIONSHIP.

AIDS information, §24-9-40.1.

DOCUMENTARY EVIDENCE.

Ancient documents.

- Hearsay exceptions, §24-3-11.

Authentication evidence.

- Generally, §§24-7-1 to 24-7-9.

DOCUMENTARY EVIDENCE —Cont'd

Authentication evidence —Cont'd

- Public records, §§24-7-20 to 24-7-27.

Best evidence rule, §§24-5-1 to 24-5-33.

Business records.

- Exception, §24-3-14.

Completeness doctrine, §24-2-4.

Federal officer's written finding or report that person is dead, missing, etc., §24-4-47.

Lost records.

- Best evidence rule generally, §§24-5-1 to 24-5-33.
- Establishment of private papers, §§24-8-20 to 24-8-30.
- Establishment of public records, §§24-8-1 to 24-8-6.

Notice to produce, §24-10-26.

- Production of transcripts in lieu of books, §§24-10-5, 24-10-6.

Parol evidence rule, §§24-6-1 to 24-6-10.

Part of document admitted.

- Opposite party may read balance, §24-2-4.

Unobtainable by subpoena.

- Admissibility of secondary evidence, §24-10-25.

Withdrawal of originals.

- Substitution of copies, §24-10-7.

DRAFTS.

Destroyed drafts.

- Summary establishment, §§24-8-21, 24-8-22.

Lost drafts.

- Summary establishment, §§24-8-21, 24-8-22.

Notarial acts.

- Authentication by certificate of notary, §24-7-23.

DRESS.

Rape shield law.

- Past sexual behavior of complaining witness.
- Mode of dress, §24-2-3.

DRUNKENNESS.

Admissions induced by intoxication.

- Excludable evidence, §24-3-37.

Witness' capacity.

- Determination by court, §24-9-7.
- Effect, §24-9-6.

DYING DECLARATIONS.

Hearsay exception, §24-3-6.

E

EMERGENCY VEHICLES.

Bills for services.

Identification evidence, §24-7-9.

ENOCH ARDEN.

Presumption of death after seven year absence.

Rebuttal, §24-4-21.

Written findings of death by federal employees, §24-4-47.

ENTRAPMENT BY OWN WITNESS,
§24-9-81.

ESTABLISHMENT OF LOST RECORDS.

Private papers, §§24-8-20 to 24-8-30.

Public records.

Establishment in superior court, §§24-8-1 to 24-8-6.

ESTOPPEL.

Defined, §24-4-24.

Elements requisite, §24-4-27.

Enumerated, §24-4-24.

Real property, §24-4-25.

Deeds, §24-4-24.

Requisite elements, §24-4-27.

Title.

Deeds, §24-4-24.

Landlord's title as against tenant in possession, §24-4-24.

Real estate.

Generally, §24-4-25.

Trustees setting up title adverse to trust, §24-4-26.

EVIDENCE, §§24-1-1 to 24-10-154.

Admissions.

Generally, §§24-3-30 to 24-3-38.

Adverse possession.

Declarations as to title by possession, §24-3-7.

Applicability of rules, §24-1-3.

Audio recordings.

Admissibility upon unavailability of witness, §24-4-48.

Authentication evidence, §§24-7-1 to 24-7-27.

Alterations of writings.

When material alterations to be explained, §24-7-2.

Comparison of other writings, §24-7-7.

Submittal to opposite party, §24-7-7.

Execution of writing.

Proof required generally, §24-7-1.

Handwriting, §24-7-6.

EVIDENCE —Cont'd

Authentication evidence —Cont'd

Material alterations of writings.

When to be explained, §24-7-2.

Medical bills.

Expert witnesses, §24-7-9.

Medical records, §24-7-8.

Production of writing.

General requirement, §24-7-1.

Notice to produce.

Party giving notice.

Dispensing with proof as against, §24-7-3.

Proof dispensed with, §24-7-3.

Public records, §§24-7-20 to 24-7-27.

Subscribing witnesses, §24-7-4.

Proof of execution when witnesses inaccessible, §24-7-5.

Best evidence rule.

Generally, §§24-5-1 to 24-5-33.

Burden of proof.

General provisions, §§24-4-1 to 24-4-48.

Calendars as proof of dates, §24-4-43.

Character evidence.

Defendant.

Inadmissible, §24-9-20.

Party's character.

Relevancy, §24-2-2.

Rape victim's past sexual behavior, §24-2-3.

Relevancy, §24-2-2.

Witness.

Impeachment, §24-9-84.

Rehabilitation, §§24-9-83, 24-9-84.

Circumstantial evidence.

Criminal convictions.

When may be had, §24-4-6.

Defined, §24-1-1.

Reasonable doubt in criminal cases, §24-4-5.

Competent evidence.

Defined, §24-1-1.

Completeness doctrine.

Admissibility of documents or records, §24-2-4.

Admissions.

Right to have whole conversation heard, §24-3-38.

Compromise and settlement.

Admissions or propositions made with view to compromise, §24-3-37.

Conduct of parties.

Relevancy, §24-2-2.

Confessions.

Generally, §§24-3-50 to 24-3-53.

EVIDENCE —Cont'd

Confidential raw research data, §24-9-40.2.

Cumulative evidence.

Defined, §24-1-1.

Death.

Presumption of continuance of life for seven years, §24-4-21.

Written finding or report by authorized federal officer, §24-4-47.

De facto officer.

Public officers and employees.

De facto officer's proof, §24-4-41.

Definitions.

Business, §24-3-14.

Generally, §24-1-1.

Hearsay evidence, §24-3-1.

Department of corrections records,

§24-7-27.

Depositions.

Preservation of testimony in criminal proceedings, §§24-10-130 to 24-10-139.

Direct evidence.

Defined, §24-1-1.

DNA analysis.

Sexual offenses, §§24-4-60 to 24-4-65.

Documentary evidence.

Ancient documents.

Hearsay exception, §24-3-11.

Authentication evidence.

Generally, §§24-7-1 to 24-7-27.

Public records, §§24-7-20 to 24-7-27.

Best evidence rule, §§24-5-1 to 24-5-33.

Business records.

Hearsay exception, §24-3-14.

Federal officer's written finding or report that person is dead, missing, etc., §24-4-47.

How much admissible, §24-2-4.

Lost records.

Establishment of private papers, §§24-8-20 to 24-8-30.

Establishment of public records, §§24-8-1 to 24-8-6.

Notice to produce, §24-10-26.

Part of document admitted.

Opposite party may read balance, §24-2-4.

Production of transcripts in lieu of books, §§24-10-5, 24-10-6.

Parol evidence rule, §§24-6-1 to 24-6-10.

Public safety department or comparable agencies in other states.

Certified copies of records or computer transmitted records, §24-3-17.

EVIDENCE —Cont'd

Documentary evidence —Cont'd

Unobtainable by subpoena.

Admissibility of secondary evidence, §24-10-25.

Withdrawal of originals.

Substitution of copies, §24-10-7.

Establishment of lost records.

Private papers, §§24-8-20 to 24-8-30.

Public records.

Establishment in superior court, §§24-8-1 to 24-8-6.

Failure to produce evidence.

Presumption, §24-4-22.

Foreign law.

Statutes as evidence of other states' laws, §24-7-24.

Guardian and ward.

Letters of guardianship.

Copies.

Evidentiary effect, §24-5-30.

Health care providers.

Offers of assistance or expressions of benevolence, regret, mistake, error, sympathy or apologies relating to unanticipated outcome.

Inadmissible, §24-3-37.1.

Hearsay, §§24-3-1 to 24-3-53.

Admissions.

Confessions.

Distinguished, §24-3-15.

Generally, §§24-3-30 to 24-3-38.

Confessions.

Admissions.

Distinguished, §24-3-15.

Generally, §§24-3-50 to 24-3-53.

Defined, §24-3-1.

Exceptions, §§24-3-3 to 24-3-18.

General provisions, §§24-3-1 to 24-3-53.

Original evidence.

Distinguished, §24-3-2.

When admitted, §24-3-1.

Identification evidence, §24-4-40.

Medical bills, §24-7-9.

Indirect evidence.

Defined, §24-1-1.

Indorsements.

Establishment of lost records.

Certified indorsement of copy, §§24-8-27, 24-8-28.

Negotiable papers.

Explanation of blank indorsements, §24-6-10.

Inferences, §24-4-9.

Irrelevant evidence.

Character of parties, §24-2-2.

EVIDENCE —Cont'd

Irrelevant evidence —Cont'd

- Conduct of parties, §24-2-2.
- Exclusion, §24-2-1.

Judgments.

- Admissibility, §24-4-42.
- Effect, §24-4-42.
- Other states' judgments.
- Authentication in general, §24-7-24.
- Justice of the peace courts in other states, §24-7-26.

Malpractice actions.

- Expert opinion testimony.
- Admissibility, §24-9-67.1.

Medical malpractice.

- Expert opinion testimony, §24-9-67.1.
- Offers of assistance or expressions of benevolence, regret, mistake, error, sympathy or apologies by health care providers relating to unanticipated outcome.
- Inadmissible, §24-3-37.1.

Missing in action (MIA's).

- Written finding or report by authorized federal officer, §24-4-47.

Missing persons.

- Finding or report by authorized federal officer, §24-4-47.

Mortality tables, §24-4-45.

- American Experience Mortality Tables, §24-4-44.

Motion pictures.

- Admissibility upon unavailability of witness, §24-4-48.

Object of rules, §24-1-2.

Opinion evidence.

- When admissible, §24-9-65.

Ordinances and resolutions.

- Certified copies of ordinances and resolutions included in general codification.
- Judicial notice, §24-7-22.

Original documents rule, §§24-5-1 to 24-5-33.

Ownership of property.

- Evidence of identity, §24-4-40.

Parol evidence rule.

- General provisions, §§24-6-1 to 24-6-10.

Perpetuation of testimony, §24-10-153.

- Depositions preserving testimony in criminal proceedings, §§24-10-135, 24-10-136.
- General provisions, §§24-10-130 to 24-10-139.
- General provisions, §§24-10-150 to 24-10-154.

EVIDENCE —Cont'd

Photographs.

- Admissibility upon unavailability of witness, §24-4-48.

Preponderance of evidence.

- Defined, §24-1-1.

Presumptive evidence.

- Defined, §24-1-1.
- Presumptions generally, §§24-4-20 to 24-4-27.

Prior convictions.

- Impeachment of witnesses, §24-9-84.1.

Public records.

- Authentication evidence, §§24-7-20 to 24-7-27.
- Lost records.

- Establishment, §§24-8-1 to 24-8-6.

- When exemplifications considered primary evidence.

- Best evidence rule, §24-5-20.

Purpose of rules, §24-1-2.

Rape shield law, §24-2-3.

Raw research data.

- Confidential raw research data, §24-9-40.2.

Reasonable doubt.

- Criminal cases, §24-4-5.

Records.

- Authentication evidence.
- Generally, §§24-7-1 to 24-7-27.
- Public records, §§24-7-20 to 24-7-27.
- Best evidence rule, §§24-5-1 to 24-5-33.
- Parol evidence rule, §§24-6-1 to 24-6-10.

Relevancy, §§24-2-1 to 24-2-4.

- Character of parties, §24-2-2.
- Conduct of parties, §24-2-2.
- Required, §24-2-1.

Securing attendance of witnesses and production and preservation of evidence.

- Depositions to preserve testimony in criminal proceedings, §§24-10-130 to 24-10-139.
- General provisions, §§24-10-1 to 24-10-7.
- Perpetuation of testimony, §§24-10-150 to 24-10-154.
- Production of medical records, §§24-10-70 to 24-10-76.
- Securing attendance of prisoners, §§24-10-60 to 24-10-62.
- Securing testimony of witnesses in cases tried on affidavits, §§24-10-40 to 24-10-45.
- Subpoenas and notice to produce.
- Generally, §§24-10-20 to 24-10-29.

EVIDENCE —Cont'd

Securing attendance of witnesses and production and preservation of evidence —Cont'd

Uniform act to secure the attendance of witnesses from without the state, §§24-10-90 to 24-10-97.

Uniform foreign depositions act, §§24-10-110 to 24-10-112.

Sexual offenses.

DNA analysis, §§24-4-60 to 24-4-65.

Sufficient evidence.

Defined, §24-1-1.

Registered paper.

Certified copy where original lost or destroyed.

Evidence of its registry, §24-5-22.

United States agriculture department.

Inspection certificates, §24-4-46.

Value, §24-9-66.

Videotapes.

Admissibility upon unavailability of witness, §24-4-48.

Witnesses.

Competency, §§24-9-1 to 24-9-7.

Credibility, §§24-9-80 to 24-9-85.

Examination generally, §§24-9-60 to 24-9-70.

Privilege.

General provisions, §§24-9-20 to 24-9-30.

Medical information, §§24-9-40 to 24-9-47.

Use of sign language and intermediary interpreter in administrative and judicial proceedings, §§24-9-100 to 24-9-108.

EXAMINATION OF WITNESSES,

§§24-9-60 to 24-9-70.

Affidavits, cases tried on.

Questioning witness at residence, §§24-10-42, 24-10-43.

Cross-examination.

Impeachment, §§24-9-81 to 24-9-85.

Objection made on direct examination.
Waiver by cross-examination, effect, §24-9-70.

Right of cross, §24-9-64.

Feelings towards parties, §24-9-68.

Harsh questions, §24-9-62.

Impeachment, §§24-9-81 to 24-9-85.

Character of witness, §24-9-84.

Credit of impeached witness for jury, §24-9-85.

Disapproving testimony, §24-9-82.

EXAMINATION OF WITNESSES —Cont'd

Impeachment —Cont'd

Manner of impeaching, §24-9-82.

Character evidence, §24-9-84.

Opposite party or person with related interest, §24-9-81.

Party's own witness, §24-9-81.

Previous contradictory statements, §24-9-83.

Improper questions, §24-9-62.

Insulting questions, §24-9-62.

Leading questions, §24-9-63.

Oath or affirmation required, §24-9-60.

Objection on direct examination.

Waiver by cross-examination, effect, §24-9-70.

Proper treatment of witness, §24-9-69.

Relationship to parties, §24-9-68.

Sequestering witnesses, §24-9-61.

EXCITED UTTERANCE.

Hearsay exceptions.

Declarations part of res gestae, §24-3-3.

EXECUTIONS.

Discovery.

Privilege of party or witness, §24-9-27.

EXECUTORS AND ADMINISTRATORS, (PRE-1998 PROBATE CODE).

Letters of administration.

Copies.

Evidence, §24-5-30.

Letters testamentary.

Copies.

Evidence, §24-5-30.

EXEMPLIFICATIONS.

Evidence.

Public records.

Municipal records and minutes, §24-7-21.

Primary evidence, §24-5-20.

State or county officers, §24-7-20.

Transmittal by facsimile, §24-5-20.

EXPERT WITNESSES.

Civil cases.

Opinions of experts, admissibility, §24-9-67.1.

Criminal cases.

Admissibility of opinions, §24-9-67.

Malpractice actions.

Admissibility of opinion of expert, §24-9-67.1.

Medical bill identification, §24-7-9.

Opinions of experts, §24-9-67.

Civil cases, §24-9-67.1.

INDEX

EXPERT WITNESSES —Cont'd

Pretrial hearing.

Qualification, determination, §24-9-67.1.

Qualification, §24-9-67.1.

EXPLANATION OF CONDUCT.

Hearsay exception, §24-3-2.

EXPUNGEMENT OF RECORDS.

DNA analysis upon conviction of certain sex offenses.

Reversal and dismissal of conviction.

Expungement of profile in data bank, §24-4-65.

F

FACSIMILE MACHINES.

Exemplifications.

Transmitted by facsimile, §24-5-20.

FALSE IMPRISONMENT.

Witnesses, §24-10-1.

FAX MACHINES.

Exemplifications.

Transmittal by facsimile, §24-5-20.

FELONIES.

Sex offenses.

DNA analysis.

Persons convicted of certain sex offense.

Obtaining sample without authority, §24-4-64.

Witnesses.

Number required, §24-4-8.

FOREIGN DEPOSITIONS ACT.

Uniform foreign depositions act.

General provisions, §§24-10-110 to 24-10-112.

Short title, §24-10-110.

FOREIGN LAW.

Evidence.

Statutes as evidence of other states' laws, §24-7-24.

FORFEITURES.

Witness' fees.

Forfeiture for causing continuance or absence from trial, §24-10-3.

Forfeiture for excessive claim, §24-10-4.

FORMER TESTIMONY.

Hearsay exception, §24-3-10.

FRAUD AND DECEIT.

Admissions obtained by fraud.

Improper evidence, §24-3-37.

FRAUD AND DECEIT —Cont'd

Confessions.

Fraud in obtaining confession, §24-3-37.

FULL FAITH AND CREDIT.

Judicial records of other states, §24-7-24.

Records.

Other states' records, §§24-7-24, 24-7-25.

G

GENDER.

Blood samples.

Tube sealed and labeled with subject's gender, §24-4-61.

GENEALOGICAL EVIDENCE.

Hearsay exception, §24-3-12.

GENEALOGIES.

Proof of pedigree, §24-3-12.

GENERAL ASSEMBLY.

Courts.

Attendance by member during session of general assembly, §24-10-26.

Journal of proceedings.

Judicial notice, §24-1-4.

Subpoenas duces tecum.

Legislators' exemption, §24-10-28.

Witnesses.

Legislators' exemption, §24-10-28.

GENETIC TESTING.

Confidentiality of information.

Sex offenses, §24-4-62.

Sex offenses.

Confidentiality of results, §24-4-62.

Dissemination of information in data bank, §24-4-63.

Storage of profile in data bank, §24-4-60.

GEORGIA BUREAU OF INVESTIGATION.

Witnesses.

Fees for members, §24-10-27.1.

GOOD CHARACTER.

Rehabilitation of witness, §§24-9-83, 24-9-84.

GOOD FAITH.

Medical records.

Disclosure.

Immunity from liability, §24-9-44.

GRADUATE CERTIFICATION.

Laboratory technicians.

Withdrawal of blood samples for DNA analysis, §24-4-61.

GRAND JURY.

Privileged communications, §24-9-21.

Witnesses.

Nonresident witnesses.

Securing attendance.

Proceeding in foreign state,
§§24-10-92, 24-10-93.

Proceeding in this state, §§24-10-94,
24-10-95.

Securing attendance at proceedings.

Nonresident witnesses, §§24-10-92 to
24-10-95.

GRANTORS.

Deeds.

Recitals.

Estoppels defined, §24-4-24.

Title.

Estoppels.

Legal presumptions, §24-4-24.

GUARDIANS.

Evidence.

Letters of guardianship.

Copies.

Evidentiary effect, §24-5-30.

Letters of guardianship.

Copies.

Evidence, §24-5-30.

GUILT, PRESUMPTIONS OF.

Rebuttable presumptions, §24-4-21.

H

HABEAS CORPUS.

Prisoners.

Securing attendance as witness,
§24-10-62.

Witness-prisoners, §24-10-62.

Witness-prisoners, §24-10-62.

HANDWRITING.

Proof, §24-7-6.

Comparisons to be presented to opposite
party, §24-7-7.

HEALTH.

Bills for services.

Identification evidence, §24-7-9.

Privileged information, §24-9-40.

HEALTH CARE FACILITIES.

Confidentiality of raw research data,
§24-9-40.2.

**Expressions of benevolence, regret,
mistake, error, sympathy or apology.**

Inadmissible in claim or action brought
by patient alleging unanticipated
outcome, §24-3-37.1.

HEALTH CARE FACILITIES —Cont'd

**Offers of assistance relating to
unanticipated outcome.**

Inadmissible in claim or action brought
by patient alleging unanticipated
outcome, §24-3-37.1.

Raw research data, confidentiality,
§24-9-40.2.

HEARINGS.

Cases tried on affidavits.

Application for subpoena, §24-10-40.

Evidences of indebtedness.

Summary establishment of lost
evidences, §24-8-21.

Lost evidences of indebtedness.

Summary establishment, §24-8-21.

Public records.

Establishment of lost records.

Hearing on objections to auditor's
report, §§24-8-4, 24-8-6.

Hearing on petition by judge of
probate court, §24-8-2.

Rape victim's past sexual behavior.

In camera hearing, §24-2-3.

Witness' attendance at proceedings.

Securing attendance of out-of-state
witnesses.

Criminal or grand jury proceedings in
foreign states, §24-10-92.

HEARSAY, §§24-3-1 to 24-3-53.

Admissibility in general, §24-3-1.

Admissions, §§24-3-30 to 24-3-38.

Acquiescence as admission, §24-3-36.

Agents, §24-3-31.

Care in receipt, §24-3-53.

Confessions, §§24-3-50 to 24-3-53.

Excludable admissions, §24-3-37.

Parties to record, §24-3-31.

Pleadings, §24-3-30.

Privies, §24-3-32.

Real parties in interest, §24-3-34.

Silence as admission, §24-3-36.

Third parties, §24-3-35.

Whole conversation.

Right to have heard, §24-3-38.

Ancient boundaries and landmarks.

Hearsay exception, §24-3-13.

Ancient documents.

Hearsay exception, §24-3-11.

Business records.

Exception, §24-3-14.

Child's testimony.

Sexual contact or physical abuse.

Hearsay exception, §24-3-16.

HEARSAY —Cont'd

Coconspirators' confessions, §24-3-52.

Coconspirators' statements.

Hearsay exception, §24-3-5.

Confessions, §§24-3-50 to 24-3-53.

Cautionary receipt, §24-3-53.

Coconspirator's confession, §24-3-52.

Corroboration required for conviction,
§24-3-53.

Spiritual exhortation, promise of secrecy
or collateral benefit, §24-3-51.

Voluntary confessions.

Only kind admissible, §24-3-50.

Deceased persons.

Declarations against interest by one since
deceased.

Hearsay exception, §24-3-8.

Declarations as to ancient rights.

Hearsay exception, §24-3-9.

Former trial testimony.

Hearsay exception, §24-3-10.

Proof of pedigree.

Exception, §24-3-12.

Defined, §24-3-1.

Distinguished from original evidence,
§24-3-2.

Dying declarations.

Hearsay exceptions, §24-3-6.

Exceptions.

Admissibility.

Generally, §24-3-1.

Ancient boundaries and landmarks,
§24-3-13.

Ancient documents, §24-3-11.

Business records, §24-3-14.

Child's testimony.

Sexual contact or physical abuse,
§24-3-16.

Coconspirators' statements, §24-3-5.

Deceased persons.

Declarations against interest by one
since deceased, §24-3-8.

Declarations as to ancient rights.

Hearsay exception, §24-3-9.

Former trial testimony, §24-3-10.

Proof of pedigree, §24-3-12.

Dying declaration, §24-3-6.

Medical diagnosis or treatment.

Statements made, §24-3-4.

Pedigree.

Proof excepted, §24-3-12.

Public safety department or comparable
agencies in other states.

Certified copies of records or
computer transmitted records,
§24-3-17.

HEARSAY —Cont'd

Exceptions —Cont'd

Res gestae exceptions, §24-3-3.

Title to property.

Declarations by one in possession of
property, §24-3-7.

Medical diagnosis or treatment.

Statements excepted, §24-3-4.

Medical reports in narrative form.

Admissibility in civil case involving injury
or disease, §24-3-18.

Original evidence.

Distinguished, §24-3-2.

Pedigree.

Proof excepted, §24-3-12.

**Public safety department or comparable
agencies in other states.**

Certified copies of records or computer
transmitted records, §24-3-17.

Res gestae exception, §24-3-3.

Title to property.

Declarations by one in possession.

Hearsay exception, §24-3-7.

HOME HEALTH AGENCIES.

**Expressions of benevolence, regret,
mistake, error, sympathy or apology.**

Inadmissible in claim or action brought
by patient alleging unanticipated
outcome, §24-3-37.1.

**Offers of assistance relating to
unanticipated outcome.**

Inadmissible in claim or action brought
by patient alleging unanticipated
outcome, §24-3-37.1.

HOSPITALS.

Billing requirements.

Identification evidence, §24-7-9.

Confidentiality of raw research data,
§24-9-40.2.

**Expressions of benevolence, regret,
mistake, error, sympathy or apology.**

Inadmissible in claim or action brought
by patient alleging unanticipated
outcome, §24-3-37.1.

**Offers of assistance relating to
unanticipated outcome.**

Inadmissible in claim or action brought
by patient alleging unanticipated
outcome, §24-3-37.1.

Privileged information, §24-9-40.

Raw research data, confidentiality,
§24-9-40.2.

HUSBAND AND WIFE.

Privileged communications, §24-9-21.

Criminal proceedings, §24-9-23.

HUSBAND AND WIFE —Cont'd

Witnesses.

- Adultery proceedings.
- Competency of husband or wife,
§24-9-2.
- Privileged communications, §§24-9-21,
24-9-23.

I

IDENTIFICATION EVIDENCE, §24-4-40.

Medical bills, §24-7-9.

IDIOTS.

Witnesses.

- Competency, §24-9-5.
- Determination by court, §24-9-7.

IMMUNITY.

Medical record disclosures, §24-9-44.

Self-incrimination.

- Witnesses, §24-9-28.

Witnesses.

- Self-incrimination, §24-9-28.

IMPEACHMENT OF WITNESSES,

§§24-9-81 to 24-9-85.

Character of witness, §24-9-84.

Credit of impeached witness for jury,
§24-9-85.

Disapproving testimony, §24-9-82.

Manner, §24-9-82.

- Character evidence, §24-9-84.

**Opposite party or person with related
interest, §24-9-81.**

Party's own witness, §24-9-81.

Previous contradictory statements,
§24-9-83.

Prior convictions, §24-9-84.1.

IN CAMERA.

AIDS.

- Confidential information.

Disclosure, §24-9-47.

Rape prosecutions, §24-2-3.

**Sexual behavior of complainant in rape
prosecution.**

- Past sexual behavior heard in camera,
§24-2-3.

**INCAPACITATED OR INCOMPETENT
PERSONS.**

Witnesses, §24-9-5.

- Subscribing witnesses.

Proof of execution of writing when
witnesses inaccessible, §24-7-5.

INDICTMENTS.

Lost bills.

- Establishment, §24-8-20.

INDIGENT PERSONS.

Deaf and hearing impaired persons.

- Interpreters to be provided, §24-9-104.

INDORSEMENTS.

Evidence.

- Establishment of lost records.

Certified indorsement of copy,
§§24-8-27, 24-8-28.

- Negotiable papers.

Explanation of blank indorsements,
§24-6-10.

**INFAMY, DISGRACE OR PUBLIC
CONTEMPT.**

Privilege, §24-9-27.

INFERENCES FROM EVIDENCE, §24-4-9.

INJUNCTIONS.

Witnesses in cases tried on affidavits.

- Questioning of witness at residence,
§§24-10-42, 24-10-43.

Subpoenaing evidence, §§24-10-44,
24-10-45.

Subpoenaing witnesses, §§24-10-40,
24-10-41, 24-10-45.

INJURIES.

Medical reports in narrative form.

- Admissibility in civil case involving injury
or disease, §24-3-18.

INNOCENCE PRESUMPTION, §24-4-21.

INSCRIPTIONS.

Proof by copies, §24-5-32.

INSPECTIONS.

Agriculture.

- U.S. department of agriculture
inspection certificates.

Prima facie evidence, §24-4-46.

Medical records.

- Inspection after production, §24-10-74.

INSULTS.

Examination of witnesses, §24-9-62.

**INTERPRETATION AND
CONSTRUCTION.**

Contracts.

- Parol evidence rule.

Generally, §§24-6-1 to 24-6-10.

Depositions.

- Uniform foreign depositions act,
§24-10-112.

INTERPRETATION AND

CONSTRUCTION —Cont'd

Medical records.

Production, §24-10-76.

INTERPRETERS.

Deaf and hearing impaired persons,

§§24-9-100 to 24-9-108.

Appointment of interpreter.

Agency proceedings, §24-9-102.

Intermediary interpreter, §24-9-106.

Arrest of hearing impaired person.

Interrogation and arrest, §24-9-103.

Compensation of interpreter, §24-9-108.

Definitions, §24-9-101.

Fee schedule, §24-9-108.

Indigent defendants, §24-9-104.

Lists of qualified interpreters.

Preparation and maintenance,
§24-9-106.

Oath of interpreters, §24-9-107.

Policy of state, §24-9-100.

Privileged communications, §24-9-107.

Replacement interpreters, §24-9-106.

Waiver of right to interpreter, §24-9-105.

Physically disabled persons.

Competency to testify, §24-9-4.

Witnesses.

Allowed for physical handicapped,
§24-9-4.

INTERROGATION.

Deaf and hearing impaired arrestees,

§24-9-103.

J

JOINDER OF PARTIES.

Evidence.

Establishment of lost records.

Joinder of additional party defendants,
§24-8-29.

Lost or destroyed papers.

Proceedings to establish.

Additional party defendants, §24-8-29.

JOURNALISTS.

News gatherers' privilege, §24-9-30.

JOURNALS.

General assembly, §24-1-4.

JUDGES.

Conduct.

Proper conduct.

Estoppel, §24-4-24.

JUDGMENTS.

Unreversed judgments.

Estoppel, §24-4-24.

JUDICIAL NOTICE, §24-1-4.

Ordinances or resolutions.

Certified copies of ordinance or
resolution included in general
codification, §24-7-22.

JURY AND JURY TRIAL.

Inferences from evidence, §24-4-9.

Medical reports in narrative form.

Medical narrative not to go with jury as
documentary evidence, §24-3-18.

Writing comparisons.

Authentication of writings, §24-7-7.

JUVENILE COURTS.

Witnesses.

Child's competency to testify, §24-9-5.

L

LANDLORD AND TENANT.

Title.

Estoppels, §24-4-24.

LANDMARKS.

Ancient landmarks.

Hearsay exception, §24-3-13.

LAW ENFORCEMENT OFFICERS.

Address of office.

Privilege not to divulge in criminal
proceedings, §24-9-26.

Privilege not to divulge address in criminal
proceedings, §24-9-26.

LEADING QUESTIONS.

Witnesses, §24-9-63.

LETTERS.

Business letters.

Presumption for failure to answer,
§24-4-23.

LIBRARIES.

Records.

Confidential nature, §24-9-46.

LIFE EXPECTANCY.

Evidence.

American experience mortality tables.

Admissibility, §24-4-44.

Other mortality tables, §24-4-45.

LOCAL GOVERNMENT.

**Judicial notice of ordinances and
resolutions.**

Certified copies of ordinances or
resolutions included in general
codification, §24-7-22.

LOST RECORDS.

Establishment of private papers, §§24-8-20 to 24-8-30.

Establishment of public records, §§24-8-1 to 24-8-6.

M

MALPRACTICE.

Expert opinion testimony.

Admissibility, §24-9-67.1.

MAPS AND PLATS.

Evidence.

Withdrawal of originals.

Substitution of copies, §24-10-7.

MARITIME COURTS.

Judicial notice, §24-1-4.

MARKET VALUE.

Opinion evidence, §24-9-66.

MEDICAL HISTORY.

Medical reports in narrative form.

Admissibility in civil case involving injury or disease, §24-3-18.

MEDICAL MALPRACTICE.

Evidence.

Expert opinion testimony, §24-9-67.1.

Offers of assistance or expressions of benevolence, regret, mistake, error, sympathy or apologies by health care providers relating to unanticipated outcome.

Inadmissibility, §24-3-37.1.

Expert opinion testimony.

Admissibility, §24-9-67.1.

Offers of assistance or expressions of benevolence, regret, mistake, error, sympathy or apologies by health care providers relating to unanticipated outcome.

Inadmissible as evidence, §24-3-37.1.

MEDICAL RECORDS.

Bills for services.

Identification evidence, §24-7-9.

Confidential or privileged matter, §§24-9-41 to 24-9-45.

Definitions, §24-9-41.

Disclosure of records.

Effect on confidential or privileged character, §24-9-42.

Immunity from liability, §24-9-44.

Use for educational purposes, §24-9-45.

MEDICAL RECORDS —Cont'd

Confidential or privileged matter —Cont'd

Disclosure of records —Cont'd

Use of medical matter so disclosed, §24-9-43.

Definitions.

Confidential or privileged matter, §24-9-41.

Disclosure of records.

Confidential or privileged matter.

Effect on confidential or privileged character, §24-9-42.

Immunity from liability, §24-9-44.

Use for educational purposes, §24-9-45.

Use of medical matter so disclosed, §24-9-43.

Evidence, §24-7-8.

Bills for services.

Identification evidence, §24-7-9.

Confidential or privileged matter, §§24-9-41 to 24-9-45.

Copies admissible, §24-10-71.

Narrative medical reports.

Admissibility in civil case involving injury or disease, §24-3-18.

Production, §§24-10-70 to 24-10-76.

Privileged matter, §§24-9-41 to 24-9-45.

Production of evidence.

Applicability of article, §24-10-75.

Compliance with subpoena or order, §24-10-72.

Construction of article, §24-10-76.

Costs of production, §24-10-73.

Custodian's appearance, §24-10-72.

Custody of records after removal, §24-10-74.

Definitions, §24-10-70.

Inspection of records after removal, §24-10-74.

Original records, §24-10-71.

Return of records, §24-10-74.

Substitutes in lieu of originals, §24-10-71.

MEDICAL REPORTS IN NARRATIVE FORM.

Admissibility in civil case involving injury or disease, §24-3-18.

MEMORY.

Witnesses.

Refreshing recollection, §24-9-69.

MENTAL CONDITION OR STATE.

Presumptions, §24-4-21.

MENTAL HEALTH.

Witness.

Competency, §24-9-5.

Determination by court, §24-9-7.

MENTAL STATE OR CONDITION.

Presumptions, §24-4-21.

MICROFILM.

Evidence.

Reproductions made in regular course of business.

Admissibility, §24-5-26.

MILITARY AFFAIRS.

Discharges.

Certified copies.

Evidence, §24-5-33.

MINISTERS.

Communications to clergyman privileged, §24-9-22.

Privilege, §24-9-22.

MINORS.

Molestation.

Child's competency to testify, §24-9-5.

MISDEMEANORS.

Sex offenses.

DNA analysis.

Persons convicted of certain sex offenses.

Unlawful dissemination or use of information, §24-4-64.

MISSING IN ACTION (MIA).

Evidence.

Written finding or report by authorized federal officer, §24-4-47.

MISSING PERSONS.

Evidence.

Finding or report by authorized federal officer, §24-4-47.

MONEY.

Receipts.

Explanation or denial.

Parol evidence, §24-6-9.

MONUMENTS.

Inscriptions.

Proof by copies, §24-5-32.

MORTALITY TABLES.

American experience mortality table.

Admissibility in evidence, §24-4-44.

Annuity mortality table for 1949, alternate.

Admissibility in evidence, §24-4-45.

Commissioners 1958 Standard Ordinary Mortality Tables.

Admissibility in evidence, §24-4-45.

MORTALITY TABLES —Cont'd

Evidence, §24-4-45.

American experience mortality tables, §24-4-44.

MOTION PICTURES.

Evidence.

Admissibility upon unavailability of witness, §24-4-48.

MOTIONS.

Subpoenas duces tecum.

Motion to quash or modify, §24-10-22.

MOTIVE.

Hearsay.

Original evidence distinguished.

Ascertainment of motives, §24-3-2.

MUNICIPAL CORPORATIONS.

Judicial notice.

Ordinances and resolutions.

Certified copies of ordinances

included in general codification, §24-7-22.

Ordinances.

Judicial notice.

Certified copies of ordinances

included in general codification, §24-7-22.

MUTILATION.

Public records.

Establishment in superior court.

Lost records generally, §§24-8-1 to 24-8-6.

N

NAMES.

Evidence of identity, §24-4-40.

NATIONALITY.

Symbols.

Judicial notice, §24-1-4.

NATURAL RESOURCES.

Department of natural resources.

Law enforcement officers.

Fees for being witness, §24-10-27.1.

NEWS GATHERERS' PRIVILEGE,

§24-9-30.

NEW TRIAL.

Motions.

Witnesses in cases tried on affidavits, §§24-10-40 to 24-10-45.

Witnesses in cases tried on affidavits.

Questioning of witness at residence, §§24-10-42, 24-10-43.

NEW TRIAL —Cont'd

Witnesses in cases tried on affidavits

—Cont'd

- Subpoenaing evidence, §24-10-44.
- Subpoenaing witnesses, §§24-10-40, 24-10-41.
- Penalty for default of witness, §24-10-45.

NONERASABLE OPTICAL IMAGE REPRODUCTIONS.

Evidence.

- Admissibility of reproductions made in regular course of business, §24-5-26.

NONRESIDENTS.

Arrest.

- Witnesses summoned to testify in state.
- Exemption from arrest, §24-10-96.

Service of process.

- Lost evidences of indebtedness.
- Summary establishment, §24-8-22.
- Witnesses summoned to testify in state.
- Exemption from service, §24-10-96.

Witnesses.

- Criminal proceeding in this state, §§24-10-94, 24-10-95.
- Securing attendance, §§24-10-90 to 24-10-97.
- Applicability of article, §24-10-97.
- Citation of article, §24-10-90.
- Construction of article, §24-10-97.
- Criminal proceeding in foreign state, §§24-10-92, 24-10-93.
- Definitions, §24-10-91.
- Exemption from arrest.
- Service of process, §24-10-96.
- Grand jury proceeding in foreign state, §§24-10-92, 24-10-93.
- Grand jury proceeding in this state, §§24-10-94, 24-10-95.

NOTARIES PUBLIC.

Authentication of acts by certificate of notary, §24-7-23.

Certificates.

- Authentication of acts, §24-7-23.

NOTES.

Destroyed notes.

- Procedure as to action on, §24-8-28.
- Summary establishment, §§24-8-21, 24-8-22.

Evidence.

- Withdrawal of originals.
- Substitution of copies, §24-10-7.

NOTES —Cont'd

Lost notes.

- Procedure as to action on, §24-8-28.
- Summary establishment, §§24-8-21, 24-8-22.

Notarial acts.

- Promissory notes.
- Authentication of acts by notary's certificate, §24-7-23.

NOTICE.

Depositions.

- Preservation of testimony in criminal proceedings, §24-10-131.

Medical reports in narrative form.

- Intention to introduce report as evidence, §24-3-18.

Production of evidence, §24-10-26.

- Cases tried on affidavits, §24-10-44.
- Dispensing with proof upon production of paper, §24-7-3.
- Transcripts in lieu of books, §§24-10-5, 24-10-6.

NOTICE TO PRODUCE.

Dispensing with proof upon production of paper, §24-7-3.

Evidence, §24-10-26.

- Transcripts in lieu of books, §§24-10-5, 24-10-6.
- Trial on affidavits, §24-10-26.

NURSES.

Expressions of benevolence, regret, mistake, error, sympathy or apology.

- Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

Offers of assistance relating to unanticipated outcome.

- Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

NURSING HOMES.

Expressions of benevolence, regret, mistake, error, sympathy or apology.

- Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

Offers of assistance relating to unanticipated outcome.

- Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

O

OATHS.

False swearing.

Witnesses, §24-9-85.

Interpreters, §24-9-107.

Production of evidence.

Transcripts in lieu of books.

Oaths relating to reason why books cannot be produced, §24-10-5.

Witnesses, §24-9-60.

False swearing, §24-9-85.

OBJECTIONS.

Cross-examination.

Objection not waived, §24-9-70.

OPINION EVIDENCE.

When admissible, §24-9-65.

ORDERS.

Depositions to perpetuate testimony.

Preservation of testimony in criminal proceedings, §24-10-130.

Evidences of indebtedness.

Lost evidences.

Summary establishment, §24-8-21.

Lost evidences of indebtedness.

Summary establishment, §24-8-21.

Medical records.

Production of records.

Generally, §§24-10-70 to 24-10-76.

Prisoner-witnesses.

Securing attendance, §§24-10-60, 24-10-61.

Rape victim's past sexual behavior.

Admissibility in evidence, §24-2-3.

Witnesses attendance at proceedings.

Securing attendance of out-of-state witnesses.

Criminal or grand jury proceedings in foreign states, §24-10-93.

Criminal or grand jury proceedings in this state, §24-10-95.

Witness-prisoners.

Securing attendance, §§24-10-60, 24-10-61.

ORDINANCES.

Certified copies of ordinances and resolutions included in general codification.

Judicial notice, §24-7-22.

Codification.

General codification.

Judicial notice, certified copies, §24-7-22.

ORDINANCES —Cont'd

Evidence.

Certified copies of ordinances and resolutions included in general codification.

Judicial notice, §24-7-22.

Judicial notice.

Certified copies of ordinances and resolutions included in general codification, §24-7-22.

ORIGINAL DOCUMENTS RULE, §§24-5-1 to 24-5-33.

ORTHOPEDIC DEVICES.

Bills from suppliers.

Identification evidence, §24-7-9.

ORTHOTISTS AND PROSTHETISTS.

Bills for services.

Identification evidence, §24-7-9.

P

PAPER.

Best evidence rule, §§24-5-1 to 24-5-33.

Certified copy of original, §24-5-22.

Negotiable papers, §24-6-10.

Blank endorsements, §24-6-10.

Private papers, §§24-8-20 to 24-8-30.

Rule nisi.

Lost or destroyed papers, §24-8-24.

PAROL EVIDENCE, §§24-6-1 to 24-6-10.

Ambiguities in agreements, §24-6-3.

Circumstances surrounding execution of agreements, §24-6-4.

Collateral undertakings between parties, §24-6-2.

Contemporaneous writings explaining each other, §24-6-3.

Deeds.

Proof of mistake in deed, §24-6-7.

Discharge of agreement, §24-6-6.

General rule of inadmissibility, §24-6-1.

Known usage, §24-6-5.

Mistake in deed or agreement, §24-6-7.

Negotiable instruments.

Blank indorsements.

Explanation, §24-6-10.

Performance of agreement.

Change of time or place, §24-6-6.

Rebuttal of equity, §24-6-6.

Receipts for money.

Denial, §24-6-9.

Explanation, §24-6-9.

Subsequent agreement, §24-6-6.

PAROL EVIDENCE —Cont'd

Surrounding circumstances, §24-6-4.

Terms of valid written instrument.

Use of parol contemporaneous evidence to contradict or vary.

General rule of admissibility, §24-6-1.

Unwritten portions of agreements.

Proof admissible where not inconsistent with written agreement, §24-6-2.

Usages known, §24-6-5.

Voidness of writing.

Original voidness, §24-6-8.

Subsequent voidness, §24-6-8.

PARTIES.

Admissions.

Evidence.

Generally, §24-3-31.

Real party in interest.

Evidence, §24-3-34.

Burden of proof.

Who has, §24-4-1.

PASTOR-PENITENT PRIVILEGE,

§24-9-22.

PEDIGREE.

Hearsay evidence.

Proof excepted, §24-3-12.

PEDOPHILES.

Admissibility of expert opinions, §24-9-67.

PERJURY.

Disregarding false testimony, §24-9-85.

Witnesses.

Number required, §24-4-8.

PERPETUATION OF TESTIMONY,

§§24-10-150 to 24-10-154.

Costs, §24-10-154.

Depositions.

Preservation of testimony in criminal proceedings, §§24-10-130 to 24-10-139.

Inadequacy of usual proceeding,

§24-10-151.

Parties in interest.

Materiality of availability, §24-10-152.

Possession of property.

Materiality, §24-10-152.

Use of testimony, §24-10-153.

When proceedings may be had, §24-10-150.

PERSONS WITH DISABILITIES.

Interpreters.

Competency of witness to testify, §24-9-4.

Witnesses.

Competency to testify, §24-9-4.

PETITIONS.

Evidences of indebtedness.

Lost or destroyed.

Summary establishment, §24-8-21.

Lost or destroyed papers.

Establishment in superior court, §24-8-24.

Public records.

Establishment of lost records.

Petition by judge of probate court, §§24-8-2, 24-8-3.

PHARMACISTS AND PHARMACIES.

Records.

Privileged information, §24-9-40.

PHOTOGRAPHS.

Evidence.

Admissibility upon unavailability of witness, §24-4-48.

Enlargements.

When admitted, §24-5-26.

Reproductions made in regular course of business, §24-5-26.

Admissibility, §24-5-26.

Microphotography.

Evidence.

Reproductions made in regular course of business.

Admissibility, §24-5-26.

PHYSICIAN-PATIENT PRIVILEGE,

§24-9-40.

AIDS information, §24-9-40.1.

PHYSICIANS AND SURGEONS.

Bills for services.

Identification evidence, §24-7-9.

Diagnoses.

Patient's statements.

Hearsay exception, §24-3-4.

Expressions of benevolence, regret,

mistake, error, sympathy or apology.

Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

Offers of assistance relating to unanticipated outcome.

Inadmissible in claim or action brought by patient alleging unanticipated outcome, §24-3-37.1.

Privileged information, §24-9-40.

AIDS information, §24-9-40.1.

Treatment of patients.

Statements of patient.

Hearsay exception, §24-3-4.

PLEADINGS.

Admissions.

Evidence, §24-3-30.

Evidence.

Admissions, §24-3-30.

Lost pleadings.

Establishment on motion, §24-8-20.

PODIATRY.

Bills for services.

Identification evidence, §24-7-9.

POLICE.

Witnesses.

Fees, §24-10-27.

PREPONDERANCE OF EVIDENCE,

§§24-4-1, 24-4-3, 24-4-4.

PRESENTMENTS.

Special presentments.

Lost presentments.

Establishment on motion, §24-8-20.

PRESUMPTION OF DEATH, §24-4-21.

Written finding or report by authorized federal officer.

Admissibility in evidence, §24-4-47.

PRESUMPTION OF INNOCENCE,

§24-4-21.

PRESUMPTIONS, §§24-4-20 to 24-4-27.

Business letters.

Failure to answer, §24-4-23.

Categories, §24-4-20.

Checks.

Payment of check, §24-4-23.1.

Conclusive presumptions.

Legal presumptions.

Estoppels, §24-4-24.

Criminal liability.

Presumption of innocence, §24-4-21.

Death, §24-4-21.

Written finding or report by authorized federal officer.

Admissibility in evidence, §24-4-47.

Definition of presumptive evidence, §24-1-1.

Factual presumptions.

Legal presumptions.

Distinguished, §24-4-20.

Failure to produce evidence, §24-4-22.

Inferences from evidence, §24-4-9.

Innocence, §24-4-21.

Kinds, §24-4-20.

Legal presumptions.

Conclusive presumptions.

Estoppels, §24-4-24.

PRESUMPTIONS —Cont'd

Legal presumptions —Cont'd

Factual presumptions.

Distinguished, §24-4-20.

Rebuttable presumptions, §24-4-21.

Mental states, §24-4-21.

Payment by means of check.

Check paid, §24-4-23.1.

Production of evidence.

Failure to produce, §24-4-22.

Railroads.

Occupancy of railroad right of way, §24-4-23.2.

Rebuttable presumptions.

Failure to produce evidence, §24-4-22.

Legal presumptions, §24-4-21.

PRIEST-PENITENT PRIVILEGE, §24-9-22.

PRIOR CONVICTIONS.

Impeachment of witnesses, §24-9-84.1.

PRISONS AND PRISONERS.

Department of corrections.

Admissibility of records of department, §24-7-27.

Evidence.

Records or authenticated copies, §24-7-27.

Records.

Admissibility of records and authenticated copies, §24-7-27.

Habeas corpus.

Securing attendance of prisoner as witness, §24-10-62.

Witnesses.

Prisoners as witnesses, §§24-10-60 to 24-10-62.

Securing attendance of prisoner-witnesses, §§24-10-60 to 24-10-62.

PRISON TERMS.

Contempt of court.

Immunized witnesses who refuse to testify, §24-9-28.

PRIVIES.

Evidence, §24-3-32.

PRIVILEGES, §§24-9-20 to 24-9-47.

AIDS.

Physician-patient relationship, §24-9-40.1.

Attorney and client, §§24-9-21, 24-9-24.

When attorney may testify for or against client, §24-9-25.

Grand jurors' communications, §24-9-21.

Hearing impaired person and interpreter, §24-9-107.

PRIVILEGES —Cont'd

Husband and wife, §24-9-21.

Criminal proceedings, §24-9-23.

Law enforcement officers, §24-9-26.

Library records.

Confidential nature, §24-9-46.

Medical information, §§24-9-40, 24-9-40.1.

Disclosure of AIDS information,
§24-9-47.

Medical records.

Confidential or privileged matter,
§§24-9-41 to 24-9-45.

News gatherers, §24-9-30.

Pharmacists and pharmacies, §24-9-40.

Physician and patient, §24-9-40.

AIDS information, §24-9-40.1.

Professional advisor, §24-9-27.

Psychiatrist and patient, §§24-9-21, 24-9-40.

Psychotherapeutic relationship, §24-9-21.

Public officials, §24-9-27.

Religious privilege, §24-9-22.

Secrets of state, §24-9-21.

Social workers, §24-9-21.

Veterinarians, §24-9-29.

PRIVITY.

Admissions.

Evidence, §24-3-32.

PROBATION.

DNA analysis and storage of profile.

Persons placed on probation for certain
crimes, §24-4-60.

Sexual offenders.

DNA analysis for persons placed on
probation for certain sex offenses.

Storage of profile and data bank,
§24-4-60.

PRODUCTION OF DOCUMENTS AND THINGS.

Applicability of article, §24-10-29.

Cases tried on affidavits, §24-10-44.

Medical records.

Applicability of article, §24-10-75.

Compliance with subpoena or order,
§24-10-72.

Construction of article, §24-10-76.

Costs of production, §24-10-73.

Custodian's appearance, §24-10-72.

Custody of records after removal,
§24-10-74.

Definitions, §24-10-70.

Inspection of records after removal,
§24-10-74.

Original records, §24-10-71.

Return of records, §24-10-74.

PRODUCTION OF DOCUMENTS AND THINGS —Cont'd

Medical records —Cont'd

Substitutes in lieu of originals, §24-10-71.

Notice to produce, §24-10-26.

Cases tried on affidavits, §24-10-44.

Dispensing with proof upon production
of paper, §24-7-3.

Transcripts in lieu of books, §§24-10-5,
24-10-6.

Transcripts in lieu of books.

Procedure when adverse party
dissatisfied, §24-10-6.

When allowed, §24-10-5.

PROFESSIONS AND BUSINESSES.

Evidence of vocation.

As evidence of identity, §24-4-40.

PROGNOSIS.

Medical reports in narrative form.

Admissibility in civil case involving injury
or disease, §24-3-18.

PROMISCUITY.

Past sexual behavior, §24-2-3.

PROMISSORY NOTES.

Notarial acts.

Authentication by certificate of notary,
§24-7-23.

PROTHONOTARY.

Clerks of court, §24-7-25.

PSEUDONYM.

AIDS disclosures, §24-9-47.

PSYCHIATRISTS.

Privileged communications, §§24-9-21,
24-9-40.

PSYCHOLOGISTS.

Bills for services.

Identification evidence, §24-7-9.

PUBLIC OFFICERS AND EMPLOYEES.

De facto officer.

Proof, §24-4-41.

Privileged information, §24-9-27.

PUBLIC RECORDS.

Authentication evidence.

Authentication evidence generally,
§§24-7-1 to 24-7-9.

County officers.

Exemplifications, §24-7-20.

Department of corrections records,
§24-7-27.

Exemplifications.

By county officers, §24-7-20.

PUBLIC RECORDS —Cont'd

Authentication evidence —Cont'd

Exemplifications —Cont'd

By state officers, §24-7-20.

Municipal records and minutes, §24-7-21.

Judicial records of other states.

Justice of the peace proceedings, §24-7-26.

Justice of the peace courts in other states.

Judgments and proceedings, §24-7-26.

Laws of other states, §24-7-24.

Municipal minutes, §24-7-21.

Municipal records, §24-7-21.

Nonjudicial records or books of other states, §24-7-25.

Notarial acts in relation to bills of exchange, drafts and promissory notes, §24-7-23.

State officers.

Exemplifications, §24-7-20.

Best evidence rule.

When exemplifications considered primary evidence, §24-5-20.

Destroyed records.

Establishment in superior court, §§24-8-1 to 24-8-6.

Evidence.

Authentication evidence, §§24-7-20 to 24-7-27.

Lost or destroyed records.

Establishment in superior court, §§24-8-1 to 24-8-6.

When exemplifications considered primary evidence.

Best evidence rule, §24-5-20.

Lost, destroyed, mutilated or stolen records.

Establishment in superior court, §§24-8-1 to 24-8-6.

Auditor.

Appointment, §24-8-4.

Compensation, §24-8-5.

Report, §24-8-4.

Objections, §§24-8-4, 24-8-6.

Authorized, §24-8-1.

Compensation of auditor, §24-8-5.

Copies of lost records to conform to originals, §24-8-3.

Hearing on objections to auditor's report, §§24-8-4, 24-8-6.

Hearing on petition by judge of probate court, §24-8-2.

Order of court, §24-8-2.

PUBLIC RECORDS —Cont'd

Lost, destroyed, mutilated or stolen records —Cont'd

Establishment in superior court —Cont'd

Petition by judge of probate court, §24-8-2.

Contents, §24-8-3.

Precedence of case, §24-8-2.

Use of established lost records as evidence, §24-8-1.

Mutilated records.

Establishment in superior court, §§24-8-1 to 24-8-6.

Stolen records.

Establishment in superior court, §§24-8-1 to 24-8-6.

R

RABBI-PENITENT PRIVILEGE, §24-9-22.

RAILROADS.

Presumptions.

Occupancy of railroad right of way, §24-4-23.2.

RAPE.

Evidence.

Complainant's past sexual conduct, §24-2-3.

Past sexual conduct of victim.

Admissibility in evidence, §24-2-3.

Shield, §24-2-3.

RAPE SHIELD LAW, §24-2-3.

REAL PARTY IN INTEREST.

Admissions, §24-3-34.

REAL PROPERTY.

Estoppels, §24-4-25.

Deeds, §24-4-24.

REASONABLE DOUBT.

Criminal cases, §24-4-5.

REBUTTABLE PRESUMPTIONS.

Legal presumptions, §24-4-21.

RECOLLECTION REFRESHED, §24-9-69.

RECORDATION.

Depositions.

Preservation of testimony in criminal proceedings, §24-10-137.

Destruction of record book.

Sound recording following destruction, §24-5-24.

Loss of record book.

Sound recording following loss, §24-5-24.

RECORDS.

Authentication evidence.

Judicial records of other states, §24-7-24.

Business records.

Hearsay exception, §24-3-14.

Computer transmitted records.

Georgia crime information center.

Admissibility in evidence, §24-3-17.

Corporations.

Evidence.

Transcripts, §24-5-29.

Courts.

Evidence, §24-5-31.

Other states' judicial records, §24-7-24.

Justices of the peace proceedings,
§24-7-26.

Full faith and credit.

Other states' judicial records, §24-7-24.

Department of corrections.

Admissibility of records and
authenticated copies, §24-7-27.

Evidence.

Authentication evidence.

Generally, §§24-7-1 to 24-7-9.

Public records, §§24-7-20 to 24-7-27.

Best evidence rule, §§24-5-1 to 24-5-33.

Business records.

Hearsay exception, §24-3-14.

Establishment of public records, §§24-8-1
to 24-8-6.

Federal officer's written finding or
report that person is dead, missing,
etc., §24-4-47.

How much admissible, §24-2-4.

Parol evidence rule.

Generally, §§24-6-1 to 24-6-10.

Private papers, establishment, §§24-8-20
to 24-8-30.

Public safety department or comparable
agencies in other states, §24-3-17.

Full faith and credit.

Other states' records, §§24-7-24, 24-7-25.

Libraries.

Confidential nature, §24-9-46.

Lost or destroyed records.

Private papers, establishment, §§24-8-20
to 24-8-30.

Applicability of article, §24-8-30.

Coverage of article, §24-8-30.

Instruments deemed office papers,
§24-8-20.

Joinder of additional to party
defendants, §24-8-29.

Motion procedure.

Authorized, §24-8-20.

RECORDS —Cont'd

Lost or destroyed records —Cont'd

Private papers, establishment —Cont'd

Summary establishment of evidences
of indebtedness, §§24-8-21,
24-8-22.

Superior court procedure, §§24-8-24 to
24-8-27.

Actions on notes, bills, bonds, etc.,
§24-8-28.

Public records, establishment, §§24-8-1 to
24-8-6.

Pharmacists and pharmacies.

Privileged information, §24-9-40.

Private papers, establishment.

Lost or destroyed records, §§24-8-20 to
24-8-30.

Applicability of article, §24-8-30.

Coverage of article, §24-8-30.

Instruments deemed office papers,
§24-8-20.

Joinder of additional party defendants,
§24-8-29.

Motion procedure.

Authorized, §24-8-20.

Summary establishment of evidences
of indebtedness, §§24-8-21,
24-8-22.

Superior court procedure, §§24-8-24 to
24-8-27.

Actions on notes, bills, bonds, etc.,
§24-8-28.

States.

Judgments and proceedings of justice of
the peace courts in other states.

Authentication, §24-7-26.

Judicial records of other states.

Authentication, §24-7-24.

Laws of other states.

Authentication, §24-7-24.

Nonjudicial records or books of other
states.

Authentication, §24-7-25.

Other states' records.

Authentication, §§24-7-24, 24-7-25.

REFRESHING RECOLLECTION.

Witnesses, §24-9-69.

RELEVANCY, §§24-2-1 to 24-2-4.

RELIGION.

Privilege, §24-9-22.

Witness' religious beliefs.

Effect on competency, §24-9-3.

RELIGIOUS PRIVILEGE, §24-9-22.

REPORTS.

Medical reports in narrative form.

Admissibility in civil case involving injury or disease, §24-3-18.

Public records.

Establishment of lost records in superior court.

Auditor's report, §§24-8-4, 24-8-6.

REPUDIATION.

Pedigree established, §24-3-12.

REPUTATION.

Rape shield law, §24-2-3.

RESEARCH.

Confidential raw research data, §24-9-40.2.

Raw research data, confidentiality, §24-9-40.2.

RES GESTAE.

When declarations of res gestae, §24-3-3.

RESIDENCE.

Evidence of identity, §24-4-40.

RES IPSA LOQUITUR, §24-4-9.

REVERSALS.

Sex offenses.

Expungement of profile in data bank, §24-4-65.

RIGHTS OF WAY.

Presumptions.

Occupancy of railroad right of way, §24-4-23.2.

RULE NISI.

Lost or destroyed papers.

Establishment in superior court.

Grant of rule absolute, §24-8-26.

Service of rule, §24-8-24.

S

SCHOOLS AND EDUCATION.

Confidentiality of raw research data, §24-9-40.2.

Raw research data, confidentiality, §24-9-40.2.

SEALS AND SEALED INSTRUMENTS.

Admiralty courts.

Judicial notice, §24-1-4.

Maritime courts.

Judicial notice, §24-1-4.

SECRECY.

Confessions.

Promises of secrecy.

Admissibility, §24-3-51.

SELF-INCRIMINATION.

Criminal defendants, §24-9-20.

Grant of immunity, §24-9-28.

Parties, §24-9-27.

SEQUESTRATION.

Witnesses.

Generally, §24-9-61.

SERVICE OF PROCESS.

Evidences of indebtedness.

Summary establishment of lost evidences, §§24-8-21, 24-8-22.

Lost evidences of indebtedness.

Summary establishment, §§24-8-21, 24-8-22.

Lost or destroyed papers.

Establishment in superior court.

Service of rule nisi, §24-8-24.

Nonresidents.

Lost evidences of indebtedness.

Summary establishment, §24-8-22.

Witnesses summoned to testify in state.

Exemption from service, §24-10-96.

Production of books, writings or other documents.

Notice to produce, §24-10-26.

Subpoenas, §§24-10-21, 24-10-23, 24-10-25.

Witnesses.

Out-of-state witnesses.

Exemption from service, §24-10-96.

SETTLEMENTS.

Admissions or propositions made with view to compromise.

Admissibility as evidence, §24-3-37.

Evidence.

Admissions and propositions made with view to compromise, §24-3-37.

SEXUAL OFFENSES.

Child sexual abuse.

Testimony of child as to sexual contact.

Hearsay exception, §24-3-16.

DNA analysis.

Persons convicted of certain sex offenses.

Analysis and storage of blood samples, §24-4-62.

Confidentiality of results, §24-4-62.

Dissemination of information in data bank.

Comparison of profile, §24-4-63.

Law enforcement officials, §24-4-63.

Request for search, §24-4-63.

Fees, §24-4-63.

Unlawful dissemination or use, §24-4-64.

SEXUAL OFFENSES —Cont'd

DNA analysis —Cont'd

Persons convicted of certain sex offenses —Cont'd

Expungement of profile in data bank.
Reversal and dismissal of conviction,
§24-4-65.

Storage of profile and data bank,
§24-4-60.

Withdrawal of blood sample.
Time and procedure, §24-4-61.

Victims of crime.

Child's description of sexual conduct or
physical abuse.

Hearsay exception, §24-3-16.

Rape victim's past behavior.

Admissibility in evidence, §24-2-3.

SHERIFFS.

Deputies.

Prisoner's delivery to serve as witness or
criminal defendant, §24-10-60.

Witness fees, §24-10-27.

Privileges in criminal proceedings.

Law enforcement officer's privilege not
to divulge address, §24-9-26.

SHIELD LAW.

Rape shield law, §24-2-3.

SIGN LANGUAGE.

Interpreters.

Use in administrative and judicial
proceedings, §§24-9-100 to 24-9-108.

SILENCE.

Admission.

Silence as, §24-3-36.

SOCIAL WORKERS.

Confidentiality of communications,
§24-9-21.

Privileged communications, §24-9-21.

SPECIAL POLICEMEN.

Privileges in criminal proceedings.

Law enforcement officer's privilege not
to divulge address, §24-9-26.

SPOUSAL PRIVILEGE, §§24-9-21, 24-9-23.

STATE PATROL.

Privileges in criminal proceedings.

Law enforcement officer's privilege not
to divulge address, §24-9-26.

Witnesses.

Fees for members of state patrol,
§24-10-27.1.

STATES.

Existence.

Judicial notice, §24-1-4.

STATES —Cont'd

Records.

Judgments and proceedings of justice of
the peace courts in other states.

Authentication, §24-7-26.

Judicial records of other states.

Authentication, §24-7-24.

Laws of other states.

Authentication, §24-7-24.

Nonjudicial records or books of other
states.

Authentication, §24-7-25.

Other states' records.

Authentication, §§24-7-24, 24-7-25.

Territorial extent, §24-1-4.

STATE SECRETS.

Confidentiality, §24-9-21.

STATUTES.

Judicial notice, §24-1-4.

SUBPOENAS.

Affidavits.

Cases tried on affidavits, §§24-10-40,
24-10-41.

Penalty for default of witness,
§24-10-45.

Applicability of provisions, §24-10-29.

Blank form, §24-10-20.

**Confidential raw research data in
researcher's possession,** §24-9-40.2.

Continuances.

No continuance where no notice to
clerk, §24-10-25.

Enforcement, §24-10-25.

Form, §24-10-20.

Blank form, §24-10-20.

Issuance, §§24-10-20, 24-10-21.

Nonresident witnesses.

Securing attendance generally,
§§24-10-90 to 24-10-97.

**Raw research data in researcher's
possession.**

Confidential raw research data,
§24-9-40.2.

Service, §§24-10-21, 24-10-23, 24-10-25.

SUBPOENAS DUCES TECUM, §24-10-22.

Applicability of article, §24-10-29.

Blank form, §24-10-20.

Cases tried on affidavits, §24-10-44.

Legislators' exemption, §24-10-28.

Medical records.

Production of evidence.

Generally, §§24-10-70 to 24-10-76.

Modifying subpoena, §24-10-22.

Quashing subpoena, §24-10-22.

INDEX

SUBPOENAS DUCES TECUM —Cont'd

Transcripts in lieu of books.

- Procedure when adverse party dissatisfied, §24-10-6.
- When allowed, §24-10-5.

SUMMONS AND PROCESS.

Arrest.

- Witness exemption, §24-10-96.

Failure to obey, §§24-10-45, 24-10-92.

Fees.

- Witnesses, §24-10-94.

SUPERIOR COURTS.

Lost or destroyed papers.

- Establishment in superior court, §§24-8-24 to 24-8-27.
- Certified indorsement of copies, §§24-8-27, 24-8-28.
- Continuances, §24-8-25.
- Grant of rule absolute, §24-8-26.

SYMBOLS OF NATIONALITY.

Judicial notice, §24-1-4.

T

THERAPEUTIC DEVICES.

Bills from suppliers.

- Identification evidence, §24-7-9.

THE UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE.

General provisions, §§24-10-90 to 24-10-97.

THIRD PARTIES.

Admissions.

- Evidence, §24-3-35.

TIME.

Evidence.

- Calendars as proof of dates, §24-4-43.

TITLE.

Estoppels, §§24-4-24, 24-4-25.

- Deeds, §24-4-24.
- Landlord's title as against tenant in possession, §24-4-24.
- Real estate.
 - Generally, §24-4-25.
- Trustees setting up title adverse to trust, §24-4-26.

Evidence.

- Declarations as to title by one in possession.
- Hearsay exception, §24-3-7.

Landlord and tenant.

- Estoppels, §24-4-24.

TITLE —Cont'd

Trusts and trustees.

- Estoppel of trustees from setting up title adverse to trust, §24-4-26.

TRANSCRIPTS.

Copies of judicial records.

- Authenticated copies.
- Evidence, §24-5-31.

TREASON.

Witnesses.

- Number required, §24-4-8.

TREATISES.

Best evidence rule.

- General provisions, §§24-5-1 to 24-5-33.

Cross-examination of witnesses.

- Opinions of experts generally, §24-9-67.
- Right of cross-examination generally, §24-9-64.

Mortality tables.

- Generally, §24-4-45.

Relevancy.

- General provisions, §24-2-1.

TRIAL.

Victims of crime.

- Right to be present in courtroom, §24-9-61.1.

TRUSTS AND TRUSTEES.

Estoppel.

- Setting up title adverse to trust, §24-4-26.

Title.

- Estoppel of trustees from setting up title adverse to trust, §24-4-26.

TUBES.

DNA analysis upon conviction.

- Procedure for withdrawal of blood samples.
- Draw tube requirement, §24-4-61.

U

UNAVAILABILITY OF WITNESS.

Admissibility of audio recordings, motion pictures, photographs or videotapes, §24-4-48.

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE.

General provisions, §§24-10-90 to 24-10-97.

UNIFORM FOREIGN DEPOSITIONS ACT.

General provisions, §§24-10-110 to 24-10-112.

UNIFORM FOREIGN DEPOSITIONS

ACT —Cont'd

Short title, §24-10-110.

UNITED STATES.

Agriculture department.

Inspection certificates.

Prima facie evidence, §24-4-46.

Laws.

Judicial notice, §24-1-4.

UNIVERSITIES AND COLLEGES.

Campus police.

Witness fee, §24-10-27.

Confidentiality of raw research data,

§24-9-40.2.

Raw research data, confidentiality,

§24-9-40.2.

V

VALUE.

Proof of value, §24-9-66.

VARIANCES.

Tables.

Mortality table.

Evidence, §§24-4-44, 24-4-45.

VETERINARIANS.

Privileges, §24-9-29.

VICTIMS OF CRIMES.

Present in court exercising jurisdiction
over offense.

Right, §24-9-61.1.

Rape victims.

Past sexual behavior.

Admissibility in evidence, §24-2-3.

Rights of victims.

Present in court exercising jurisdiction
over offense, §24-9-61.1.

Sexual offenses.

Child's description of sexual conduct or
physical abuse.

Hearsay exception, §24-3-16.

Rape victim's past behavior.

Admissibility in evidence, §24-2-3.

Trial.

Right to be present in courtroom,
§24-9-61.1.

Witnesses.

Child victims.

Competency to testify, §24-9-5.

VIDEO TAPES.

Evidence.

Admissibility upon unavailability of
witness, §24-4-48.

VITAL RECORDS.

Evidence.

Proof of pedigree.

Hearsay exception, §24-3-12.

VOLUNTARINESS OF CONFESSION,

§§24-3-50, 24-3-51.

W

WAIVER.

Witnesses.

Medical information.

Patient's waiver of privilege, §24-9-40.

WILLS, (PRE-1998 PROBATE CODE).

Copies.

Evidence, §24-5-31.

WITNESSES.

Admissions generally, §§24-3-30 to 24-3-38.

Adultery proceedings.

Competency of husband and wife,
§24-9-2.

Affirmation, §24-9-60.

Arrest.

Freedom from arrest, §24-10-1.

Nonresident witnesses summoned to
testify in state, §24-10-96.

Attachment of witnesses, §24-10-25.

Attendance at proceedings.

Fees for attendance, §24-10-24.

Arson investigators of state fire
marshal's office, §24-10-27.1.

Bureau of investigation.

Members, §24-10-27.1.

Claiming, etc., §24-10-2.1.

Correctional officers, §24-10-27.1.

Double fees, §24-10-3.

Forfeiture for causing continuance or
absence from trial, §24-10-3.

Forfeiture for excessive claim,
§24-10-4.

Mileage fees, §24-10-24.

Natural resources department.

Law enforcement officers,
§24-10-27.1.

Police officers, deputy sheriffs or
members of campus police,
§24-10-27.

State patrol.

Members, §24-10-27.1.

Female witnesses, §24-10-2.

Foreign depositions, §24-10-111.

Freedom from arrest, §24-10-1.

Nonresident witnesses summoned to
testify in state, §24-10-96.

WITNESSES —Cont'd

Attendance at proceedings —Cont'd

- Legislators' exemption, §24-10-28.
- Out-of-state witnesses.
 - Securing attendance, §§24-10-90 to 24-10-97.
- Prisons.
 - Securing attendance, §§24-10-60 to 24-10-62.
- Securing attendance.
 - Applicability of article, §24-10-29.
 - Out-of-state witnesses, §§24-10-90 to 24-10-97.
 - Prisons, §§24-10-60 to 24-10-62.

Bias.

- Credibility as jury question, §24-9-80.
- Feelings and relationship to parties, §24-9-68.

Bureau of investigation.

- Fees for members, §24-10-27.1.

Cases tried on affidavits.

- Questioning of witness at residence, §§24-10-42, 24-10-43.
- Subpoenaing witnesses, §§24-10-40, 24-10-41.
- Penalty for default of witness, §24-10-45.

Character of witness.

- Bad character, §24-9-84.

Child witnesses.

- Competency, §24-9-5.
 - Determination by court, §24-9-7.
- Description of sexual contact or physical abuse.
 - Hearsay exception, §24-3-16.
- Sex offense cases.
 - Description of sexual contact.
 - Hearsay exception, §24-3-16.

Competency, §§24-9-1 to 24-9-7.

- Adultery proceedings, §24-9-2.
- Child witnesses, §24-9-5.
 - Determination by court, §24-9-7.
- Determination by court, §24-9-7.
- Drunkards, §24-9-6.
- General rule of competency, §24-9-1.
 - Date of application of rule, §24-9-1.
- Husband and wife.
 - Competency of wife to testify against, §24-9-23.
- Idiots, §24-9-5.
 - Determination by court, §24-9-7.
- Lunatics, §24-9-5.
 - Determination by court, §24-9-7.
- Objections, §24-9-7.
- Physical defects.
 - Effect, §24-9-4.

WITNESSES —Cont'd

Competency —Cont'd

- Religious beliefs.
 - Effect, §24-9-3.
- Restoration, §24-9-7.
- Subscribing witnesses.
 - Proof of execution of writing when witnesses inaccessible, §24-7-5.

Contempt.

- Privilege of parties and witnesses, §24-9-27.
- Refusal to testify after grant of immunity, §24-9-28.
- Securing witnesses and evidence.
 - Enforcement of subpoenas, §24-10-25.

Continuances.

- Fees.
 - Effect of continuance, §24-10-2.1.
 - Forfeiture for causing continuance, §24-10-3.

Credibility, §§24-4-4, 24-9-80 to 24-9-85.

- Falsely swearing witnesses, §24-9-85.
- Feelings and relationship to parties, §24-9-68.
- Impeachment generally, §§24-9-81 to 24-9-85.
- Jury question, §24-9-80.

Criminal proceedings.

- Corroboration of witness testimony, §24-4-8.
- Defendants, §24-9-20.
 - Competency to testify, §24-9-1.
 - Spouse, §24-9-23.
- Expert opinion testimony.
 - Admissibility, §24-9-64.
- Number of witnesses required, §24-4-8.

Cross-examination.

- Impeachment generally, §§24-9-81 to 24-9-85.
- Medical reports in narrative form.
 - Adverse party's right to cross-examine person signing, §24-3-18.
- Objections made on direct examination.
 - Effect as to waiver by cross-examination, §24-9-70.
- Right of cross, §24-9-64.

Deaf and hearing impaired persons.

- Filming of persons' testimony, §24-9-107.
- Taping of persons' testimony, §24-9-107.

Death.

- Subscribing witnesses.
 - Proof of execution of writing when witnesses inaccessible, §24-7-5.

Examination, §§24-9-60 to 24-9-70.

- Cases tried on affidavits.
 - Questioning of witness at residence, §§24-10-42, 24-10-43.

WITNESSES —Cont'd

Examination —Cont'd

Cross-examination.

Objections made on direct examination.

Effect as to waiver by cross-examination, §24-9-70.

Right of cross, §24-9-64.

Feelings towards parties, §24-9-68.

Harsh questions, §24-9-62.

Impeachment generally, §§24-9-81 to 24-9-85.

Improper questions, §24-9-62.

Insulting questions, §24-9-62.

Leading questions, §24-9-63.

Oath or affirmation required, §24-9-60.

Objections on direct examination.

Effect as to waiver by cross-examination, §24-9-70.

Proper treatment of witness, §24-9-62.

Refreshing recollection, §24-9-69.

Relationship to parties, §24-9-68.

Sequestering witnesses, §24-9-61.

Exclusion, §24-9-61.

Expert witnesses.

Civil cases.

Opinions of experts, admissibility, §24-9-67.1.

Criminal cases.

Admissibility of opinions, §24-9-67.

Malpractice actions.

Admissibility of opinion of expert, §24-9-67.1.

Medical bill identification, §24-7-9.

Opinions of experts, §24-9-67.

Civil cases, §24-9-67.1.

Pretrial hearing.

Qualification, determination, §24-9-67.1.

Qualification, §24-9-67.1.

False imprisonment, §24-10-1.

Feelings towards parties, §24-9-68.

Fees.

Attendance fees, §24-10-24.

Arson investigators of state fire marshal's office, §24-10-27.1.

Bureau of investigation.

Members, §24-10-27.1.

Claiming, etc., §24-10-2.1.

Correctional officers, §24-10-27.1.

Double fees, §24-10-3.

Forfeiture for causing continuance or absence from proceedings, §24-10-3.

Forfeiture for excessive claim, §24-10-4.

WITNESSES —Cont'd

Fees —Cont'd

Attendance fees —Cont'd

Mileage fees, §24-10-24.

Natural resources department.

Law enforcement officers, §24-10-27.1.

Police officers, deputy sheriffs or members of campus police, §24-10-27.

State patrol.

Members, §24-10-27.1.

Cases tried on affidavits.

Questioning of witness at residence.

Fees of officers, §24-10-43.

Mileage fees, §24-10-24.

Tender required, §24-10-24.

Felony cases.

Number of witnesses required, §24-4-8.

Female witnesses.

Attendance at proceedings, §24-10-2.

Former testimony.

Hearsay exception, §24-3-10.

Previous contradictory statements, §24-9-83.

Grand jury.

Securing attendance at proceedings.

Out-of-state witnesses.

Proceedings in foreign state, §§24-10-92, 24-10-93.

Proceedings in this state, §§24-10-94, 24-10-95.

Handwriting of others.

Authentication, §24-7-6.

Husband and wife.

Adultery proceedings.

Competency, §24-9-2.

Privileged communications, §§24-9-21, 24-9-23.

Idiots.

Competency, §24-9-5.

Determination by court, §24-9-7.

Immunity to testify.

Granting, §24-9-28.

Refusal to testify after grant of immunity.

Contempt of witness, §24-9-28.

Impeachment, §§24-9-81 to 24-9-85.

Character of witness, §24-9-84.

Credit of impeached witness for jury, §24-9-85.

Disapproving testimony, §24-9-82.

Manner, §24-9-82.

Character evidence, §24-9-84.

Opposite party or person with related interest, §24-9-81.

WITNESSES —Cont'd

Impeachment —Cont'd

- Party's own witness, §24-9-81.
- Previous contradictory statements, §24-9-83.

- Prior convictions, §24-9-84.1.

Improper questions, §24-9-62.

Incompetent persons, §24-9-5.

- Competency to testify, §24-9-1.
- Determination by court, §24-9-7.

Insane persons.

- Competency, §24-9-5.
- Determination by court, §24-9-7.

Insanity.

- Subscribing witnesses.
- Proof of execution of writing when witnesses inaccessible, §24-7-5.

Insulting, §24-9-62.

Interpreters.

- Deaf and hearing impaired persons.
- Generally, §§24-9-100 to 24-9-108.
- Physical disabled.
- Allowance of interpreter, §24-9-4.

Juvenile proceedings.

- Child's competency to testify, §24-9-5.

Leading questions, §24-9-63.

Legislators' exemption, §24-10-28.

Lunatics.

- Competency, §24-9-5.
- Determination by court, §24-9-7.

Medical bills.

- Identification, §24-7-9.

Medical reports in narrative form.

- Cross-examination of person signing, rebuttal testimony and supplementing report, §24-3-18.

Mental health.

- Competency of witnesses, §§24-9-5, 24-9-7.

Minors.

- Competency, §24-9-5.
- Determination by court, §24-9-7.
- Description of sexual contact or physical abuse.
- Hearsay exception, §24-3-16.
- Sex offense cases.
- Description of sexual contact.
- Hearsay exception, §24-3-16.

Negative testimony.

- Generally preferred, §24-4-7.

Nonresidents.

- Criminal proceeding in this state, §§24-10-94, 24-10-95.
- Securing attendance of out-of-state witnesses.
- Applicability of article, §24-10-97.

WITNESSES —Cont'd

Nonresidents —Cont'd

- Securing attendance of out-of-state witnesses —Cont'd
- Citation of article, §24-10-90.
- Construction of article, §24-10-97.
- Criminal proceeding in foreign state, §§24-10-92, 24-10-93.
- Definitions, §24-10-91.
- Exemption from arrest, §24-10-96.
- Grand jury proceeding in foreign state, §§24-10-92, 24-10-93.
- Grand jury proceeding in this state, §§24-10-94, 24-10-95.

Number.

- Consideration by jury, §24-4-4.
- Required number, §24-4-8.

Oaths, §24-9-60.

Objections on direct examination.

- Effect as to waiver by cross-examination, §24-9-70.

Opinion testimony, §24-9-65.

- Expert opinion, §24-9-67.

Perjury.

- Number of witnesses required, §24-4-8.

Perpetuation of testimony, §§24-10-150 to 24-10-154.

- Costs of proceedings, §24-10-154.
- Depositions to preserve testimony in criminal proceedings, §§24-10-130 to 24-10-139.
- Inadequacy of usual proceeding, §24-10-151.
- Parties in interest.
- Materiality of availability, §24-10-152.
- Possession of property.
- Materiality, §24-10-152.
- Use of testimony, §24-10-153.
- When proceedings may be had, §24-10-150.

Physical defects.

- Effect on competency, §24-9-4.

Physically disabled.

- Deaf and hearing impaired persons.
- Interpreters, §§24-9-100 to 24-9-108.

Positive testimony.

- Generally preferred, §24-4-7.

Prior inconsistent statements, §24-9-83.

Prior testimony.

- Hearsay exception, §24-3-10.

Prisoners.

- Securing attendance, §§24-10-60 to 24-10-62.
- Nonresident prisoners, §§24-10-93, 24-10-95.

INDEX

WITNESSES —Cont'd

Refreshing recollection, §24-9-69.

Relationship to parties, §24-9-68.

Religious beliefs.

Effect on competency, §24-9-3.

Sequestration, §24-9-61.

Service of process or papers.

Nonresident witnesses summoned to testify in state.

Exemption from service, §24-10-96.

Out-of-state witnesses.

Exemption from service, §24-10-96.

State patrol.

Fees for members of state patrol,
§24-10-27.1.

Subpoenas.

Out-of-state witnesses.

Securing attendance generally,
§§24-10-90 to 24-10-97.

Subscribing witnesses.

Authentication of writings, §24-7-4.

When witnesses inaccessible, §24-7-5.

Treason.

Number of witnesses required to convict,
§24-4-8.

WITNESSES —Cont'd

Turncoat witnesses.

Impeachment, §24-9-81.

Unavailability.

Admissibility of audio recordings, motion pictures, photographs or videotapes,
§24-4-48.

Victims of crime.

Child victim's competency to testify,
§24-9-5.

WRITINGS.

Authentication, §§24-7-1 to 24-7-27.

Best evidence rule, §§24-5-1 to 24-5-33.

Parol evidence rule, §§24-6-1 to 24-6-10.

WRONGFUL DEATH.

Damages.

Computing value of decedent's life.

Admissibility of mortality tables,
§§24-4-44, 24-4-45.

X

XEROGRAPHIC COPIES.

Best evidence rule.

Generally, §§24-5-1 to 24-5-33.

